

5-1-2010

**Vol. 1 No. 2, Spring 2010; Illinois Does Not Care About Caregivers
as Evidenced by the Ineffective and Exclusionary Custodial Claims
Statute of the Probate Act**

Mariam L. Hafezi Qualman

Follow this and additional works at: https://huskiecommons.lib.niu.edu/niulr_sup



Part of the [Law Commons](#)

Original Citation

Mariam L. Hafezi Qualman, Comment, Illinois Does Not Care About Caregivers as Evidenced by the Ineffective and Exclusionary Custodial Claims Statute of the Probate Act, 1 N. Ill. U. L. Rev. Online Supp. 67 (2010).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois Law Review Supplement by an authorized administrator of Huskie Commons. For more information, please contact jschumacher@niu.edu.

Illinois Does Not Care About Caregivers as Evidenced by the Ineffective and Exclusionary Custodial Claims Statute of the Probate Act

I.	INTRODUCTION	68
II.	BACKGROUND INFORMATION	69
	A. THE STATUTE.....	69
	B. LEGISLATIVE HISTORY	70
	C. CONSTITUTIONALITY OF THE STATUTE	73
III.	NECESSITY OF A CUSTODIAL CLAIMS STATUTE.....	77
	A. STATISTICS SHOW AN INCREASE IN THE NUMBER OF PEOPLE BECOMING CAREGIVERS FOR THEIR ELDERLY OR DISABLED FAMILY MEMBERS.....	77
	B. THE ILLINOIS DEPARTMENT ON AGING—AN AID TO THE STATUTORY CUSTODIAL CLAIM	79
IV.	SHORTCOMINGS OF THE CURRENT STATUTE.....	81
	A. SECTION 18-1.1 IS TOO EXCLUSIONARY	81
	1. <i>The Class of People Eligible to Make Custodial Claim Is Unreasonably Limited</i>	81
	2. <i>The Dedication Requirement of the Statute Is Unfairly Restrictive</i>	84
	B. SECTION 18-1.1 IS INEFFECTIVE IN ACCOMPLISHING ITS PURPOSE.....	87
V.	SOLUTION TO THE CURRENT STATUTORY CUSTODIAL CLAIM PROVISION	91
	A. THE AUTHOR’S PROPOSED LEGISLATION.....	92
VI.	CONCLUSION.....	94

According to the 2003 National Alliance for Caregiving/AARP National Caregiver Survey, at least 44.4 million adults provide the care that is so critical in helping friends and loved ones with debilitating illnesses remain in their homes and other community settings. It is estimated that 80[%] of all care received by older Americans is provided by family members—spouses, children, grandchildren and other relatives.¹

1. National Alliance for Caregiving, <http://www.caregiving.org/resources/> (last visited Apr. 26, 2010).

I. INTRODUCTION

Imagine if you, a widow, had a sister suffering from Parkinson's disease, and you moved to the small town in Illinois where she lived into an apartment across the hall from her so that you could help her bathe, dress, and prepare food.² Imagine you did this for four years as she steadily worsened from the incurable disease.³

Or, imagine you are a priest that had to take a leave of absence from your holy work in order to live with your mother, who suffered from increasing health problems, for approximately two and a half years.⁴ Before finally making the decision to move in with your mother because her health was so poor, you visited her two to three times per week, performing caretaking duties for her for several years.⁵

One would hope that, in either of the above instances, the statute drafted by the Illinois legislature, which, according to the Illinois Supreme Court, was enacted "to allow immediate family members to recover the additional opportunity and emotional costs of committing their lives to disabled relatives,"⁶ would be applicable to either of these narratives. In actuality, the accounts above are true stories in which the respective caretakers did indeed file a claim under the Statutory Custodial Claim statute from the Illinois Probate Act,⁷ but were unsuccessful because they did not fall within the strict purview of the statute's requirements.⁸

These sad but true accounts raise questions as to whether the statute is truly accomplishing its intended purpose when people like those described above are left out. This Comment begins by summarizing the legislative history behind this statute, including the prophetic warning by the Illinois governor, regarding the potential problems with it.⁹ In Part III, this Comment discusses why such a statute is necessary.¹⁰ In Part IV, the Comment

2. *In re Estate of Hoehn*, 600 N.E.2d 899, 900 (Ill. App. Ct. 1992).

3. *Id.*

4. *In re Estate of Riordan*, 814 N.E.2d 597, 599 (Ill. App. Ct. 2004).

5. *Id.*

6. *In re Estate of Jolliff*, 771 N.E.2d 346, 351 (Ill. 2002).

7. 755 ILL. COMP. STAT. 5/18-1.1 (2008).

8. *Riordan*, 814 N.E.2d at 599 (living with his ill mother for two and a half years did not satisfy the dedication requirement of the statute, which demands that the caretaker live with the ill for at least three years, and because the court held that the frequent visits that occurred before the son moved in with the ill mother did not constitute dedication, the son's custodial claim failed); *Hoehn*, 600 N.E.2d at 901 (taking care of her ill sister while living across the hall only eight feet from her sister's apartment for four years did not satisfy the living requirements of section 18-1.1 since she did not actually live in the same home as her sister).

9. *See infra* Part II.B.

10. *See infra* Part III.

goes on to analyze how this statute is exclusionary and ineffective as it is currently drafted.¹¹ Finally, in Part V, this Comment introduces a more workable statute that will more effectively serve the purpose of compensating family caretakers for the emotional and financial sacrifices they undertake when they care for an ill relative.¹²

II. BACKGROUND INFORMATION

A. THE STATUTE

Section 18-1.1 of the Illinois Probate Act currently states as follows:

Any 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 three years shall be entitled to a claim against the estate upon the death of the disabled person. The claim shall take into consideration the claimant's lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of personally caring for the disabled person. Notwithstanding the statutory claim amounts stated in this Section, a court may reduce an amount to the extent that the living arrangements were intended to and did in fact also provide a physical or financial benefit to the claimant. The factors a court may consider in determining whether to reduce a statutory custodial claim amount may include but are not limited to: (i) the free or low cost of housing provided to the claimant; (ii) the alleviation of the need for the claimant to be employed full time; (iii) any financial benefit provided to the claimant; (iv) the personal care received by the claimant from the decedent or others; and (v) the proximity of care provided by the claimant to the decedent to the time of the decedent's death. The claim shall be in addition to any other claim, including without limitation a reasonable claim for nursing and other care. The claim shall be based upon the nature and the extent of the person's disability and, at the minimum but subject to the extent of the assets available, shall be in the amounts set forth below:

1. 100% disability, \$180,000

11. See *infra* Part IV.

12. See *infra* Part V.

2. 75% disability, \$135,000
3. 50% disability, \$90,000
4. 25% disability, \$45,000¹³

B. LEGISLATIVE HISTORY

Upon first glance, what may appear to be a comprehensive, thoroughly debated, and well-developed statute is actually a section of legislation that was attached to the back end of three completely unrelated laws.¹⁴ The language found in section 18-1.1 was part of the fourth section of a third senate amendment to House Bill 4116—a bill originally drafted for the Illinois Marriage and Dissolution of Marriage Act.¹⁵ After passing in the house, House Bill 4116 was sent to the senate, where all the language of the original bill was deleted and three amendments were added by the senate, which included the section 18-1.1 language.¹⁶ The bill, with all three senate amendments, eventually passed in both the Illinois House and Senate in June of 1988 and was then sent to Governor James R. Thompson in July of 1988.¹⁷ Governor Thompson, on September 2, 1988, wrote an amendatory veto message to the house, expressing his opinions regarding House Bill 4116.¹⁸ Though Governor Thompson had approved sections 1, 2, and 3 of the bill, he expressed severe concern over section 4, which contained the changes to the Probate Act, and in his letter to the house, Governor Thomp-

13. 755 ILL. COMP. STAT. 5/18-1.1 (Supp. 2009) (emphasis added).

