ILLINOIS STATE
BAR ASSOCIATION

Board of Governor Meeting
March 10, 2017

Action Agenda Item #78
Legislation

ILLINOIS STATE BAR ASSOCIATION

MEMORANDUM

To: ISBA Board of Governors

From: Jim Covington

Date: February 24, 2017

In re: Two Legislative Proposals

This memo will summarize two legislative proposals that need your direction. Both were matters that we simply ran out of time to get through our lengthy legislative process. The first is from Trusts and Estates and the second from Animal Law. Please call me if you have any questions. Thank you.

(1) ISBA Legislative Proposal 99-7 amends statutory awards from a decedent's estate for an "adult dependent child."[1] Trusts and Estates believes that the current statute is archaic and undercuts current estate planning that tries to protect disabled adults after the death of a caretaker family member.

This proposal was sent to several section councils in 2015 and then again in 2016, and Trusts and Estates has reworked it several times to accommodate concerns that were raised. Elder Law, Mental Health, and Trusts Estates now support it. General Practice still opposes, and I'll get into their opposition later in this memo. The ISBA Legislation Committee unanimously supported it last month,

Currently, this statute allows the court, if it deems reasonable, to award the surviving spouse, minor children, or "adult dependent children" a sum of money for their proper support for the nine-month period after the decedent's death. Under current law it may not be less than $20,000 for the spouse and $10,000 for each child.

For the past couple of decades or so, both federal and Illinois law have allowed specific planning for disabled persons, including supplemental or special needs trusts, as well as payback trusts. "Payback trusts" provide for the disabled person during his or her lifetime with any remaining balance payable to the State to the extent that funds were expended for the benefit of the dependent person. These tools are in addition to the use of POD and TOD accounts, joint tenancy accounts, and the new Transfer on Death Instrument (TODI).

[1] 755 ILCS 5/15-1, 15-2.

Estate planners are aware that providing for a disposition in a decedent's estate for the benefit of a person who is eligible to receive Medicaid or Supplemental Security Income would render the person ineligible and cause the disposition to repay the State. Thus, estate plans are routinely crafted to avoid that result.

That special planning could be adversely affected if, in addition to the plans made for the benefit of the disabled adult child outside of the probate estate, the probate estate would also provide a potentially significant award for the benefit of the disabled adult child.

For example, a parent may have established a significant supplemental needs trust for the benefit of an adult child. But if that adult child is also entitled to claim a significant award under the probate estate, the parents' estate plan for other beneficiaries would be adversely affected.

This proposal was triggered in 2013 by the First District Appellate Court of Illinois that found that an adult child of the decedent was "dependent" for the reason that the child was unable to maintain himself and was a ward of the estate.[2] The adult dependent child's award in that case could have exceeded $400,000 and significantly if not entirely exhausted the probate estate.

That Appellate Court decision highlighted the fact that significant and appropriate planning outside the probate estate for the benefit of a disabled adult child may be frustrated if that adult dependent child is still entitled to a significant portion of the probate estate as well as the benefits of other planning.

Considering the methods by which parents and others may provide for adult children who might otherwise become public charges, there is no longer a need for an award from the probate estate for an adult dependent child.

What this bill does:

- Creates a separate statutory award for adult dependent child for at least $5,000. A minor child would still be entitled to at least $10,000, and a surviving spouse would still be entitled to at least $20,000 as under current law.
- The qualifying language would be "for each adult child of the decedent who likely is to become a public charge and was financially dependent on the decedent and resided with the surviving spouse at the time of death." (*Note, one of General Practice's concerns was that there was no clear definition of financially dependent child. As used in the Spouse's Award and Child's Award sections of Article XV of the Illinois Probate Act, the term "dependent" is defined in Section 1-2.06 as "a person who is unable to maintain himself and is likely to become a public charge."*)

[2] *In re: Estate of Raul N. Mosquera* (2013 Il. App. 1st 120130).

