



ILLINOIS STATE BAR ASSOCIATION

# TRUSTS & ESTATES

*The newsletter of the Illinois State Bar Association's Section on Trusts & Estates*

## 2010 Bank Convenience Accounts: An exciting new tool?

*By Graham Boardman Schmidt<sup>1</sup>*

Many struggle with how to plan for paying expenses during a future disability, whether it is their own disability, or the disability of a spouse or child. The available mechanisms that grant a family member or friend access to bank accounts of the disabled person, such as powers of attorney for property and living trusts, are often unattractive. In order to avoid the complexity and the cost of these procedures, the addition of a signer to a bank account is often an informal method to plan for disability. Illinois residents have historically believed that adding a signer to a bank account does not give the signer true authority over that account and does not give the rights of survivor-

ship at the account-owner's death.

Until 2010, an automatic right of survivorship attached to all multiparty accounts formed under the Illinois Joint Tenancy Act (765 ILCS 1005/2(a)). Although there may have been an agreement as to title and possession of the account funds between the owner and the signer, the Illinois' statutory framework did not explicitly recognize multiparty accounts in which the signer does not hold present title to the account (though some banks established such accounts at their own discretion). The practical result was that if a dispute arose between parties regarding

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## Not just a bill

*By Mary Cascino<sup>1</sup>*

After unanimously passing both houses, a bill that revises the Power of Attorney Act, 755 ILCS 45/2-1, *et seq.* is awaiting the Governor's signature!

Two bills proposing to revise the Illinois Power of Attorney Act were introduced in the last legislative session. House Bill 4136 was developed by the ISBA Elder Law Section Council with input from the ISBA Trusts & Estates Section Council and House Bill 3886, in the format of the Uniform Power of Attorney Act, was proposed by American Association of Retired Persons ("AARP").

The present bill, HB 6477, is the result of negotiation with a variety of interested organizations and consolidates, with some give and take, the 23-year history of the Illinois Power of Attor-

ney Act with the Uniform Power of Attorney Act.

The revisions are designed to minimize abuses of elderly, incapacitated and disabled persons by agents serving under powers of attorney.

Some of the revisions make the statutory forms more user-friendly, such as revising the Notice to the principal, while other revisions, such as the Notice to Agent in the Property Power of Attorney, are intended to visibly inform the agent about his or her duties under the Act.

The statutory forms will not be substantially altered. The statutory form of the Property Power of Attorney will consist of three (3) parts: (1) Notice to the principal on a separate page, (2) the form itself with separated notes to the prin-

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## 2010 Bank Convenience Accounts: An exciting new tool?

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ownership of account funds, an Illinois court would presume joint-ownership (ownership of a joint present interest by each party) in the bank account and then consider evidence of actual intent if it contradicted that presumption. Following the original bank account owner's death, disappointed heirs or legatees would have the burden of demonstrating by clear and convincing evidence that the original owner did not intend for the additional signer to have a right of survivorship in the account. See *Shea v. Brennan (In re Estate of Shea)*, 364 Ill. App. 3d 963, (Ill. App. Ct. 2d Dist. 2006).

The confounding feature of these accounts is that there is usually no written evidence of intent available at the original owner's death. Estate attorneys, heirs, legatees and courts often conduct fruitless searches for written expressions of the original owner's intent.

Prior to the recent convenience account legislation, banks sometimes offered ad hoc "convenience accounts" by recognizing an agent's limited authority over a bank account pursuant to a power of attorney for property. However, the execution of a separate power of attorney for property document by the original owner can result in unforeseen consequences for both the principal and agent. Under Illinois common law, a presumption of fraud attaches to transfers between a principal and agent due to the automatic fiduciary duty arising from the power of attorney relationship. See *Estate of Teall v. Neitzel (In re Estate of Teall)*, 329 Ill. App. 3d 83, 263 Ill. Dec. 364, 768 N.E.2d 124 (1st Dist. 2002). When an agent makes a transfer to itself, the transfer is *presumed* to be a result of undue influence. However, since principals typically appoint agents who are natural objects of their affection, innocent gifts to children or trusted friends can be presumed to be fraudulent and result in guardianship and probate litigation. The use of power of attorney for property documents to establish ad hoc "convenience accounts" can frustrate the original owner's intent almost as often as the use of multiparty accounts under the Joint Tenancy Act.