14. H.B. 4116, 85th Gen. Assem., Reg. Sess. (Ill. 1988) (later codified at Pub. Act 85-1417). The first three sections of House Bill 4116 are as follows: the first section approved section 602 of the Illinois Marriage and Dissolution of Marriage Act, which addressed custody matters and how the best interest of the child must be factored into custody decisions by the court; the second section amended the Adoption Act by rewriting various definitions; and the third section amended the Illinois Parentage Act of 1984 by revising parts of the Act regarding assessment of court costs and attorney's fees incurred in relation to the dissolution of marriage. *Id.*

15. *Id.* The fourth section, which contained the statutory custodial claim being discussed in this Comment, added provisions to the Probate Act of 1975 regarding conditional gifts, custodial claims, and the classification of claims against a decedent's estate. *Id.*

16. *Id.*

17. Winston & Strawn LLP, <http://www.winston.com/index.cfm?contentID=24&itemID=10873> (last visited Apr. 26, 2010). Former Governor James R. Thompson is currently a Partner and Senior Chairman at Winston & Strawn LLP, working out of the Chicago branch. *Id.* Thompson is a Republican and was the longest serving governor of Illinois, serving from 1977-1991. *Id.* Thompson was a Commissioner of the National Commission on Terrorist Attacks upon the United States (9-11 Commission) and has been twice named one of the United States' most influential lawyers by *The National Law Journal*. *Id.*

18. 1988 ILL. SENATE J. 5896-97; 1988 ILL. HOUSE J. 7524-25.

son explained why he would veto House Bill 4116 if section 4 was not deleted from the language:

Section 4 of this legislation attempts to address the difficulty a family member faces in seeking fair compensation for personal custodial care services rendered to a disabled person. While I understand monetary, as well as emotional hardships endured by the family of a disabled person are often extreme, Section 4 of this bill is inequitable and unworkable, and will lead to complex probate litigation.

Section 4 of this bill contains serious inconsistencies and ambiguities. —“Disabled person” is a crucial category, as well as —“degrees of disability”¹⁹; however, no definition is given for either in the text of the bill. Moreover, the category of persons who are entitled to conditional gifts is unfairly restricted, and the custodial claimant is given 1st class creditor status—superior to those of all beneficiaries under the disabled person’s will. Further, it denies the State reimbursement for care given the disabled person until after all the statutory custodial care claims have been paid. Finally, the quality of care given is never addressed, nor is there any distinction, or increased claim provisions made, between a person who provides 3 years of care and one who provides 30 years of care.

I believe Section 4 of this bill is inequitable, unworkable, and will no doubt cause havoc with the handling of probate estates. Moreover, I cannot in good faith support and approve legislation which might put disabled persons in the role of —“pawn” being tossed to and fro in a battle between persons eager to grant and claim a —“conditional gift” upon the disabled person’s death.¹⁹

In response to this amendatory veto message from the governor, who cited numerous potential problems with this statute from various perspectives—including the perspectives of the disabled person, the caretakers, the State, and the beneficiaries—the house, on November 16, 1988, swiftly overrode the veto in a 107–6 vote²⁰ after a brief presentation by the house

19. 1988 ILL. SENATE J. 5896-97; 1988 ILL. HOUSE J. 7525.

20. Transcript of House Debate at 29-30, H.B. 4116, 85th Gen. Assem., Reg. Sess., Nov. 16, 1988, <http://www.ilga.gov/house/transcripts/htrans85/HT111688.pdf>.

sponsor of the bill.²¹ Interestingly, there was no debate on the concerns raised by the governor.²²

On December 1, 1988, the bill and veto message went to the Illinois Senate, and for the first time, the changes to be made to the Probate Act were debated on the floor.²³ According to Senator Poshard,²⁴ the Senate sponsor of this bill, the “narrow problem” this language was trying to address was actually the issue of equitable distribution to a parent who cares, perhaps more than the other parent, for a disabled child for many years.²⁵ Senator Welch²⁶ argued that there was great concern about this potential law by the bar associations and probate judges because of the many logistical issues it creates for a judge, including determining which parent gets a greater share or how much a parent should get over a caregiving sibling.²⁷ Senator Poshard responded that the determination is essentially left to the court’s discretion and that intent to give a gift for taking care of them is assumed.²⁸ Senator Berman²⁹ raised the concern that the language did not

21. *Id.* Representative Mike Tate was the house sponsor of House Bill 4116. *Id.*

22. *Id.* Representative Tate described the problem aimed to be resolved by House Bill 4116 as follows:

[I]f a person becomes disabled [as a minor] and later obtains substantial economic resources, one parent may have additional children with the same spouse or subsequent children. And those essentially unrelated children share the child estates equally with the parent who gives a lifetime of care to that disabled child. This Bill simply allows both mechanisms to address this inequity and both of which are now currently discretionary with the court.

Id. Following this description, the vote was taken and House Bill 4116 was declared passed, “the specific recommendations for change of the Governor notwithstanding.” *Id.*

23. Transcript of Senate Debate at 53-59, H.B. 4116, 85th Gen. Assem., Reg. Sess., Dec. 1, 1988, <http://www.ilga.gov/senate/transcripts/strans85/ST120188.pdf>.

24. Southern Illinois University, Biography of SIU President Glenn Poshard, <http://www.siu.edu/pres/biography.html> (last visited Apr. 26, 2010). Glenn Poshard was an Illinois State Senator from 1984-1988. *Id.* Poshard’s political affiliation is Democrat, and following his time in the Illinois Senate, Poshard was elected to the United States House of Representatives. *Id.* Poshard graduated from Southern Illinois University, holds a Ph.D. in administration of higher education, and is currently the President of Southern Illinois University. *Id.*

25. Transcript of Senate Debate at 54-55, H.B. 4116, 85th Gen. Assem., Reg. Sess., Dec. 1, 1988, <http://www.ilga.gov/senate/transcripts/strans85/ST120188.pdf>.

26. Illinois General Assembly, Biography of Senator Patrick Welch, <http://www.ilga.gov/senate/Senator.asp?MemberID=771>. Patrick Welch is a Democratic Illinois State Senator and has been serving in the General Assembly since 1983. *Id.* Welch is an attorney and currently holds the position as Assistant Majority Leader in the State Senate and as Chairman of the Appropriations II Committee. *Id.*

27. Transcript of Senate Debate at 55-57, H.B. 4116, 85th Gen. Assem., Reg. Sess., Dec. 1, 1988, <http://www.ilga.gov/senate/transcripts/strans85/ST120188.pdf>.

28. *Id.*

29. See S. Res. 230, 91st Gen. Assem., Reg. Sess. (Ill. 1999), <http://www.ilga.gov/legislation/legisnet91/srgroups/sr/910SR0230LV.html>. Arthur L. Ber-

require any proof as to the quality or quantity of care given to the disabled person.³⁰ Senator Berman also stated that “the presiding judge of the probate division of Cook County [is] strongly, and that’s a soft word, strongly opposed to this bill.”³¹ Despite the concerns raised, which coincided with some of the governor’s warnings, the veto was overridden 49–8.³²

On January 1, 1989, House Bill 4116 became law and is known as Public Act 85-1417.³³ Since that time, there have been only two changes to section 18-1.1: (1) in 1992, the Illinois Senate added “child” to the group of persons allowed to make a custodial claim if they were a caregiver,³⁴ and (2) on January 1, 2008, the predetermined minimum amounts that can be claimed by a caregiver were increased.³⁵

C. CONSTITUTIONALITY OF THE STATUTE

In 2002, the Illinois Supreme Court, in the case of *In re Estate of Jolliff*, fully addressed the constitutionality of section 18-1.1 based on arguments that the statute violated substantive due process of law, equal protection, the special legislation provision,³⁶ and the separation of powers provision of the Illinois Constitution.³⁷ The court reversed the trial court and held that even though the statute was not a “model of clarity in legislative drafting,” it should be upheld on all grounds.³⁸

In *Jolliff*, the decedent, Willie Jolliff, was rendered 100% disabled due to an accident that injured his brain stem.³⁹ His sister, Edith Porter, was

man, a Chicago lawyer, was a Democratic member of the Illinois Senate beginning in 1977. *Id.* Berman was a partner at Karlin & Fleisher and served on the Chicago Board of Education. *Id.* Berman retired from the Illinois Senate on January 2, 2000. *Id.*

30. Transcript of Senate Debate at 57, H.B. 4116, 85th Gen. Assem., Reg. Sess., Dec. 1, 1988, <http://www.ilga.gov/senate/transcripts/strans85/ST120188.pdf>.

31. *Id.*

32. *Id.* at 59.

33. 1988 ILL. SENATE J. 5896-97; 1988 ILL. HOUSE J. 7524-25.

34. 1992 Ill. Laws 1753.

35. 2007 Ill. Laws 2952. In the original statute, effective in 1989, the predetermined amounts for which custodial claims could be made were \$25,000, \$50,000, \$75,000, and \$100,000 respectively based on the 25%, 50%, 75%, and 100% disability of the ailing person. 755 ILL. COMP. STAT. 5/18-1.1 (2008). In 2008, the amounts were increased to \$45,000, \$90,000, \$135,000, and \$180,000, respectively, for the percentages of disability. 2007 Ill. Laws 2952.

36. *In re Estate of Jolliff*, 771 N.E.2d 346 (Ill. 2002). The special legislation clause of the Illinois Constitution states, “The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.” *Id.* at 350-51 (citing ILL. CONST. art. IV, § 13).

37. *Jolliff*, 771 N.E.2d at 351.

38. *Id.* at 355.

