

Probate Practice (Spring 2002)

The following was general information presented in speeches to the Chicago Bar Association Solo & Small Firm Practice Committee (Feb., 2002) and an informal group of Parish Nurses (May, 2002). It is general in nature and not intended to be relied on for specific problems. For specific problems, the reader is advised to contact an attorney or the author at Lynne R. Ostfeld, P.C., ostfeld@ostfeldlaw.com

The Probate Division is divided into three sections: minors' estates; disabled persons' estates; decedents' estate. Cases in this division are not just a "probate" case.

The main office to find the files, file documents and obtain forms is on the 12th floor, next to the County Division. Surety company representatives are also found here, at a counter in front of the northern windows. The courtrooms and docket room are on the 18th floor.

Information as to whether or not a Will has been filed can be found in the Will Books on the 12th floor. The computers can be used to determine if an estate has been opened. The docket books, on the 18th floor, show all of the activity in the estate.

The Probate Division is now having its case information computerized, but the progress is slow. The clerks, and not the attorneys, have access to the judge's docket book to schedule hearings. Original pleadings are generally given to the judge the day of the hearing. Courtesy copies are generally given to judges several days before a hearing and are mandatory with accountings.

MINORS' ESTATES

755 ILCS 5/11

Minors' estates are opened to handle a minor's receipt of sums of money, to appoint a guardian of the estate and/or of the person, and to appoint a stand-by or short-term guardian.

A minor and his parent can be in a conflictual situation regarding an inheritance. Whether it is in the minor's estate or the decedent's estate, consider requesting the court to appoint a *guardian ad litem* to represent the minor.

If all assets in a minor's estate are in accounts with a clearly marked indication that all withdrawals are subject to court approval until the minor's 18th birthday, the case can be closed, the bond cancelled, and the case transferred to Judge Kawamoto's call. Otherwise, the attorney and guardian must prepare and present annual accountings. There is a fee for this and the attorney must give a courtesy copy to the judge well in advance of the hearing so that he can review it prior to the hearing.

GUARDIANSHIP and EMERGENCIES

True medical emergencies can generally be handled by the physician or family if the person himself is unable to give informed consent.

Quasi emergencies for an adult not able to give consent, such as is required for non-essential invasive treatment, access to finances, or transfer to another facility, can be handled through opening a disabled person's estate.

The definition of a "disabled person" is in 755 ILCS 5/11a-2:

"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, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering.

The controlling law for a disabled person's estate is 755 ILCS 5/11a-1 *et seq.* All of the requirements must be followed within the time specified. The "Procedures preliminary to hearing" are contained in 755 ILCS 5/11a-10.

The following forms (which are available on the 12th floor, Daley Center) are essential:

- Petition for Appointment of Guardian for Disabled Person - CCP 200
- Notice of Rights of Respondent - CCP 201 C
- Summons for Appointment of Guardian for Disabled Person - CCP 201 A
- Petition for Temporary Guardian - CCP 202
- Order Appointing Guardian ad Litem for Alleged Disabled Person - CCP 209
- Report of Physician - CCP 211
- Oath and Bond of Representative - Surety - 312, or
- Oath and Bond of Representative - No Surety - CCP 313
- Order Appointing Temporary Guardian - CCP 203, or
- Order Appointing Limited Guardian for Disabled Person - CCP 207, or
- Order Appointing Plenary Guardian for a Disabled Person - CCP 204
- Statement of Right to Discharge Guardian or Modify Guardianship Order - CCP 214

No later than 14 days before the hearing, summons must be served on the disabled person informing him or her of the petition. 755 ILCS 5/11A-10. This does not have to be done by the Sheriff. 755 ILCS 5/11a-10 (e). It cannot be by substitute service and cannot be waived by the presence of an attorney for the "respondent".

Notice of the hearing also has to be served on those persons named in the petition, and who do not waive notice, not less than 14 days before the hearing. 755 ILCS 5/11a-10 (f). This means that notice has to be given to the respondent's (alleged disabled person) nearest relatives:

...the nearest relatives of the respondent in the following order: (1) the spouse and adult children, parents and adult brothers and sisters, if any; if none, 2) nearest adult kindred known to the petitioner...

755ILCS 5/11a-8

A bond must be posted if there is a petition for guardianship of the person's estate. That can be obtained on the 12th floor; bondsmen have a desk for that purpose on the north side of the 12th floor, immediately in front of the windows between the two court offices.

Temporary Guardianship (755 ILCS 5/11a-4) is done on an expedited basis, lasts for a limited time, and is ordered for a very narrow, specific purpose.

Sec. 11a-4 Temporary guardian Prior to the appointment of a guardian under this Article, pending an appeal in relation to the appointment, or pending the completion of a citation proceeding brought pursuant to section 23-3 of this Act (755 ILCS 5/23-3), the court may appoint a temporary guardian upon a showing of the necessity therefor for the immediate welfare and protection of the alleged disabled person or his estate on such notice and subject to such conditions as the court may prescribe. In determining the necessity for guardianship, the immediate welfare and protection of the alleged disabled person and his or her estate shall be of paramount concern, and the interests of the petitioner, any care provider, or any other party shall not outweigh the interests of the alleged disabled person....