- The award must be at least $5,000, but the court may give whatever sum it deems reasonable, or agreed upon the surviving spouse and representative of the decedent's estate of affiant under a small-estate affidavit. *(Note, this was another General Practice concern that the court has no discretion. I'm not sure how to read "a sum of money that the court deems reasonable" as limiting the judge's discretion.)*
- Requires the adult child's agent or guardian or other adult on behalf of the adult child to provide written notice to the representative or affiant asserting that the adult child was financially dependent on the decedent at the time of the decedent's death within 30 days of the surviving spouse or adult child receiving notice of this potential award.

General Practice's final concern was the proposal was too broad. I'm not sure how to respond to this because of the vagueness of this concern.

Current status. Bill introduction deadline for both chambers was February 10, 2017. To preserve our options for this spring, I reached out to Steven A. Andersson, the minority chair of the House Judiciary Committee. He is a member of the ISBA Assembly and does estate-planning work. I told him that I was seeking approval from the Board so that ISBA could formally initiate this. He introduced it as HB 2516 as a placeholder that may be found here.

(2) ISBA Legislative Proposal 100-1. It creates civil immunity for volunteer humane investigators who investigate complaints concerning the care and treatment of companion animals, which includes canines, felines, and equines. It does not immunize acts or omissions of willful or wanton misconduct.

This proposal was sent to a number of sections and committees at the ISBA annual meeting in June of 2016, and Animal Law Section Council has amended it to make it narrower and more focused after its initial review. Animal Law reached out to Brad Pollock and Michael Hartigan of Tort Law Section Council, and the attached draft is a result of that conference call and follow-up emails.

Under the Illinois Humane Care Act and corresponding rules, a humane investigator is trained and approved by the Department of Agriculture (DoA). The vast majority of these investigators are volunteers from humane societies who are organized to protect companion animals. Other persons who may perform these investigators by statute include law enforcement officers, Department investigators, and animal-control officers, all of whom already receive statutory immunity as state or local employees.

In some local jurisdictions, animal-control officers don't respond to calls for help after the workday is over unless public safety is involved. Also, in many situations the county animal-control charges local municipalities for any services provided. If a municipality chooses not to pay (and they often make that choice), there is no assistance from animal control available.

Nor do DoA employees respond after the workday is over, and as a policy, the Department is asking local jurisdictions to handle companion animals matters so the Department can concentrate on enforcement if there isn't shared authority. The Department enforces 12 animal-related statutes; there is shared authority only under Humane Care Act. Humane investigators fill the void if no local government authority will respond. If police respond, they often ask local humane investigators to assist.

The Department of Agriculture is now contemplating new rules to require more training for humane investigators such as a weeklong course in the National Animal Control Associations series or at the University of Missouri cruelty school. Those new rules will actually require more training for approved humane investigators than is required for governmental animal-control officers, who are not required to have any formal training. (Yet those so employed enjoy statutory immunity under the Local Government Tort Immunity Act.)

The Animal Law Section Council believes that these volunteers should have immunity (except for willful and wanton misconduct) so that no good deed is punished. They believe that these volunteers (numbering 300-400 across the State) speak for animals that can't speak for themselves.

The actual proposed language is here:

(510 ILCS 70/10) (from Ch. 8, par. 710)

Sec. 10. Investigation of complaints.

(a) Upon receiving a complaint of a suspected violation of this Act, a Department investigator, any law enforcement official, or an approved humane investigator may, for the purpose of investigating the allegations of the complaint, enter during normal business hours upon any premises where the animal or animals described in the complaint are housed or kept, provided such entry shall not be made into any building which is a person's residence, except by search warrant or court order. Institutions operating under federal license to conduct laboratory experimentation utilizing animals for research or medical purposes are, however, exempt from the provisions of this Section. State's Attorneys and law enforcement officials shall provide such assistance as may be required in the conduct of such investigations. Any such investigation requiring legal procedures shall be immediately reported to the Department. No employee or representative of the Department shall enter a livestock management facility unless sanitized footwear is used, or unless the owner or operator of the facility waives this requirement. The employee or representative must also use any other reasonable disease prevention procedures or equipment provided by the owner or operator of the facility. The animal control administrator and animal control wardens appointed under the Animal Control Act shall be authorized to make investigations complying with this Section for alleged violations of Sections 3, 3.01, 3.02, and 3.03 pertaining to companion animals. The animals impounded shall remain under the jurisdiction of the animal control administrator and be held in an animal shelter licensed under the Animal Welfare Act.