39. *Id.* at 348.

appointed the conservator of Willie's person and estate.⁴⁰ Edith also took on the responsibility of caring for Willie in her home, full-time, for over twelve years.⁴¹ During the years between Willie's disabling injury and death, Edith collected \$275,880 in conservator fees and \$70,925 in helper fees from the guardianship estate.⁴² Upon Willie's death, Edith made a statutory custodial claim pursuant to section 18-1.1 in the amount of \$200,000.⁴³ Willie's daughter, Cheryl, was appointed independent administrator of Willie's estate upon his death, and she defended against the statutory custodial claim by Edith.⁴⁴

The trial court agreed with Cheryl's arguments that the statute violated due process because it arbitrarily assumed a minimum amount of damages had been suffered by the caretaker to the detriment of other beneficiaries and legatees of the estate.⁴⁵ Cheryl stated that the arbitrariness of the statute is evident in that there are no minimum requirements for proof of the quality of care or amount of care given to the disabled person, and there is no indication as to how to determine the level of disability of a disabled person, but a claimant can still be awarded a minimum amount of compensation.⁴⁶

Additionally, the trial court agreed that the statute violated equal protection because allowing only parents, children, and siblings to file such a claim "creates a gift for only certain persons who provide care . . . to the exclusion of all others who could have provided the same care," such as grandchildren, nieces, nephews, and even friends.⁴⁷

The trial court held that the statute violated the separation of powers provision of the Illinois Constitution because the legislature, in creating the predetermined minimum award system, prevented the court from having appropriate discretion to award a lesser amount, thereby encroaching on a constitutional power that is preserved for the judiciary.⁴⁸

The Illinois Supreme Court reversed the trial court on all matters.⁴⁹ First, after determining that the custodial claims statute did not infringe on a fundamental right, the court stated that the appropriate test to be applied to determine whether it violates due process, pursuant to the Fourteenth Amendment, was the deferential rational basis test.⁵⁰ In applying this test,

40. *Id.*

41. *Id.* at 348-49.

42. *Jolliff*, 771 N.E.2d at 348.

43. *Id.*

44. *Id.*

45. *Id.* at 349.

46. *Id.*

47. *Jolliff*, 771 N.E.2d at 349.

48. *Id.*

49. *Id.* at 357.

50. *Id.* at 354-55.

the court held that the statute does not violate due process because the idea of setting minimum claim amounts has a rational relationship to the government's interest in encouraging immediate family members to commit themselves to disabled relatives."⁵¹ In justifying the minimum claim amounts, the court stated that the amounts are modest and subject to the available assets in the disabled person's estate."⁵² Additionally, in calculating the amount of time Edith cared for Willie and the amount she claimed pursuant to section 18-1.1, the court made the point that it would be unfair for other heirs of the deceased, who did not perform any caregiving duties for him, to collect more from his estate than the deceased's sister, Edith, who dedicated over a decade of her life to Willie's daily care.⁵³

In addressing Cheryl's second due process violation argument that the statute did not account for the quality of care to be given the disabled person, the court held that, despite the statute being somewhat poorly drafted, the lack of specific requirements pursuant to level of disability or accounting for the quality of care was not enough to render the statute ineffective as it is currently written.⁵⁴

Cheryl's third due process violation argument was that the statute did not prevent multiple family members from making a statutory custodial claim,⁵⁵ a similar concern raised by Governor Thompson in his amendatory veto message when he penned his concern that ill or elderly family members would be "pawns" in a game by family members who want to collect on the statutory custodial claim.⁵⁶ The court agreed that this was a possibility but held that the potential for multiple claims was rare and did not render section 18-1.1 unconstitutional.⁵⁷

In holding that the statute did not violate the equal protection clause, the court went through a two-part test to determine if the statute violated equal protection.⁵⁸ First, the court determined that the statute "discriminates in favor of a select group" since it allows only certain caregivers—spouses, children, parents, and siblings—to make a custodial claim.⁵⁹ After finding that this practice was discriminatory, the court then determined that the standard of review that should be applied is deferential rational basis since this statute does not involve a fundamental right or create a suspect class.⁶⁰

51. *Id.* at 355.

52. *Jolliff*, 771 N.E.2d at 355.

53. *Id.*

54. *Id.*

55. *Id.* at 356.

56. 1988 ILL. SENATE J. 5896-97; 1988 ILL. HOUSE J. 7525.

57. *Jolliff*, 771 N.E.2d at 356.

58. *Id.* at 352.

59. *Id.*

60. *Id.*

The court proceeded to ask whether the classification set out in the statute had a rational relationship to a legitimate interest of the government.⁶¹ To answer that question, the court looked at the legislative history of the statute and stated that it could imagine that the family members specifically listed in section 18-1.1 are similar to those stated in section 2-1 of the Probate Act which governs the rules of intestacy in Illinois as to who can collect from a relative's intestate estate.⁶² Additionally, the court found that the specific selection of family members prevents the exacerbation of Governor Thompson's concern that various family members, who are able to make a statutory custodial claim, would increase the possibility of "jockeying" the disabled person around.⁶³ Since the deferential rational basis test requires only hypothetical government reasons for making a classification of people,⁶⁴ the Illinois Supreme Court upheld the statute pursuant to the equal protection clause.⁶⁵

The Illinois Supreme Court then held that the statute does not violate the special legislation clause,⁶⁶ because although caretakers can file a claim on a decedent's estate under section 18-1(a) to recoup expenses for nursing care, the legislature specifically created section 18-1.1 to allow family members to recover costs from the emotional stress and toll of caretaking, as well as costs from lost opportunities due to the undertaking of caring for a disabled family member.⁶⁷

Finally, the court held that the statute did not violate the separation of powers provision of the Illinois Constitution based on the predetermined claim amounts, because the set amounts were minimum values, not maximums; and since this claim was statutorily-created, the legislature has the same control to determine claim amounts.⁶⁸

61. *Id.*

62. *Jolliff*, 771 N.E.2d at 353.

63. *Id.* at 354.

64. *Id.* at 352. When addressing the constitutionality of a law under deferential rational basis review, a court needs only to be able to conjecture some connection between the law and the state's purpose. *See, e.g., In re A.A.*, 690 N.E.2d 980 (Ill. 1998); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *People v. Shepherd*, 605 N.E.2d 518 (Ill. 1992).

65. *Jolliff*, 771 N.E.2d at 354.

66. *Id.*

67. *Id.* at 351-54.

68. *Id.* at 357.

III. NECESSITY OF A CUSTODIAL CLAIMS STATUTE

A. STATISTICS SHOW AN INCREASE IN THE NUMBER OF PEOPLE BECOMING CAREGIVERS FOR THEIR ELDERLY OR DISABLED FAMILY MEMBERS

As indicated in the 2003 National Alliance for Caregiving and AARP National Caregiver Survey,⁶⁹ there are an estimated 44.4 million American caregivers (21% of the adult population) age 18 and older who provide unpaid care to an adult age 18 or older. These caregivers are present in an estimated 22.9 million households (21% of U.S. households).⁷⁰ According to the Illinois Department on Aging,⁷¹ “[o]ne in four households (25%) [takes] on the role of providing care to older family members and friends.”⁷² Additionally, “[e]ighty-five percent (85%) of all long term care services are provided by unpaid caregivers. If the work of these family caregivers had to be replaced by paid home care staff, the estimated cost would be \$45 to \$94 billion per year.”⁷³

A 2008 AARP study⁷⁴ furthers this idea that family caregivers save the government and taxpayers an extraordinary amount of money by providing unpaid caretaking for their relatives:

In 2007, the estimated economic value of their unpaid contributions was approximately \$375 billion, up from an estimated \$350 billion in 2006. This increase assumes the

69. NATIONAL ALLIANCE FOR CAREGIVING & AARP, CAREGIVING IN THE U.S. 6 (2004), available at http://assets.aarp.org/rgcenter/il/us_caregiving.pdf. The survey found the following results:

This study is based on a national survey of 6,139 adults in the U.S., from which 1,247 caregivers were identified. Caregivers are defined as 18 years of age or older living in the U.S., and providing one or more ADLs [activities of daily living] or IADLs [instrumental activities of daily living] for someone 18 years of age or older. The 1,247 caregiver interviews include a total of approximately 200 African-American, 200 Hispanic, and 200 Asian-American caregivers obtained through over-sampling. Interviewing was conducted from September 5 through December 22, 2003.

Id.

70. *Id.* at 8.

71. Illinois Department on Aging, <http://www.state.il.us/aging/default.htm> (Apr. 26, 2010). The Illinois Department on Aging is a state-run agency dedicated to the assistance of elderly persons and their caregivers. *Id.*

72. Illinois Department on Aging, Illinois Family Caregiver Support Program, <http://www.state.il.us/aging/1caregivers/caregivers-main.htm> (last visited Apr. 26, 2010).