### Legislative solution

Responding to the public demand for a proper way to construct a "convenience" checking account, on August 4, 2009, the Il-

linois legislature enacted the "Banking Convenience Account for Depositors Act" 205 ILCS 720 ("Act"). Under the Act, any bank conducting operations with Illinois residents is *authorized, but not required*, to offer a formal "convenience deposit account." This deposit account is to be created by a primary account holder and all assets ever held by the deposit account will be deemed to be the sole property of the primary account holder. The primary account holder can then designate a second person, the "convenience depositor", to have the authority to write checks and withdraw funds. Convenience accounts are titled in the name of both the primary depositor and the secondary convenience depositor, but the primary account holder can terminate the second party's authority to make deposits or withdrawals at any time. Upon the death of the primary account holder, the funds of the deposit account become the property of the primary account holder's estate (or perhaps pass via a pay-on-death designation) and the convenience depositor has no right of survivorship.

Convenience accounts established under the Act may be very attractive for disability planning. An elderly person, or perhaps someone having a medical procedure, may designate a "convenience depositor" for his or her bank account. If the convenience depositor abuses the access to the primary account holder's account by making unauthorized or unjustified withdrawals, the primary account holder may terminate the access. Importantly, the Convenience account eliminates the open question of the original account holder's intent for the funds following his or her death.

Adding to its allure, the Act does not provide a system for evaluating the intent of the primary account holder in establishing a Convenience account and provides simply that this account may be established "for the convenience of the depositor" (Section 10, (a) of the Act). Assuming that a banking institution will not restrict the deposits and withdrawals based on the bank's own interpretation of the Act, a banking customer may open a Convenience account for his or her own designs. Many bank customers may find it useful to establish an account that grants possession, but not title, of funds to another individual. Convenience accounts could be valuable to clients of successive marriages

who desire to give his or her spouse access to a bank account but also want the account assets to be payable at death according to the client's will or trust (or via a POD designation). A parent may want to provide a child access to a parent's bank account for emergency money while the child is traveling abroad, then terminate the child's access once the child refuses to come home from the summer in Spain. Creative attorneys may also make use of Convenience accounts under the Act for asset protection techniques.

Illinois is not the first state to approve of multiparty bank accounts without rights of survivorship. Both Florida and Texas have permitted something similar to our Convenience account since the early 1990s. However, several questions remain as to ultimate authority over such accounts. For example, how will the global powers of an agent serving under a power of attorney for property or of a court-appointed guardian coordinate or conflict with the Convenience account depositor's rights to allocate Convenience account funds? Does the Act create more law suits as Convenience accounts proliferate or provide efficient disability planning, especially for clients with smaller estates? It will be interesting to see if the Convenience account provides any convenience for Illinois residents. ■

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## Not just a bill

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principal, and (3) Notice to Agent.

Despite the provision for these separate parts, a form that is in substantial compliance with the statutory form should be deemed valid and honored and may be relied on by a third-party.

The bill also provides forms for an agent's or successor agent's Certification and Acceptance of Authority, which is intended to further induce the reliance of third parties, such as financial institutions and health care providers. The Acceptance of Authority portion should alert an agent that his or her duties are triggered when he or she undertakes the position of agent.

In addition to revisions to the forms, the bill finally defines the parties (interested persons) that may bring legal action against the agent. Damages will now be recoverable against agents who act recklessly or in bad faith, to the detriment of the principal, including expended attorney fees and costs. These provisions do not limit other applicable remedy.

A somewhat controversial section of the bill recognizes that, at times, a principal does authorize co-agents to act under a non-statutory power of attorney and provide guidance on how co-agents may act in a manner that a third party may rely upon and accept.