The full guardianship hearing (which still has to be completed even when there is a temporary guardian) takes place on a somewhat more relaxed scale.

The procedure is to take the petition to the Daley Center, 12th floor, Probate counter. Once the petition is filed, the fee paid and the calendar assignment made, the attorney goes to the appropriate courtroom on the 18th floor and schedules the return date hearing. It will be at 11:00 a.m. on the selected day. The attorney gives the forms to the clerk along with an Order appointing a *guardian ad litem*. The judge will insert the name of the person appointed and Chantal Blackmore, in Judge Budzinski's office, will notify the parties of the appointment.

The physician's report, which must have been performed within three months of the filing of the petition, is jurisdictional. 755 ILCS 5/11a-9. It must be presented to the judge. However, if one cannot be obtained, a petition can be submitted to the court to compel the respondent to undergo the appropriate medical examination. This must be

backed up with substantial facts to support this invasion of privacy. If there is a cross-petition or family fight in the background, the petition to obtain the physician's report can be quite contentious. The case, *Estate of Silverman*, 257 Ill. App. 3d 162 (1st Dist. 1993), needs to be reviewed if there will be a fight and limited discovery opportunities.

A guardian of a person need not live in Illinois but the money must remain here.

An inventory is filed within 60 days of the appointment and then annual accountings on the anniversary date of the appointment. Expenditures from the disabled person's funds should not be made until after court permission is obtained, which is done through submitting an appropriate petition or annual budget.

DECEDENTS' ESTATES

Death-bed Wills and Codicils are looked upon with great suspicion, if they are challenged.

If a dying person is being subject to influence by others to sign a Will favoring them, consider having him sign an affidavit by which he reaffirms a prior Will and addresses the attempts by others to get him to sign something else. Have this witnessed.

If you are having a Will prepared for someone who is dying, be sure that it is properly witnessed. 755 ILCS 5/4-3.

Sec. 4-3. Signing and attestation. (a) Every will shall be in writing, signed by the testator or by some person in his presence and by his direction and attested in the presence of the testator by 2 or more credible witnesses.

Will contests must be filed within 6 months after the admission to probate of a domestic will. 755 ILCS 5/8-1.

Upon a person's death:

- check the safe deposit box for burial instructions
- save the newspapers for date of death valuations of securities
- check the security of the house and personal property against thieves during the funeral and relatives both before and after
- learn the names and addresses of the immediate family (those who would inherit if there is no Will) for purposes of the heirship portion of the opening of a probate estate - **Heirship affidvits are more difficult than many attorneys appreciate.**
- file the Will in the county of residence as soon as possible and hold onto the receipt
- once the estate is open, consider petitioning for an award for the spouse or children to help them financially until the estate is settled, because a distribution of assets may not be available until after the 6 month claim period. (see 755 ILCS 5/15-1 *et seq.*)

Once the person has been buried or cremated, one other immediate task of possible import is saving the assets from being pillaged. The Probate Code provides for the discovery of relevant information and the recovery of property. 755 ILCS 5/16-1.

Sec. 16-1 *Citation on behalf of estate.* (a) Upon the filing of a petition therefor by the representative or by any other person interested in the estate or, in the case of an estate of a ward by any other person, the court shall order a citation to issue for the appearance before it of any person whom the petitioner believes (1) to have concealed converted or embezzled or to have in his possession or control any personal property, books of account, papers or evidences of debt or title to lands which belonged to a person whose estate is being administered in that court or which belongs to his estate or to his representative or (2) to have information or knowledge withheld by the respondent from the representative and needed by the representative for the recovery of any property by suit or otherwise. The petition shall contain a request for the relief sought.

(b) The citation must be served not less than 10 days before the return day designated in the citation and must be served and returned in the manner provided for summons in civil cases. If there is a personal representative who is not the respondent, notice of the proceeding shall be given by mail or in person to the personal representative not less than 5 days before the return day designated in the citation.

(c) If the representative is the respondent, the court may appoint a special administrator to represent the estate. The court may permit the special administrator to prosecute or defend an appeal.

(d) The court may examine the respondent on oath whether or not the petitioner has proved the matters alleged in the petition, may hear the evidence offered by any party, may determine all questions of title, claims of adverse title and the right of property and may enter such orders and judgment as the case requires. If the respondent refuses to answer property questions put to him or refuses to obey the court's order to deliver any personal property or, if converted, its proceeds or value, or books of account, papers or evidences of debt or title to lands, the court may commit him to jail until he complies with the order of the court or is discharged by due course of law and the court may enforce its order against the respondent's real and personal property in the manner in which judgments for the payment of money are enforced. The court may tax the costs of the proceeding against the respondent and enter judgment therefor against him.

This section is narrowly construed and not a grant of total authority over the administration of the estate. There is a difference between a citation to discover property and a citation to recover property. This distinction must be acknowledged and honored.