73. *Id.*

74. Ari Houser & Mary Jo Gibson, *Valuing the Invaluable: The Economic Value of Family Caregiving*, UPDATE (AARP, Pub. Pol’y Inst., Wash. D.C.), Nov. 13, 2008, http://www.aarp.org/research/ppi/lc/care/articles/i13_caregiving.html (last visited Apr. 26, 2010).

age-adjusted prevalence of caregiving is unchanged, *but* reflects an increase in the U.S. population, aging of the population, and an increase in the economic value per hour of care.⁷⁵

In Illinois alone, the economic value of family caregivers is over seventeen billion dollars.⁷⁶ That is a staggering number considering that the caregivers must, for the most part, pay for the costs of caregiving out of their own pockets and are not in any way compensated for the time devoted or sacrifices made in order to take care of a family member.⁷⁷

It is unlikely that the need for family caretakers will subside in the coming years due to a multitude of factors discussed in a report and presentation by the Family Caregiver Alliance in 2007.⁷⁸ These factors include an aging baby boomer generation,⁷⁹ the many medical advancements allowing for longer lives of elderly and/or disabled persons,⁸⁰ and the continuously rising costs of long-term healthcare with very few workable solutions in sight.⁸¹ Even worse, because of these uncontrollable factors, there is an indication that there will be a shortage of professional caretakers in the future,⁸² thereby removing the option of professional care and forcing family

75. *Id.* at 1.

76. *Id.* at 4.

77. Evercare, *Family Caregivers—What They Spend, What They Sacrifice*, STUDY, Nov. 2007, http://www.caregiving.org/data/Evercare_NAC_CaregiverCostStudyFINAL20111907.pdf (“Half of the caregivers who were helping an elder who was not their spouse were providing financial assistance—an average of \$200 a month [out of their own pocket].”).

78. FAMILY CAREGIVER ALLIANCE, *FAMILY CAREGIVING: STATE OF THE ART, FUTURE TRENDS* 5 (2007), http://www.caregiver.org/caregiver/jsp/content/pdfs/2007_asa_preconference_proceedingsII.pdf.

79. *Id.* (“In 2000, about 12[%] of the U.S. population was age 65 and older; by 2050, one in five (21%) will be 65 and older, and one in three Americans will be over 55.”).

80. *Id.* at 6 (“Americans] will have more chronic illness for two basic reasons. One is aging; in advanced age, chronic conditions are almost inevitable. Equally important, over the past century we have learned to cure many acute diseases that used to kill people.”).

81. *Id.* at 7 (“Health care costs overall and long-term care spending in particular continue to escalate . . . [H]ealth policy is very complex, with little consensus to guide policymakers. Until there is a groundswell of public insistence that something be done about health care costs, coverage and quality, many policymakers will be in a quandary as to what to do.”).

82. KaiserHealthNews.org, *Caregiver Shortage Expected To Worsen as Aging Baby Boomers Increase Demand*, KAISER HEALTH NEWS, Sept. 28, 2006, <http://www.kaiserhealthnews.org/daily-reports/2006/september/28/dr00040106.aspx?referrer=search> (last visited Apr. 26, 2010). According to a 2006 report by the International Longevity Center USA and the Schmieding Center for Senior Health and Education,

members to take on the financial, physical, and emotional responsibilities of taking care of their elderly or disabled relative. All of these issues make the need for a statutory custodial claim an evident and logical part of the solution to this increasingly prevalent situation of family caregivers with no compensation for their financial and emotional sacrifices.

B. THE ILLINOIS DEPARTMENT ON AGING—AN AID TO THE STATUTORY CUSTODIAL CLAIM

Aside from the statutory custodial claim, Illinois has recognized the need to address the growing disabled and/or elderly population and address the needs of the family members who undertake to care for them by establishing a special agency called the Illinois Department on Aging.⁸³ According to its website, the purpose of this agency is to help elderly people continue to live independently by providing home-delivered meals, help with housekeeping, home modification, training, counseling and emotional support, and transportation services.⁸⁴ Additionally the agency offers services and information to non-professional caregivers who take care of elderly family or friends.⁸⁵ The agency has set up multiple Caregiver Resource Centers where caregivers can take their elderly friend or family member and receive adult day service for the senior citizen and respite services for the caregiver, individual counseling and support groups, financial information and services, legal services caregiver training, case management assistance, and employment programs.⁸⁶ The agency recognizes that the definition of a caregiver is really unlimited and is not bounded by family blood lines.⁸⁷ Additionally, the agency recognizes that the toll on caregivers varies

20% of elderly patients currently lack access to professional and family caregivers and [the] shortage will increase in the future. In addition, the report . . . finds that caregiver wages are among the lowest in the nation, an indication that U.S. residents likely will not "be more willing to take these low-wage jobs in the future.

Id.

83. Illinois Department on Aging, <http://www.state.il.us/aging/default.htm> (Apr. 22, 2010).

84. Illinois Department on Aging, Community Care Program, <http://www.state.il.us/aging/1athome/ccp.htm> (last visited Apr. 26, 2010).

85. Illinois Department on Aging, Illinois Family Caregiver Support Program, <http://www.state.il.us/aging/1caregivers/caregivers-main.htm> (last visited Apr. 26, 2010).

86. Illinois Department on Aging, Caregiver Resource Center, <http://www.state.il.us/aging/1caregivers/crc.htm> (last visited Apr. 26, 2010).

87. Illinois Department on Aging, What Does a Caregiver Do?, <http://www.state.il.us/aging/1caregivers/who-what.htm#whatdo> (last visited Apr. 26, 2010). According to the agency, "the term 'caregiver' refers to anyone who provides assistance to someone else who needs it." *Id.*

and sometimes the sacrifices go unrealized even by the caregiver.⁸⁸ So, in an effort to curtail the many hardships experienced by a caregiver when caring for an elderly person, the agency attempts to provide as much help and aid as possible.⁸⁹

However, while this agency is a wonderful supplement and source of help for caregivers, especially for those who have never done so before or have limited means to pay for all of the costs of taking care of another person, there is no compensation available from these agencies for the caregiver for all that he or she has sacrificed over the course of the caregiving. In fact, even on the legal assistance link of the agency's website, there is no indication that a statute like section 18-1.1 exists as a possible method of receiving compensation for the caregiver's efforts.⁹⁰ Furthermore, the legal services offered appear to be only for the elderly person, not the caregiver, so a caregiver does not have the same legal resources to even know that such an avenue exists for him or her.⁹¹ This is particularly upsetting because the website appears to be comprehensive and helpful for caregivers, and to leave out such an important statute makes it much more unlikely that a family caregiver would even consider making a statutory custodial claim.⁹² Furthermore, according to a 2004 AARP study on caregiving in the United States,⁹³ the first place caregivers look for information is the internet.⁹⁴ If the agency, through its information for caregivers, included information about the statutory custodial claim—including how one can make such a claim and what proof one must show that caregiving was rendered for the appropriate amount of time—then perhaps custodial claims would increase, thereby helping to compensate family caregivers, which in turn would help

88. *Id.*

89. *Id.*

90. Illinois Department on Aging, Legal Services, <http://www.state.il.us/aging/1abuselegal/legal.htm> (last visited Apr. 26, 2010). According to the Legal Assistance link, the legal services provided include representation for elder abuse and neglect, financial exploitation, consumer fraud, landlord-tenant relationships, nursing home residents' rights, and conflicts over benefit programs, such as Medicare, Medicaid, Social Security, and pensions. *Id.* Further legal assistance is available for "simple estate planning, living wills, and powers of attorney." *Id.* There is no indication of legal assistance for caregivers themselves. *See id.*

91. *Id.*

92. *See* discussion *infra* Part IV.B. The rarity of statutory custodial claims is examined in further detail later on in this Comment.

93. *See supra* text accompanying note 69.