(b) Any veterinarian acting in good faith is immune from any civil or criminal liability resulting from his or her actions under this Section. The good faith on the part of the veterinarian is presumed.

(c) Civil liability under this Act may not be imposed against an approved humane investigator for any act or omission in conducting investigations or otherwise enforcing the provisions of this Act, unless the act or omission is a result of willful or wanton misconduct. This immunity does not extend to the operation of a motor vehicle.

This revised proposal was re-referred to the following sections and committees at the 2016 midyear meeting:

General Practice. Support.

Local Government. Support.

Tort Law. Tort Law supported it but as amended below:

(c) Civil liability under this Act may not be imposed against an approved humane investigator for any act or omission in conducting investigations or otherwise enforcing the provisions of this Act, unless the act or omission is a result of willful or wanton misconduct. This immunity does not extend to the operation of a motor vehicle *or bodily injury to a person.* *(Tort's amendment was "or bodily injury.")*

Animal Law had agreed to an exception for operation of a motor vehicle (I think arriving out of the conference call with Pollock and Haritgan) because driving a motor vehicle was not Animal Law's concern—there is already a well-established body of law regulating doing so with insurance and it is outside the scope of doing an humane investigation at the request of DoA or local government. They think Tort Law's proposed additional language is so broad and vague it emasculates the proposal.

Civil Practice. Opposed unanimously as presented. They opposed for the following reasons:

- There should be an exception to immunity if there is insurance coverage in place that would apply to any damage or liability.
- Overly broad to immunize any act or omission under the auspicious of "conducting investigations."

Animal Law's response to the first concern: They are unaware, and I'm unaware, of any statutory exception for immunity if there is insurance. I'll look into that. Granted, a few humane investigators will be employed by a unit of local government, but Animal Law believes it is very few of them are so employed. For example, Sangamon County has just four animal officers. I'm guessing none of them work after 5:00 p.m. unless it is an emergency matter affecting public safety.

Animal Law's response to the second concern: Animal Law is following the statute by using the words "conducting investigations." That's what they do, but only at the request of DoA or a unit of local government. Trying to figure out how to draft statutory language to conform to the possible myriad of fact-specific situations isn't practical.

Agricultural Law. Animal Law presented to them at the midyear meeting, and they referred it to their legislative subcommittee. They've never taken a formal position on it since its referral at the annual meeting. They met on Feb. 2 and delegated a possible amendment to a lawyer employed by the Farm Bureau that is on the committee. I did receive a lengthy email from that lawyer after the midyear meeting that summarized her concerns.

Her email was concerned that the Humane Care Act applies to livestock and that therefore livestock facilities would be involved. She is correct about that, but humane investigators concentrate on companion animals and they have always received direction from DoA to refer all livestock matters to DoA.

So, her concern was that if a humane investigator was on site to investigate a complaint about a companion animal but sees something that should be addressed concerning livestock. She sought an amendment to foreclose this possibility by amending to limit investigators' ability to investigate allegations of the Act involving livestock facilities. She further sought an amendment that these investigations must be conducted as authorized by the Act and applicable DoA administrative rules.

Animal Law's response. Well, it simply doesn't happen; humane investigators are not asked by DoA to investigate livestock matters. Animal Law is a little uneasy about removing this statutory language just because they are asking for immunity. The Farm Bureau's issue is broader than immunity; their concern is the underlying statute. Animal Law doesn't care to expand the scope of this proposal.

Animal Law also thinks that it is current law that you must conduct investigations in conformity under any applicable DoA rules.

Legislation Committee. The Legislation Committee supports this proposal in concept.

Current status. Senator Don Harmon (D-Oak Park) has agreed to sponsor a shell bill as a placeholder for us pending the Board's decision and what he thinks should be in a final draft.

Thank you.