

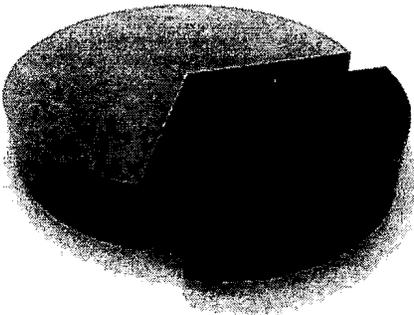
Custodial claims enable family members who cared for a now-deceased relative to be paid for their years of unpaid or underpaid caregiving. Here's how it works.

Custodial Claims:

Compensation for Family Caregivers



By Margot Gordon



Many families with disabled parents, siblings, or children face a difficult situation: while the disabled person may have some money, he or she doesn't have enough for caretaking without the help of family members, who in turn may have to forgo their own opportunities to earn income.

In an effort to remedy this inequity, section 18-1.1 of the Illinois Probate Act was enacted in 1988. It significantly changed probate law by allowing specified family members who lived with and provided direct care to a "disabled person" to file a claim in probate court for those services, after the disabled individual's death. The statute overrides the common-law presumption that services rendered by family members are gratuitous.

The law provides that "[a]ny spouse, parent, brother, sister or child of a disabled person who dedicates himself or herself to the care of the disabled person by living with and personally caring for the disabled person for at least

3 years shall be entitled to a claim against the estate upon the death of the disabled person.¹ To be eligible, the claimant must have actually lived with the disabled minor or adult, be one of the specifically enumerated relatives, and file a claim in the decedent's probate estate within the six-month claims period.²

But though this statutory provision has been in effect for more than two decades, custodial claims are still rare. Also, the amounts sought by claimants pursuant to section 18-1.1 are typically the statutory minimum. They thus do not reflect the true benefit provided to the deceased's estate.

Perhaps one reason these claims are little used, particularly in Cook County, is that probate courts formerly took the position that custodial claims were unconstitutional and routinely denied them. That dis-

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couraged lawyers from bringing them.

The Illinois Supreme Court in *In re Estate of Jolliff* finally cleared the way for custodial claims when it turned aside the various constitutional arguments against section 18-1.1, namely that the statute violated the Special Legislation Clause, the Equal Protection Clause, the Due Process Clause and the Separation of Powers Clause of the Illinois constitution.³

Thanks to the statute, a relative who has cared for a disabled minor or adult before that person dies may receive assets from the estate before other family members who did not. Beyond that, filing a custodial claim may allow family caregivers to receive funds before state or federal estate taxes are imposed and thereby essentially replace estate tax liability with lower income tax liability.

Of course, the estate tax is in flux as this article goes to press. There is now no federal or Illinois estate tax liability, but the current tax legislation is scheduled to sunset in 2011.

If that happens, estates in excess of \$1 million will be subject to both Illinois and federal estate tax liability. Many believe Congress will enact new estate legislation before the current tax legislation sunsets next year. Given the dynamism of the estate tax situation, I have used the 2009 numbers for purposes of this article.

Determining the size of a custodial claim

The amount of a statutory custodial claim is based

on the nature and extent of the person's disability, taking into consideration the assets available and the claimants' lost employment opportunities, lost lifestyle opportunities, and emotional distress⁴ (note that a claimant may recover even if he or she did not suffer these latter three losses⁵). Section 18-1.1 sets forth a minimum payment to the claimant for the services he or she provided based on the extent of the deceased person's disability and the probate assets available.

The extent of a person's disability under section 18-1.1 is a question of fact for the trial court.⁶ Whether a person is under guardianship is not determinative of disability under this statute.