94. NATIONAL ALLIANCE FOR CAREGIVING & AARP, *supra* note 69, at 16 (noting that 29% of caregivers would research questions they had on the internet first; 28% would ask a doctor questions; 15% would seek out family or friends with questions; and 10% would seek answers from other health professionals).

to encourage family members to take care of their own elderly or disabled family members—the purported purpose behind section 18-1.1.⁹⁵

IV. SHORTCOMINGS OF THE CURRENT STATUTE

A. SECTION 18-1.1 IS TOO EXCLUSIONARY

1. *The Class of People Eligible to Make Custodial Claim Is Unreasonably Limited*

According to the language of the statute, the only people eligible to file a statutory custodial claim are spouses, parents, siblings, and children.⁹⁶ This language excludes grandparents, grandchildren, aunts, uncles, cousins, and other blood relatives.⁹⁷ According to the floor debates from the time section 18-1.1 was passed, there was no particular reason set forth for selecting the above-described class of people as eligible to make the claim.⁹⁸ In fact, at the time the original statute was passed, the General Assembly left out children as part of the eligible class, and it was not until 1992 that the General Assembly amended the statute to add them.⁹⁹

In the *Jolliff* case, the Illinois Supreme Court justified this limited class because it “serves the legislative goal of encouraging immediate family members to commit themselves to disabled relatives.”¹⁰⁰ The court also reasoned that this limitation was important because it limited the number of people who could potentially make the claim, thereby reducing the possibility of the disabled and/or elderly family member being shuffled around among family members eager to succeed on the custodial claim.¹⁰¹ This, however, is ironic considering that the court, only a few short paragraphs later in the *Jolliff* opinion, held that the statute was constitutional despite the fact that multiple claims could be made.¹⁰² In holding that the possibility of multiple claims was constitutional, the court chose not to consider the potential shuffling of the care recipient as a relevant issue simply on the basis that the possibility of multiple claims is rare¹⁰³—though it is used as a

95. *In re Estate of Jolliff*, 771 N.E.2d 346, 351 (Ill. 2002).

96. 755 ILL. COMP. STAT. 5/18-1.1 (2008).

97. *Id.*

98. Transcript of House Debate at 29-30, H.B. 4116, 85th Gen. Assem., Reg. Sess., Nov. 16, 1988, <http://www.ilga.gov/house/transcripts/htrans85/HT111688.pdf>; Transcript of Senate Debate at 53-59, H.B. 4116, 85th Gen. Assem., Reg. Sess., Dec. 1, 1988, <http://www.ilga.gov/senate/transcripts/strans85/ST120188.pdf>.

99. 1992 Ill. Laws 1753.

100. *Jolliff*, 771 N.E.2d at 354.

101. *Id.*

102. *Id.* at 356.

103. *Id.*

reasonable basis for holding that the limited class of potential claimants is appropriate.¹⁰⁴ Despite the contradictions within the *Jolliff* opinion, it can be conceded that the limited class is constitutional pursuant to the deferential rational basis review test, which requires only a hypothetical link to a legitimate government purpose.¹⁰⁵ Just because the statute is constitutional, however, does not mean that it is perfect. The eligible claimant class should be broadened to ensure fairness for all types of families.

For example, for white families, the majority of the caregivers are between the ages of thirty-five and sixty-four, and are usually spouses taking care of their sick or disabled spouse.¹⁰⁶ In African-American and Hispanic households, however, the caregivers are more likely to be between the ages of eighteen and forty-nine, and to be taking care of their elderly parents or grandparents.¹⁰⁷ Additionally, the limited claimant class assumes only a certain type of family structure that leaves out the possibility of extended family members (e.g., grandchildren, cousins, aunts, uncles) assuming caregiving duties of their ailing relatives.

To assume that only children would take care of their parents or vice versa, or assuming that no other immediate or extended family member would undertake such a duty, is to ignore the dynamics of many other sub-cultures within the American culture where there exist many variations of the typical family.¹⁰⁸ For example, in many Hispanic families, several degrees of relatives often live together under one roof or live within very close proximity to one another.¹⁰⁹ It is the norm for various family members, including cousins and grandchildren, to take care of younger children or elder members of the family.¹¹⁰ In many Asian cultures, it is considered

104. *Id.* at 354.

105. *Jolliff*, 771 N.E.2d at 354.

106. NATIONAL ALLIANCE FOR CAREGIVING & AARP, *supra* note 69, at 24 (“Minority caregivers are more likely to be between the ages of 18-34 than caregivers of any other ethnic group surveyed (35% African-American, 33% Hispanic, 38% Asian v 22% white). Conversely, white caregivers are more likely to be of age 65+ than African-American or Asian caregivers (15% v 5% African-American, 8% Asian).”).

107. *Id.*

108. Tanya Bricking, *Taking Care of Elders Part of Culture for Many*, HONOLULU ADVERTISER, Feb. 28, 2005, at A1, available at <http://www.globalaging.org/elderrights/us/2005/culture.htm> (“Across the United States, families of Asian, black and Latino heritage rank among the highest in numbers of caregivers who take responsibility for the increasing needs of their elders within the family.”).

109. Mary Ballesteros-Coronel, *Taking Care of the Elderly*, AARP SEGUNDA JUVENTUD, 2002, available at <http://www.aarpsegundajuventud.org/english/health/spring-2002/1.eldercare.htm>. (noting that Blanca, who is taking on caring for her eighty-two-year old, ill grandmother, stated, “I even had to move (to an apartment next door) to be near her and to be certain that she is okay.”).

110. *Id.*

the norm to care for elderly relatives.¹¹¹ In Indian cultures, it is customary for the eldest child to take on the responsibility of caring for an ill parent and moving the parent into his or her home.¹¹² In fact, in India, there is talk of new legislation that would punish children with jail time if they fail to care for their elderly parent.¹¹³ For many African-American families, it is common to take on the responsibility of caring for immediate or extended family members.¹¹⁴ Since the United States and Illinois are comprised of such a heterogeneous mix of ethnic groups and so many others that still have strong attachments to these deep-seeded cultural values, which include taking care of ill or disabled family members, the legislature should have taken into account these subcultures and their cultural ideals when determining the eligible class allowed to make a statutory custodial claim.

While the desire to curtail the influx of custodial claims by multiple family members is understandable, it would be more fair to allow all blood relatives the opportunity to make a custodial claim and then let the factfinder determine who best deserves what amount from the claim.¹¹⁵ Moreover, the eligible class would still remain limited, since it would still exclude friends or neighbors from making a claim, as well as in-laws and step-relatives since, as it is well-established in the Illinois Probate Code, these extended family members are excluded for all purposes relating to estates and their claims.¹¹⁶ Though it can be argued that in-laws and even close friends should be allowed to make statutory custodial claims based on the significant amount of care given by these people,¹¹⁷ in the interest of judicial economy and limiting the drain on estates, it would be fair and prudent to draw the line at blood relatives. Furthermore, the non-blood relatives always have the option of filing a contract claim¹¹⁸—an option that rarely

111. See Bricking, *supra* note 108, at A1. A Japanese daughter taking care of her elderly, ill father states, “It’s the culture. We take it as a responsibility, not an obligation, but a responsibility.” *Id.*

112. Amelia Gentleman, *Letter from India: India Moving to Protect Parents*, N.Y. TIMES, March 1, 2007, http://www.nytimes.com/2007/03/01/world/asia/01iht-letter.4763815.html?_r=1.

113. *Id.*

114. Robin J. Miller et al., *Non-Family Caregivers of the African American Elderly: Research Needs and Issues*, AFR.-AM. RES. PERSP., Spring/Summer 2000, at 69, 72. (“Consistent with historical trends, informal or familial care to the aged, and particularly the African American aged, is the predominate form of elder care.”)

115. See *infra* Part V.

116. 755 ILL. COMP. STAT. 5/2-1 (2008).

117. NATIONAL ALLIANCE FOR CAREGIVING & AARP, *supra* note 69, at 35 tbl.7 (stating that 7% of all care recipients are mothers-in-law and 17% of all care recipients are non-relatives).

118. See *In re Estate of Milborn*, 461 N.E.2d 1075 (Ill. App. Ct. 1984). In this case, neighbors of a disabled woman took care of her for approximately five years by cooking for her, performing housekeeping chores, and doing laundry. *Id.* Upon her death, the neighbors

works for blood relatives as any sort of work done or care given to a family member by another family member is simply considered gratuitous and no implied contract is likely to be found.¹¹⁹

2. *The Dedication Requirement of the Statute Is Unfairly Restrictive*

The dedication requirement of section 18-1.1¹²⁰ also renders the custodial claims statute rarely applicable because it requires that the caretaker reside with and care for the disabled person for at least three years.¹²¹ Additionally, the three years of care must involve cohabitating with the disabled person.¹²² This living requirement has been strictly construed by the Illinois courts, as illustrated in the two cases described in the introduction.¹²³ In the case of *In re Estate of Hoehn*, for instance, living across the hall from her sister—a mere eight feet away—was not sufficient to satisfy the living requirement of the statute and the caretaker sister was unable to succeed on her section 18-1.1 claim.¹²⁴ How can such a result be reconciled when there are houses that cover more square footage than these two sisters' neighboring apartments? To prevent the sister in *Hoehn* from succeeding on her custodial claim after caring for her sister for four years is antithetic to the legislature's purported purpose behind section 18-1.1, which assumedly is to encourage family members to take on caregiving duties for their own family members to help reduce the financial impact on taxpayers and the state and federal governments.¹²⁵ Similarly, in *Riordan*, because the son actually lived with his mother for only two and a half years before she passed away, the son's claim failed pursuant to the three-year live-in requirement.¹²⁶ The court failed to give credence to the son's argument that he would have continued to care for his mother for as long as necessary but she happened to

made a claim on the decedent's estate for their services rendered on the basis of an implied contract. *Id.* The court held that this was an implied contract in law because it arose out of the concept of unjust enrichment. *Id.* In that vein, the court awarded the neighbors \$5000 for their services. *Id.*

119. *Id.* at 1079 (making the determination that neighbors had an implied contract, the court noted that the neighbors were not "related to the decedent by blood or marriage and did not share the same house as the decedent" and accordingly, the court declined "to extend the presumption of gratuitous intent beyond the traditional bounds of an immediate family relationship").