The Health Care statutory form now provides separate sections for various powers that were somewhat buried in paragraph one of the prior form, such as access to medical records, disposition of remains and organ donation. There is a separate HIPAA authority that takes immediate effect to enable the agent to consult with a principal's physician to determine whether the principal is incapacitated.

The Health Care statutory form has also updated the second option for the withholding or removal of life sustaining treatment to be consistent with terms used in the Health Care Surrogate Act.

Some other highlights of the bill are:

- Provision that a power of attorney **does not revoke prior powers** of attorney unless the instruments specifically so states. The predecessor statutory form provides that it does revoke all prior like powers of attorney.
- Definition of the "interested parties" who

may bring an action against an agent

- Venue for bringing actions is amended to make it more convenient for the principal
- Additional limits on who may witness the execution of a power of attorney
- The Notice to the principal would now contain a place for the principal to initial to indicate that he or she has read and understands the provision and effect of naming an agent to act on the principal's behalf

If signed by the Governor, **the bill will not take effect until July 1, 2011** in order to give financial institutions, health care providers and social services adequate time to educate their employees and the general public about the revisions. ■

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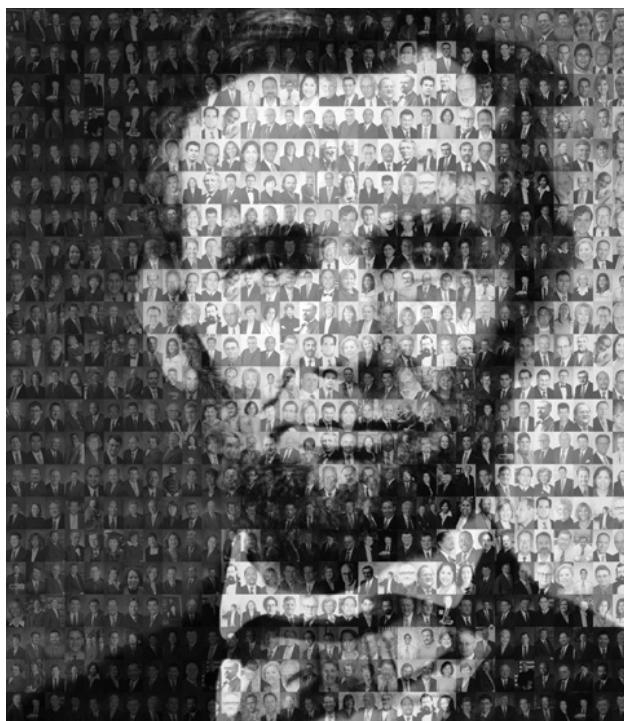
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### June

**Friday, 6/18/10– Quincy, Stoney Creek Inn**—Legal Writing: Improving What You Do Every Day. Presented by the Illinois State Bar Association. 8:30-12:45.

**Monday, 6/21/10- Webinar**—Advanced Legal Research on Fastcase. Presented by the Illinois State Bar Association. \*An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <<https://www1.gotomeeting.com/register/863461769>>. 12-1.

**Tuesday, 6/22/10- Teleseminar**—Buying and Selling Distressed Real Estate, Part 1

**Tuesday, 6/22/10- Webcast**—Women in the Criminal Justice System. Presented by the ISBA Women in the Law Committee. 12-1.

**Wednesday, 6/23/10- Teleseminar**—Buying and Selling Distressed Real Estate, Part 2.

**Wednesday, 6/23/10- Teleseminar**—Health Care Reform 2010- How it Will Impact Employers, Part 2.

**Thursday, 6/24/10- Friday 6/25/10- St. Louis, Hyatt Regency St. Louis at the Arch**—CLE Fest Classic St. Louis- 2010. Presented by the Illinois State Bar Association. 11:00-4:40; 8:30-4:10.

**Thursday, 6/24/10- Teleseminar**—Business Exit and Succession Planning for closely Held Businesses. 12-1.

**Tuesday, 6/29/10– Springfield, INB Conference Center, 431 S. 4th St**—Legal Writing: Improving What You Do Every Day. Presented by the Illinois State Bar Association. 8:30-12:45.