For example, in *McGee v La Salle Natl Bank (in re Estate of Rollins)*,⁷ the trial court found that the claimant did not meet her burden of showing 25 percent disability even though there was evidence that she had been the guardian of the decedent's person and provided some care to the decedent. The court stated that a claimant must show "more than the fact that they 'cared' for the disabled person. They must also show that the required care was extended to a person who was at least 25% disabled."⁸

By way of contrast, in *Estate of Lower* the decedent was determined to be 100 percent disabled because he retained caretakers to assist him in his home from 1998 until his death in 2003. At the hearing, each of the decedent's caregivers opined about the amount of assistance he required and his inability to be left alone. His physician also concluded that the decedent had been disabled since 1999. In this matter there was no evidence of guardianship.⁹

In 2008, section 18-1.1 was amended and the base amounts for claims were increased. As of 2008, a minimum amount of \$45,000 is set for a claim for an estate of a person who is determined to have a "25% disability," \$90,000 for "50% disability," \$135,000 for "75% disability" and \$180,000 for "100% disability."¹⁰

However, pursuant to this same 2008 statutory amendment, the probate court also has authority to reduce these minimums to the extent the claimant received a physical or financial benefit from the decedent. The benefits the court can consider in making reductions to the claim include, but are not limited to, (a)

1. 755 ILCS 5/18-1.1.

2. See *In re Estate of Hoehn*, 234 Ill App 3d 627, 600 NE2d 899 (3d D 1992) (claim of sister disallowed where she lived across hall from disabled brother).

3. 199 Ill 2d 510, 517, 771 NE2d 346, 350 (2002) ("[s]ection 18-1.1 laudably recognizes the often unseen and intangible sacrifices made, and opportunities forgone, by immediate family members who commit their lives every day to making the lives of disabled persons better").

4. 755 ILCS 5/18-1.1.

5. See *Estate of Lower*, 365 Ill App 3d 469, 478, 848 NE2d 645, 654 (2d D 2006).

6. See *Estate of Jolliff*, 199 Ill 2d 510, 526, 771 NE2d 346, 356 (2002).

7. 269 Ill App 3d 261, 645 NE2d 1026 (1st D 1995).

8. *Id.* at 273, 645 NE2d at 1034.

9. 365 Ill App 3d 469, 477, 848 NE2d 645, 653 (2d D 2006).

10. 755 ILCS 5/18-1.1.

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free or reduced housing costs, (b) other benefits which would have alleviated the claimant's need to be employed, (c) any separate financial benefit, and (d) personal care from the deceased or others.¹¹ The court can also consider how recent or distant in the past the caregiving was to the disabled person's death and reduce the claim amount accordingly.¹²

I have filed claims, ultimately approved, in amounts ranging from the old minimum of \$100,000 to \$3 million for cases involving 100 percent disability. I have also based claims on the entire time during which there were both funds in the estate and care being provided. To date, courts have not reduced any of these claims.

The period of time for which a claimant can make a custodial claim is not specifically limited by the statute.¹³ It should be noted, however, that in the amended statute, a factor that the court can consider in whether to reduce a claim is the *proximity* of the care provided by the claimant to the decedent at the decedent's death.¹⁴

I have limited my claims to the period in which the decedent actually had funds because one of our major arguments is that the claimant saved the decedent money by providing care for free or reduced rates. Of course, if the decedent had no funds, then there would be no such savings.

Of course, if parties are actively objecting, the claimant should be prepared to provide testimony in support of his or her claim. Counsel for the claimant also should consider using the expert testimony of a case manager to value the claimant's work. Also, if any of the deceased disabled individual's heirs or legatees is a minor, the probate court likely will appoint a guardian ad litem to represent the minor's interests.

An example

As an example, assume David was a disabled adult as a result of a birth injury and could not perform such activities of daily living as eating, walking, or dressing. He lived with his mother, father, and five adult siblings.

David's mother provided the majority of David's daily care and did not work outside the home due to the time required to care for him. David died in 2009 at the age of 25 with a taxable estate of \$15 million (as a result of a sizable personal injury settlement). He did

not have any estate plan documents at the time of his death. At his death, his heirs were his mother, father and adult brother.