120. 755 ILL. COMP. STAT. 5/18-1.1 (2008). The dedication requirement of Section 18-1.1 is that the claimant must live with the disabled relative for at least three years. *Id.*

121. *Id.*

122. *Id.*

123. *In re Estate of Riordan*, 814 N.E.2d 597 (Ill. App. Ct. 2004); *In re Estate of Hoehn*, 600 N.E.2d 899 (Ill. App. Ct. 1992).

124. *Hoehn*, 600 N.E.2d at 900.

125. *See supra* Part II.B.

126. *Riordan*, 814 N.E.2d at 600.

die before the three-year mark came about.¹²⁷ Additionally, the court did not give any credit to the son for taking care of his mother for a few years prior to moving in with her by visiting her several times per week.¹²⁸ The court opted for strict construction of the statute, and since the son did not actually live with his mother for three years, there was a failure of the dedication requirement of actually cohabiting with the disabled person.¹²⁹

The results in these two cases are upsetting, especially when one considers the hardships and sacrifices these family members likely made to take care of their very ill relatives.¹³⁰ In fact, in the case of *In re Estate of Riordan*, the son, who was also a priest, had to take a leave of absence from his job in order to increase his caregiving responsibilities for his mother.¹³¹ In *Hoehn*, the caregiving sister was as elderly as her ill sister; she tried as long as she could to take care of her by herself before she finally had to give in and put her sister in a nursing home, because she simply could not handle the physical and financial difficulties of caring for her ill sister.¹³² These types of exclusions based on the strict dedication requirements of section 18-1.1 really reduce the ability of this statute to serve its assumed purpose of encouraging families to take care of their own when they become ill or disabled.¹³³

Unfortunately, due to the lack of legislative debate when this statute was created, there is no indication why the General Assembly selected three years as the minimum amount of time, nor why actually living with the disabled person is necessary.¹³⁴ According to a 2003 AARP study, the average length of caregiving is 4.3 years.¹³⁵ That does not tell the whole story, because the study also showed that

127. *Id.*

128. *Id.*

129. *Id.*

130. See, e.g., *In re Estate of Riordan*, 814 N.E.2d 597 (Ill. App. Ct. 2004); *In re Estate of Hoehn*, 600 N.E.2d 899 (Ill. App. Ct. 1992).

131. *Riordan*, 814 N.E.2d at 598.

132. *Hoehn*, 600 N.E.2d at 900.

133. *In re Estate of Jolliff*, 771 N.E.2d 346, 350 (Ill. 2002) (“Section 18-1.1 laudably recognizes the often unseen and intangible sacrifices made, and opportunities foregone, by immediate family members who commit their lives every day to making the lives of disabled persons better.”).

134. Transcript of House Debate at 29-30, H.B. 4116, 85th Gen. Assem., Reg. Sess., Nov. 16, 1988, <http://www.ilga.gov/house/transcripts/htrans85/HT111688.pdf>; Transcript of Senate Debate at 53-59, H.B. 4116, 85th Gen. Assem., Reg. Sess., Dec. 1, 1988, <http://www.ilga.gov/senate/transcripts/strans85/ST120188.pdf>.

135. NATIONAL ALLIANCE FOR CAREGIVING & AARP, *supra* note 69, at 33 fig.13 (discussing how 29% of all caregivers have been doing so for five or more years; 31% of all caregivers have been doing so for one to four years; 34% of all caregivers have been doing so for less than one year; and 5% of all caregivers have been doing so only occasionally).

[o]lder caregivers are more likely to say they have been providing care for ten years or more compared to younger caregivers (17% of caregivers 50-64 years and 18% of caregivers 65+ v. to 9% of caregivers 18-34 years). These older caregivers tend to be caring for parents and spouses. Conversely, younger caregivers are more likely to say they have been providing care for less than six months compared to older caregivers (22% of caregivers 18-34 years v. 13% of caregivers 50-64 years and 11% of caregivers 65+).¹³⁶

Based on the strict construction of the statute by the Illinois courts, however, the three-year minimum and the live-in requirement matter greatly to the courts. The statute should therefore be changed in order to better serve its purpose, which is shown in this Comment's proposed legislation.¹³⁷ The proposed legislation of this Comment includes some adjustments to the dedication requirements.¹³⁸

Taking into account the disparity between young and old caregivers with regard to the length of time they have been caregiving, the dedication requirement should be reduced from three years since it excludes so many caregivers—particularly younger ones.¹³⁹ In an ideal world, there would be no minimum caregiving time requirement, but that is simply not realistic for public policy reasons, which includes judicial economy in the processing of probate estates, the ease of providing evidence of long-term care, the prevention of fraudulent claims and shuffling around of the sick and/or elderly relative, and compensation for those that truly undertake to give long-term care to a relative. Considering these reasons, one year is a more reasonable and fair minimum dedication requirement. This way, the majority of caregivers will have an opportunity to be compensated for their services.¹⁴⁰

As for the live-in requirement, this should be adjusted to allow for families to live in close proximity to one another, within one hour, since not all caregiving has to be done by cohabitation.¹⁴¹ According to the 2003 survey, 85% of caregivers who do not live with the disabled and/or elderly

136. *Id.*

137. *See infra* Part V.

138. *See infra* Part V.

139. *See infra* Part V.

140. NATIONAL ALLIANCE FOR CAREGIVING & AARP, *supra* note 69, at 33 (stating that 60% of all caregivers have been doing so for one or more years).

141. *Id.* at 42 fig.18 (stating that 24% of all care recipients live in the same home as the caregiver, 42% of all care recipients live within twenty minutes of their caregiver, 19% of all care recipients live between twenty minutes and one hour from their caregiver, 5% of all care recipients live between one and two hours from their caregiver, and 10% of all care recipients live over two hours from their caregiver).

family member live within one hour of them.¹⁴² One hour is difficult to describe due to variations in traffic, urban versus rural driving, etc., but it sets a general guideline. Most likely, a caregiver cannot live much farther than one hour away and provide high-level and frequent care to their family member on a regular basis. Whether a caregiver rises to the level of care intended by the custodial claims statute shall be determined by the courts on a case-by-case basis. This live-in requirement adjustment would also have allowed for people like the sister in the *Hoehn* case to have succeeded on her claim since she lived within eight feet of her ill sister.¹⁴³ By changing the live-in requirement to the requirement of living within one hour of the care recipient, 85% of all caregivers will fall within the purview of the dedication requirement.¹⁴⁴

B. SECTION 18-1.1 IS INEFFECTIVE IN ACCOMPLISHING ITS PURPOSE

Although there is little to look to in the legislative history of section 18-1.1 from which to determine its purpose, the Illinois Supreme Court explained that the purpose is to compensate family members for undertaking the sacrifice and hardship of caring for ill, elderly, and/or disabled relatives.¹⁴⁵ Given this purpose, one would expect that the custodial claim would be rather common, just as claims made by the state, banks, and other types of lien holders are.

This was not supported by an empirical study conducted on December 15, 2008 at the DeKalb County Courthouse in Sycamore, Illinois by the author of this comment. The purpose of the study was to determine how common it was for statutory custodial claims to be made on decedent estates. It was hypothesized that, due to the strict requirements of section 18-1.1 (only spouses, parents, children, or siblings living with the elderly or disabled person for a minimum of three years are eligible to make a section 18-1.1 claim),¹⁴⁶ there would be little to no custodial claims made. All of the decedent estate files in DeKalb County were reviewed and counted from 2006, 2007, and 2008.¹⁴⁷ In those three years, absolutely zero section 18-1.1 statutory custodial claims were made.

142. *Id.*

143. *In re Estate of Hoehn*, 600 N.E.2d 899, 900 (Ill. App. Ct. 1992).

144. NATIONAL ALLIANCE FOR CAREGIVING & AARP, *supra* note 69, at 7.

145. *In re Estate of Jolliff*, 771 N.E.2d 346, 350 (Ill. 2002).

146. 755 ILL. COMP. STAT. 5/18-1.1 (2008).

