

STATUTORY CUSTODIAL CLAIMS: CARING FOR CAREGIVERS

Caring for an aging or sick relative can be hard work, from both an emotional and a physical perspective. Even worse, in situations where around-the-clock care is needed, the family caregiver may be forced to put his or her professional life on hold, thereby sacrificing current and future earnings. Consider the following situation:

James, a widower with four sons, is blind and requires constant care. James' three oldest sons refuse to help with his care; however, James' youngest son (Sam) agrees to drop out of college, move back in with James, and take care of him. Sam provides around-the-clock care to James for six years.

We certainly may not expect James to write Sam a check every two weeks for the care Sam provides, but what happens upon James' death? James obviously could leave Sam most or all of his estate by executing a Will to that effect. But what if James didn't have a Will? Or, what if James had an old Will giving all of his property equally to his four children, and never got around to updating that old Will? In those cases, Sam would be entitled to receive one-fourth of James' estate, which is the same amount that James' other sons would be entitled to receive. For instance, if James died with an estate valued at \$200,000, then Sam and each of his brothers would receive \$50,000. This result strikes many people as extremely unfair.

One option for Sam would be to file a claim against James' estate. In this claim, Sam would state that he is owed a certain amount of money as a result of his work in caring for James. If Sam's claim is successful, it would be paid out of the estate, and only that portion of the estate remaining after such payment would be divided and distributed to the four sons. For instance, if Sam filed a \$100,000 claim against James' estate and the probate court found this claim to be justified, then Sam would receive a total of \$125,000 (the claim amount plus one-fourth of the remaining estate) and each of his brothers would receive \$25,000. The problem with this option is that, in the past, Illinois probate courts have been extremely reluctant to approve these types of claims. Instead, judges have taken the position that no actual contract existed between the caregiver and the aging or sick relative, and that to pretend such a contract exists would be inappropriate. This position has placed a huge burden on family caregivers, who may be left with limited financial opportunities.

The Illinois legislature attempted to remedy this unfairness in 1989, with the passage of §18-1.1 of the Illinois Probate Act. Section 18-1.1 (which is referred to in the remainder of this article as the "custodial claim law") expressly allows family caregivers to file what's called a "statutory custodial claim" against the estate of the relative to whom they provided care.

In order to take advantage of the custodial claim law, the family caregiver must have been a spouse, parent, brother, sister or child of the deceased person (referred to here as the "decedent"). Furthermore, the decedent must have been at least partially disabled, and the family caregiver must have dedicated himself or herself to the care of the decedent by living with and personally caring for the decedent for at least 3 years.

The custodial claim law even goes so far as to set minimum amounts to be awarded for a claim, depending upon the extent of the decedent's disability:

| <u>Extent of Disability</u> | <u>Minimum Claim Amount</u> |
|-----------------------------|-----------------------------|
| 100% | \$100,000 |
| 75% | \$75,000 |
| 50% | \$50,000 |
| 25% | \$25,000 |

So, for instance, if a family caregiver meets the criteria set forth above and the decedent had a 100% disability, then the family caregiver is entitled to at least \$100,000.

Unfortunately, the passage of the custodial claim law did not end the story. A number of probate judges felt that the custodial claim law was poorly drafted and unconstitutional, and issued orders to that effect. Illinois appellate courts did not directly address those orders, which may have discouraged family caregivers from filing statutory custodial claims. After all, why file such a claim if it's just going to be dismissed?

However, in 2000, a Cook County probate judge (Judge Kennedy) entered an order stating that the custodial claim law was unconstitutional, and the family caregiver appealed that order to the Illinois Supreme Court. The Illinois Supreme Court reversed Judge Kennedy's order and ruled that the custodial claim law was, in fact, constitutional. (For the record, the case was *Estate of Jolliff*, 771 N.E.2d 346 (2002).) While the custodial claim law still has its problems (such as the lack of a definition for "disability"), this decision should open the way for more family caregivers to file statutory custodial claims. *For more information regarding statutory custodial claims, please consult a qualified probate attorney.*

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