Assuming that no claim is made in David's estate, the estate will owe state and federal estate taxes of approximately \$6,060,000, leaving \$8,940,000 to be divided evenly among his seven heirs, or approximately \$1,277,000 per heir. However, if David's mother were to file a claim for \$3 million and be awarded this amount by the probate court, the claim would be considered a debt of David's estate and would be deducted from the value of his estate for estate tax purposes.

As a result, David's mother would receive \$3 million of income, David's estate would have to pay estate taxes of approximately \$4,483,000, and the remainder to David's heirs (which would include David's mother) would be \$7,517,000 or \$1,074,000 per heir. David's mother would also owe income tax on the claim proceeds of approximately \$1,200,000. At the end of the day, David's family members would collectively receive \$9,317,000 instead of \$8,940,000, for a net increased benefit to the family of \$377,000 (with Mom receiving \$1,800,000 more, and the other heirs all receiving \$200,000 less).

Estates not subject to tax

Custodial claims make sense even for estates that are not subject to estate taxes.¹⁵ This is especially true when the claimant provided most or all of the care and the other family members are not willing to disclaim a portion of their inheritance to pay for it.

Under Illinois law, statutory custodial claims are treated as first class claims along with funeral, burial, and administration expenses. These claims must be paid before heirs or legatees can take, even though the claim reduces or eliminates the estate for them.¹⁶

Note that the same individual can seek both guardian fees and a statutory custodial claim, assuming he or she has been both acting as guardian and living with and providing direct care to the disabled adult or minor. The statute makes clear that a custodial claim may be in addition to any other claim against the

estate.¹⁷

In addition, I believe an individual can file a custodial claim even though compensated by the estate as long as he or she can show that the compensation was less than the private pay value of the care.

IRS denial of claims

Pursuant to Section 2053 of the Internal Revenue Code, statutory custodial claims are deductible as claims against the estate for federal or state estate tax liability purposes. This is because an estate may deduct an obligation of the decedent created by or established under

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the terms of a statute.

Having said that, state court rulings are not necessarily binding in establishing property rights recognized for federal tax purposes. The IRS may still seek to disallow a claim on the basis that the state court proceeding was not bona fide litigation.¹⁸

To date, the author knows of only one case where the IRS audited a custodial claim in a minor's decedent's estate and challenged the deductibility of the custodial claim for federal estate tax purposes.

11. *Id.*

12. But see *In re Estate of Hale*, 383 Ill App 3d 559, 890 NE2d 1244 (1st D 2008). Under the prior version of the custodial claim statute, there was no language limiting the claimant's recovery against an estate to a certain number of years prior to the date of the disabled individual's death.

13. *Id.* at 561-64, 890 NE2d at 1245-48, where the appellate court overturned the trial court's five-year limitation.

14. 755 ILCS 5/18-1.1(v) (emphasis added).

15. Again, the author acknowledges that currently all estates in which the decedent died in 2010 would not be subject to estate tax; however, for 2009 that would have been for estates of less than \$3,500,000 for federal estate tax purposes and \$2 million for Illinois estate tax purposes.

16. 755 ILCS 5/18-10.

17. See 755 ILCS 5/18-1.1; *Hale* at 562, 890 NE2d at 1246.

18. See *Estate of Nesselrodt v CIR*, 51 TCM (CCH) 1406 (1986); *May v Henslee*, 53-1 US Tax Cas (CCH) ¶ 10,897(1952).

In that case, the IRS argued that a minor was not a disabled person for purposes of section 18-1.1 and thus the custodial claim was not a deductible expense. The administrator ultimately settled with the IRS, so there are no rulings on this issue.

Estates of minors

Section 18-1.1 does not specify that statutory custodial claims are limited to the estates of deceased disabled adults, as opposed to minors. There appears to be no case involving a statutory custodial claim in a minor decedent's estate.