147. Empirical Study of Decedents' Estates conducted by this author on December 15, 2008 in Sycamore, Illinois. In 2006, there were sixty decedents' estates; in 2007, there were ninety-seven decedents' estates; in 2008, there were ninety-six decedents' estates. Guardian estates were not considered as part of this study. Each estate file was reviewed to see what liens and/or claims were filed with the estate and their resolution. Many files had

In 2006, there were sixty probate estates of deceased persons. Among those estates, interestingly, there was one claim made by the daughter-in-law of the deceased who made a demand of \$75,600 for personal caregiver services rendered to the decedent for four months prior to her passing.¹⁴⁸ The claimant acknowledged, in her pretrial memorandum, that she failed to qualify under section 18-1.1 as she was not a blood relative nor did she care for the decedent for at least three years, but she asked the court to find an implied contract.¹⁴⁹ The claimant came to her damage total by using the \$25.00/hour rate a twenty-four hour nurse would charge for the type of care the decedent needed, which included changing diapers, bathing her, and other such duties as the decedent was bedridden at the time.¹⁵⁰ In the end, the case was settled and the claimant was awarded \$17,500 for her caregiving services,¹⁵¹ likely based on the strength of her implied contract theory as a non-blood relative.¹⁵²

The absolute lack of utilization of section 18-1.1 claims on an estate illustrates that there is a problem with the statute. It can be argued that the lack of custodial claims could be attributed to various reasons such as a lack of assets in a decedent's estate, or that family members may feel that no compensation is due to them since it was their duty to care for their relative, or that the caregiver is already an heir and will therefore already be getting a share of the estate. However, it is highly unlikely that the nearly 300 examined estates were without assets to compensate a caregiver. Additionally, the statutory custodial claim is not about getting one's standard share of the estate, but to provide additional compensation for the emotional and financial sacrifices undertaken by a particular family member in their effort to care for their ill family member. It is therefore unlikely that 300 decedents' relatives felt guilty about asking for any additional compensation. It is also unlikely that lawyers are unaware of the statute and fail to inform their clients, as evidenced by the mention of the statute in the claim by the daughter-in-law for caregiving services rendered discussed above.¹⁵³

The lack of statutory custodial claims is more likely due to the fact that an extremely low number of people qualify to make a claim under the statute as it is currently drafted because of the strict requirements and strict

very little paperwork. Those files with claims were typically from banks, hospitals, or attorneys filing claims to get their outstanding bills paid.

148. Pretrial Memorandum of Claimant at 1, *In re Estate of Esther J. Salerno, Deceased*, No. 06 P 173 (Ill. Cir. Ct. DeKalb County Sept. 26, 2007).

149. *Id.*

150. *Id.*

151. Agreed Order at 1, *In re Estate of Esther J. Salerno, Deceased*, No. 06 P 173 (Ill. Cir. Ct. DeKalb County Sept. 26, 2007).

152. See *In re Estate of Milborn*, 461 N.E.2d 1075 (Ill. App. Ct. 1984).

153. Pretrial Memorandum of Claimant at 1, *In re Estate of Esther J. Salerno, Deceased*, No. 06 P 173 (Ill. Cir. Ct. DeKalb County July 11, 2007).

construction thereof evident in the precedent case law.¹⁵⁴ Based on the evidence that there is a severe lack of custodial claims, though the study was done in a relatively small county, the statute is rendered virtually ineffective as it stands. If the legislature truly wants a statute that would help to compensate family caregivers, then it should redraft the statute to broaden the requirements by allowing more family members to make valid and viable claims that they can succeed on, as presented in the proposed legislation.¹⁵⁵

Even more appalling is the new trend that seems to be emerging in cases involving section 18-1.1 claims—a failure of an otherwise valid statutory custodial claim based on a rule of evidence.¹⁵⁶ In the case of *In re Estate of Rollins*, a half-sister took care of her war-wounded brother, who had diabetes as well as an amputated leg, for over twenty years.¹⁵⁷ Upon the brother's death, the caretaker sister was denied her statutory custodial claim because the insurance company defending the claim was able to preclude any evidence regarding the care and disability of the decedent pursuant to section 8-201 of the Dead Man's Act,¹⁵⁸ which prevents an adverse party directly interested in the outcome of the lawsuit from testifying to any conversation had with the deceased person since the deceased cannot contradict any such testimony.¹⁵⁹

On appeal, the appellate court affirmed the trial court's allowance of the Dead Man's Act despite the fact that the sister satisfied all of the strict requirements of section 18-1.1 and denied her statutory custodial claim of \$80,000.¹⁶⁰ The continued application of the Dead Man's Act in section 18-1.1 cases is unduly oppressive as illustrated by the above case¹⁶¹ and takes away any semblance of opportunity for family members who sacrifice and care for an ill or disabled family member to make a valid claim. In addition to revising the language of section 18-1.1 to be more inclusive, the legislature must address the issue of the Dead Man's Act and other similar rules of

154. See, e.g., *In re Estate of Riordan*, 814 N.E.2d 597, 599 (Ill. App. Ct. 2004); *In re Estate of Rollins*, 645 N.E.2d 1026, 1029 (Ill. App. Ct. 1995); *In re Estate of Hoehn*, 600 N.E.2d 899, 900 (Ill. App. Ct. 1992).

155. See *infra* Part V.

156. See, e.g., *Rollins*, 645 N.E.2d at 1027.

157. *Id.* at 1028.

158. *Id.* at 1029. Section 8-201 of the Dead Man's Act states the following: In the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability.

Rollins, 645 N.E.2d at 1031 (quoting 735 ILL. COMP. STAT. ANN. 5/8-201 (West 1992)).

159. *Id.*

160. *Id.*

161. *Rollins*, 645 N.E.2d at 1031.

evidence and determine whether they should be applied in such cases, or if exceptions should be made.

Those in favor of section 18-1.1 as it exists may argue that there have been successful claims made under the statute as it is written. For example, the *Jolliff* case ended up resulting in a successful claim for Edith Porter after her twelve years of dedication to the care of her 100% disabled brother.¹⁶² In the case of *In re Estate of Hale*, the deceased's daughter, Virginia Chapa, made a successful custodial claim because she took care of her mother for nine years, twenty-four hours a day, forgoing other employment in order to do so.¹⁶³ In the case of *In re Estate of Lower*, the wife of the decedent made a statutory custodial claim for \$100,000 after dedicating herself to the care of her 100% disabled husband for four years and ceased her employment of raising dogs when her husband's condition deteriorated.¹⁶⁴ The trial court found in her favor despite the fact that she herself did not necessarily do all the physical caretaking and had professional caretakers aid in the care-giving.¹⁶⁵ The appellate court affirmed the lower court's holding that the statute does not require sole physical caregiving in order to make such a custodial claim.¹⁶⁶ Since the evidence showed that the wife was dedicated to the oversight of her husband's well-being and health, as well as dedicated to the maintenance of her household, the court held that her custodial claim was indeed valid.¹⁶⁷

Though these cases are evidence that it is not impossible to succeed on a section 18-1.1 claim as it is currently written, it is important to focus on those that are left out of the statute—a grandchild who moves next door to take care of her grandmother,¹⁶⁸ a sister who lives across the hall from her ill sister,¹⁶⁹ a family who undertakes to care for a their elderly grandparent,¹⁷⁰ or a son who leaves work in order to dedicate himself to the care of his mother for two and a half years.¹⁷¹ If the legislature wants to help reduce the stress and hardship on each and every one of these described caregivers,

162. *In re Estate of Jolliff*, 771 N.E.2d 346, 357 (Ill. 2002).

163. *In re Estate of Hale*, 890 N.E.2d 1244, 1245 (Ill. App. Ct. 2008).

164. *In re Estate of Lower*, 848 N.E.2d 645, 647-48 (Ill. App. Ct. 2006).

165. *Id.* at 648.

166. *Id.* at 654.

167. *Id.*

168. *See supra* note 109 and accompanying text.

169. *In re Estate of Hoehn*, 600 N.E.2d 899, 899-900 (Ill. App. Ct. 1992).

170. Alzheimer's Association, *Francisca's Story*, 2007, http://www.alz.org/living_with_alzheimers_9955.asp. Francisca, living in Chile, but dealing with an ill grandmother, states, "During the last 10 years, I have had the opportunity to get to know Alzheimer's; my granny is living with it. As a family, we have organized her care, taking on different shifts and tasks. One of granny's daughters is in charge of her as the primary caregiver." *Id.*

171. *In re Estate of Riordan*, 814 N.E.2d 597, 598-600 (Ill. App. Ct. 2004).

then the legislature needs to revise section 18-1.1 as it is currently written so that going forward, it is a viable statute and a viable aid for family caregivers.