**Tuesday, 6/29/10- Teleseminar**—Negligent Hiring. 12-1.

### July

**Tuesday, 6/6/10- Teleseminar**—Like-Kind Exchange of Business and Business Internals.

**Thursday, 7/8/10- Webinar**—Conducting Legal Research on FastCase. Presented by the Illinois State Bar Association. \*An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <<https://www1.gotomeeting.com/register/906864752>>. 12-1.

**Tuesday, 6/13/10- Teleseminar**—Business Torts, Part 1.

**Wednesday, 6/14/10- Teleseminar**—Business Torts, Part 2.

**Thursday, 7/22/10- Webinar**—Advanced Legal Research on Fastcase. Presented by the Illinois State Bar Association. \*An exclusive member benefit provided by ISBA and ISBA Mutual. Register at <<https://www1.gotomeeting.com/register/403171688>>. 12-1.

**Thursday, 7/22/10- Teleseminar**—Construction Contracts.

**Tuesday, 7/27/10- Teleseminar**—Goodwill in Business Transactions.

### September

**Thursday, 9/16/10- Chicago, Chicago History Museum**—GAIN THE EDGE!® Negotiation Strategies for Lawyers. Master Series Presented by the Illinois State Bar Association. 8:30-4:00.

**Friday, 9/17/10- Chicago, ISBA Regional Office**—Hot Topics in Tort Law- 2010. Presented by the ISBA Tort Law Section. 1-4:15

**Thursday, 9/23/10- Chicago, ISBA Regional Office**—Experts and Litigators on Issues Impacting Children & Custody in Family Law. Presented by the ISBA Family Law Section. 8-6.

**Friday, 9/24/10- Springfield, Illinois Primary Healthcare Association**—Don't Make My Green Acres Brown: Environmental Issues Affecting Rural Illinois. Presented by the ISBA Environmental Law Section. 9-5.

### October

**Friday, 10/1/10 – Chicago, ISBA Re-**

**gional Office**—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section. 9-5.

**Friday, 10/1/10 – Webcast**—Countering Litigation Gamesmanship. Presented by the ISBA General Practice Solo & Small Firm Section, Co – Sponsored by the Federal Civil Practice Section. 9-5.

**Friday, 10/8/10- Carbondale, Southern Illinois University, Courtroom 108**—Divorce Basics for Pro Bono Attorneys. Presented by the ISBA Committee on Delivery of Legal Services. 1-4:45.

**Friday, 10/15/10- Bloomington, Double Tree**—Real Estate Update 2010. Presented by the ISBA Real Estate Section. 9-4:45.

**Monday, 10/18-Friday, 10/22/10- Chicago, ISBA Regional Office**—40 Hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30-5:45 each day.

**Thursday - Saturday, 10/21/09 - 10/23/09 – Springfield, Hilton Hotel**—6th Annual Solo & Small Firm Conference. Presented by the Illinois State Bar Association.

**Thursday, 10/28/10- Springfield, Statehouse Inn**—Experts and Litigators on Issues Impacting Children & Custody in Family Law. Presented by the ISBA Family Law Section. 8-6.

### November

**Thursday, 11/4/10- Lombard, Lindner Learning Center**—Real Estate Update 2010. Presented by the ISBA Real Estate Section. 9-4:45.

### Spring Semester 2011

**Friday, 3/4/11 – Chicago, ISBA Regional Office**—Dynamic Presentation Skills For Lawyers. Master Series Presented by the Illinois State Bar Association. 12:30-5. ■

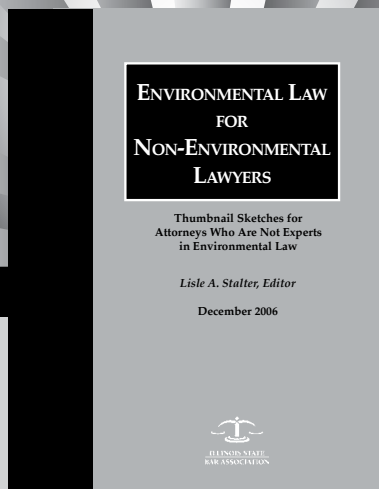


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