The appellate court in *Estate of Lower* adopted the statutory definition of "disabled person" from section 11a-2 of the Probate Act which provides that "'Disabled person' means a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate..."¹⁹ However, in that case, the decedent was an adult and the parties had agreed to use section 11a-2 for the definition of disabled adult. In addition, in the legislative history surrounding the passage of section 18-1.1, Senator Poshard indicated that **the statute was meant to benefit a custodial parent who cared for a child stating as follows:**

Let me explain to you the problem here, and it's a very narrow problem indeed. Let's say that you have a *child* who suffers some injury and becomes permanently physically and mentally disabled. That *child* will never be competent to make a will, and under the current law, in the absence of a will, the *child's* assets by intestacy laws half go to the father and half go to the mother. That's the current law in this state, regardless of the contact either has had or does not have with the *child*. Such a *child* may have substantial assets, maybe from a lawsuit judgment, and those monies on the *child's* death by current law go equally to both parents. That result is simply not fair or right when in some circumstances...only one parent for many years has cared for the *disabled child*. **The fair result is an equitable distribution to account for all the effort and the care by**

the custodial parent. Everybody agrees that the current law does not address this situation, that some changes are needed. This bill, I suggest, is a workable and fair solution. It allows the court to award a gift from the estate of a disabled person to a relative caring for that person to be disbursed upon the death of the disabled person. **The relative who cared for the disabled person can make a claim against the estate of the disabled person based on any lost employment, lost lifestyle opportunities and emotional distress and that would be in addition to any claim for nursing care. So, I think it's a fair and equitable measure here.**²⁰

While the term "minor" is never used, **this suggests that the legislature intended that relatives caring for disabled minors could make statutory custodial claims.**

The practice in Illinois probate courts is to allow custodial claims in minor's estates. As of the present, my practice is to seek custodial claims in the probate estates for disabled minors but to advise family members that they could be challenged by the IRS for estate tax purposes.

Submitting a claim

The statute provides limited direction about how to effectuate the claim. Section 18-2 (governing all probate claims) provides that every claim must be in writing and sufficient to inform the representative of the nature of the claim or relief sought.²¹

Further, the Illinois Appellate Court has ruled that a statutory custodial claim cannot be heard by any court that presided over a guardianship proceeding prior to the death of the disabled adult, because the death deprives the guardianship court of subject matter jurisdiction.²² Section 18-1.1 itself provides only that the claim should take into consideration the claimant's lost employment opportunities, lost lifestyle opportunities, and emotional distress suffered as a result of personally caring for the deceased disabled individual.

While some practitioners use the

probate court's preprinted claim form, I drafted a more extensive, verified pleading for custodial claims. **I also usually retain a case management service to review what it would have cost to provide the comparable level of care to the decedent with private pay services and attached that document to the claim.**

Tax consequences for claimant

The receipt of funds under a statutory custodial claim is treated as income to the claimant. Under section 61 of the Internal Revenue Code, gross income includes compensation for services.

Thus, claim proceeds to address the lost employment of the claimant would be compensatory in nature and subject to income tax. In addition, damages received for emotional distress resulting from non-physical injuries are treated as income for income tax purposes.²³

For estates not subject to federal and Illinois estate tax where all the parties are cooperative, disclaimers are probably a better alternative because the funds received as a result of a disclaimer are not treated as income and subject to income tax. Of course, many families will not agree to this approach. In that case, the caregiver has no alternative but to make a claim.

Conclusion

For caregiver family members, section 18-1.1 can provide welcome assistance after a disabled individual has died to address the caregiver's lost employment and lifestyle opportunities that came with providing home care for the disabled individual. ■

19. *Lower* at 476, 848 NE2d at 652 (emphasis added), quoting 755 ILCS 5/11a-2.

20. Emphasis added. 85th General Assembly, Senate Transcript (Dec. 1, 1988), available at <http://ilga.gov/senate/transcripts/trans85/ST120188.pdf>.

21. 755 ILCS 5/18-2.

22. See *In re Estate of Gebis*, 186 Ill. 2d 188, 710 NE2d 385 (1999).

23. See *Murphy v IRS*, 493 F.3d 170 (DC Cir 2007).