V. SOLUTION TO THE CURRENT STATUTORY CUSTODIAL CLAIM PROVISION

Section 18-1.1 should be redrafted and revised with clear reasoning and an articulated purpose behind the decisions for the eligible class and dedication requirements.¹⁷² In the following proposed legislation, several modifications are made that drastically change the current custodial claim statute's language.¹⁷³ These changes are made in consideration of all the studies and research illustrating the increasing number of family caregivers and the money these caregivers save the states.¹⁷⁴ The changes include reducing the length of time requirement; changing the cohabitation requirements to increase the number of people who can make a claim; expanding the claim to include ill persons as well as disabled persons; broadening the eligible claimant class; including compensation for money spent during caregiving, as well as for the value of the caregiving services rendered; removing the ability to use the Dead Man's Act in section 18-1.1 cases; and removing the predetermined claim amounts.¹⁷⁵ The setoff provision from the original statute is left unchanged.¹⁷⁶ Changes or additions in the language of Section 18-1.1 are shown by << >>; deletions are indicated by strikethrough. Additionally, definitions are added to the first section of the Illinois Probate Act to help clarify the terms set forth in the proposed section 18-1.1.¹⁷⁷

172. See *supra* Part III.

173. See *infra* Part V.A.

174. See *supra* Part III.

175. See *infra* Part V.A.

176. 755 ILL. COMP. STAT. 5/18-1.1 (2008). The setoff provision of the current statute states the following:

Notwithstanding the statutory claim amounts stated in this Section, a court may reduce an amount to the extent that the living arrangements were intended to and did in fact also provide a physical or financial benefit to the claimant. The factors a court may consider in determining whether to reduce a statutory custodial claim amount may include but are not limited to: (i) the free or low cost of housing provided to the claimant; (ii) the alleviation of the need for the claimant to be employed full time; (iii) a financial benefit provided to the claimant; (iv) the personal care received by the claimant from the decedent or others; and (v) the proximity of the care provided by the claimant to the decedent to the time of the decedent's death.

Id.

177. See *infra* Part V.A.

A. THE AUTHOR'S PROPOSED LEGISLATION

Article I. General Provisions. 5/1-2. Definitions.¹⁷⁸

<<5/1-2.25. Blood relative. Any person who is related to a decedent by blood, including half-siblings, adopted siblings or children, cousins no more than three times removed, aunts or uncles by blood, not marriage. Blood relatives do not include step-relatives or relatives through marriage.>>

<<5/1-2.26. Disabled person. Any person of any age who is deemed permanently disabled, as determined by a Board-certified physician and evidenced in medical records. For the purposes of section 18-1.1, a person must be deemed 50% or more disabled in order for a claimant to file a custodial claim.>>

<<5/1-2.27. Ill person. Any person of any age who is deemed permanently ill, as diagnosed by a Board-certified physician and evidenced in medical records. For the purposes of section 18-1.1, an ill person must be in need of care-giving services in order for a caregiver to file a custodial claim.>>

Article XVIII. Claims Against Estates.¹⁷⁹

5/18-1.1. Statutory custodial claim. Any <<blood relative or>> spouse, ~~parent, brother, sister, or child~~, <<age eighteen years or older,>> ~~of a disabled person~~ who dedicates himself or herself to the care of the <<ill or>> disabled person by living with <<or living within one hour of>> and personally caring for the <<ill or>> disabled person for at least <<one>>~~three~~ years shall be entitled to a claim against the estate upon the death of the <<ill or>> disabled person. The claim shall take into consideration the claimant's lost employment opportunities, lost lifestyle opportunities, ~~and~~ emotional distress experienced<<, personal money spent>> as a result of personally caring for the <<ill or>> disabled person <<, and a fair assessment of the value of the care giving services rendered to the ill or disabled person>>.

178. 755 ILL. COMP. STAT. 5/1-2 (2008).

179. 755 ILL. COMP. STAT. 5/18 (2008).

Notwithstanding the statutory claim amounts stated in this section, a court may reduce an amount to the extent that the living arrangements were intended to and did in fact also provide a physical or financial benefit to the claimant. The factors a court may consider in determining whether to reduce a statutory custodial claim amount may include but are not limited to (i) the free or low cost of housing provided to the claimant, (ii) the alleviation of the need for the claimant to be employed full time, (iii) any financial benefit provided to the claimant, (iv) the personal care received by the claimant from the decedent or others, and (v) the proximity of care provided by the claimant to the decedent to the time of the decedent's death. The claim shall be in addition to any other claim, including without limitation a reasonable claim for nursing and other care.

<< Multiple family members may make claims and it shall be left up to the court's discretion to determine if a claimant indeed qualifies under this provision and, if so, to what extent the claimant should be monetarily compensated.>>

<<Whether a claimant meets the dedication requirements of the statute and proves their demand for relief pursuant to lost employment and lifestyle opportunities, and money spent on caregiving under this statute, must be shown by clear and convincing evidence by the claimant. A fair value for emotional distress shall be left to the court's discretion to be determined on a case-by-case basis. As for monetary compensation for the amount of time caregiving services were rendered, the average costs of professional long-term care for the time that care was given shall be the baseline for such recovery.>>

<<The Dead Man's Act cannot be applied to cases involving custodial claims.>>

~~The claim shall be based upon the nature and the extent of the person's disability and, at the minimum but subject to the extent of the assets available, shall be in the amounts set forth below:~~

- ~~1. 100% disability, \$180,000~~
- ~~2. 75% disability, \$135,000~~

~~3. 50% disability, \$90,000~~

~~4. 25% disability, \$45,000~~

VI. CONCLUSION

The need for a custodial claim statute is real because the costs of long-term care are increasing and people are living longer, even with disabilities and illnesses, due to the continuing advancements in medicine and technology.¹⁸⁰ Though there has been a great effort by the federal government,¹⁸¹ state governments,¹⁸² and private institutions¹⁸³ to provide support systems and aid to family caregivers, none of these address the need for monetary compensation. Not only is being a caregiver physically demanding,¹⁸⁴ but seeing a family member ill or disabled is emotionally draining,¹⁸⁵ especially when rendering care for long periods of time. In addition to these physical and emotional hardships, the financial burden of caring for another person is great as being a caregiver affects their job,¹⁸⁶ as well as increases their monthly costs.¹⁸⁷ Thus, it must be acknowledged that section 18-1.1 is one of the pieces needed to help provide relief to those who undertake this very difficult task of caring for an ill or disabled family member.

Section 18-1.1, as it is currently written, fails to serve the purpose of aiding family members who care for other family members.¹⁸⁸ The proposed changes in legislation offer some revisions that help necessarily broaden the class of those that can file a custodial claim, but remains limited enough to preserve judicial economy.¹⁸⁹ Additionally, it aims to

180. See *supra* text accompanying notes 79-81.

181. See National Family Caregiver Support Program, http://www.aoa.gov/AoARoot/AoA_Programs/HCLTC/Caregiver/index.aspx (last visited Apr. 26, 2010).

182. See Illinois Department on Aging, <http://www.state.il.us/aging/default.htm> (last visited Apr. 26, 2010).

183. See National Alliance for Caregiving, <http://www.caregiving.org> (last visited Apr. 26, 2010); AARP, <http://www.aarp.org> (last visited Apr. 26, 2010).

184. NATIONAL ALLIANCE FOR CAREGIVING & AARP, *supra* note 69, at 57 (“[T]he greater the caregiving responsibilities, the greater the chance the caregiver’s health is in fair or poor condition.”).

185. *Id.* at 59 (“One third (35%) of caregivers say taking care of the person they help rates a four or five, on a five point scale where five is very stressful.”).

186. *Id.* at 65 (stating that 57% of caregivers have to go in late, leave early, or take time off of work in order to render care).

187. *Id.* at 66. Caregivers who contribute financially, not counting those taking care of their spouse, spend an average of \$200 per month on the care recipient. *Id.* This amount increases substantially if the care recipient is extremely disabled or ill or are over the age of sixty-five. *Id.*

188. See *supra* Part III.

189. See *supra* Part V.

compensate family caregivers not just for lost lifestyle or work opportunities, but to truly compensate them for the services rendered.¹⁹⁰ Though many family caregivers say that taking care of their relatives is just the right thing to do¹⁹¹ and no reward is needed, the legislature should not disregard these caregivers' needs. Instead, the Illinois General Assembly should revisit section 18-1.1 and make the proper changes so that it can truly be an effective and helpful law for family caregivers.

MARIAM L. HAFEZI QUALMAN*

190. See *supra* Part V.

191. See Bricking, *supra* note 108.

* J.D. Candidate 2010, Northern Illinois University College of Law. The author would like to thank her family for their unconditional love and encouragement, and especially thank her husband, Tom Qualman, for being so supportive and understanding while the author was writing this Comment and making it through law school.