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A baker's dozen considerations before probating small or insolvent decedents' estates

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Why Open Probate for a Small or Insolvent Estate if it Can Be Avoided?

The general public has been conditioned to fear the word, "probate." For decades, attorneys warned it is a time-consuming, expensive, and convoluted court procedure. However, many Illinois attorneys now assert that probate isn't the nightmare it's been made out to be, but its bad rap is due to estate planning attorneys overselling living trusts. There's truth on both sides.

Small estates in Illinois can potentially avoid probate via a Small Estate Affidavit if the gross value of the decedent's entire personal estate does not exceed $100,000.[1]

However, in some cases probate is the only alternative, even for small estates. Attorney Cary Lind of Cary Lind, P.C. in Arlington Heights, Illinois, states that even a small estate may be required to go through probate in cases where the will or trust are contested, or a bond in lieu of probate cannot be used, or the representative cannot be sure that all interested parties will be satisfied with small estate administration outside of probate.

The Small Estate Affidavit seems a preferable choice when compared with the hassle, expense, paperwork, and court appearances in probate. It would seem frivolous, superfluous and even foolhardy to open probate when a Small Estate Affidavit is a viable option.

For insolvent estates, spending the meager remains of estate monies on court costs and attorney fees to open probate sounds like throwing good money after bad. Since heirs cannot "inherit" debts in the decedent's name alone (there are some exceptions), why not advise the heirs to simply walk away from an insolvent estate and leave the creditors to fight over it?

Probate can, however, be employed as a strategy against creditors for small or insolvent estates. Although small or insolvent estates could potentially avoid probate by use of an Illinois Small Estate Affidavit, the opening of probate could allow for a shortened creditor claim period and bar certain creditor claims altogether.

Opening Probate to Shorten the Creditor Claim Statute of Limitations

Many attorneys advise that probate is advantageous for small and insolvent estates solely to shorten the creditor claim bar date. Illinois law at 755 ILCS 5/18-12b provides that all creditor claims are, " . . . in any event, barred two years after decedent's death, whether or not letters of office are issued upon the estate of the decedent." However, decedent's estates which have had Letters of Office issued by a probate Court can, through various statutory methods, significantly shorten the creditor bar date. For example, unknown creditors' claims can be barred as early as 6 months (there are some exceptions) after the first date of publication notice, after probate is opened and Letters of Office have been issued.[2]

All decedents' estate matters could benefit from a truncated creditor claim bar date, which favors opening probate for small and insolvent estates. However, Attorney Tim Midura of Huck, Bouma, P.C. in Wheaton, Illinois, suggests there are no hard and fast rules for probating small or insolvent decedents' estates, and recommends that attorneys "evaluate each case based on a myriad of elements."

Determining Whether to Open Probate for Small/Insolvent Estates

This article addresses those cases where

probate is optional, and offers a number of factors for you to consider as you and your client determine whether or not probate is the most prudent course of action for a certain insolvent or small estate:

1. Keep in mind the purpose of probate

Cary Lind emphasizes that, "probate should not be viewed as the enemy or as something that is overly burdensome but as a combination of procedures meant to protect all those rights . . . so that [an estate] can then be distributed to those who should receive it."

"The Probate Act and the entire Probate system are set up to balance and protect the rights of all kinds of parties and to set up procedures to make sure that all those parties are given a process to assert their rights and for representatives not to be left hanging with individual liability," explains Lind. He lists the parties who are protected by the Act: a) heirs and legatees; b) minors and disabled people; c) those who believe they should be beneficiaries of an estate or trust; d) creditors; e) governmental authorities who collect taxes and require reporting and payment; f) third parties who rely on the process such as banks, title companies, investment firms, etc.; and g) those who carry out its terms, preventing them from being personally liable for actions that complied with it.

2. Case-specific considerations.

Tim Midura offers the following questions to guide your assessment of whether or not to probate a particular small or insolvent decedents' estate:

a) what can be accomplished with and without probate?
b) what loose ends might there be [with or without probate]?
c) who might be on the hook for loose ends?
d) who benefits from [an abbreviated creditor bar date] and who doesn't?
e) what are other available assets (non-probate)?
f) what are the costs [with or without probate]?
g) what are the risk thresholds of the various parties?
h) [could] the lawyer [and the small estate affiant] be on the hook for a "bad outcome"?
i) how many beneficiaries are there and are any beneficiaries adversarial, spendthrifts, [dependent children, disabled, recalcitrant, whereabouts unknown], etc.?

3. Consider the expense of Probate: is it cost-effective?

Probate can be expensive, particularly for those which are contested, have creditor claims or other complications. Even a best case scenario of an uncomplicated, uncontested, probate matter in Independent Administration having few assets could be costly. In the Greater Chicago Metropolitan area, the court costs, publication costs, surety bond costs, and attorneys' fees could, even for a "simple" probate estate, total between $2,000 - 5,000. This estimate doesn't include the costs of the personal representative's fees, asset appraisals, accounting fees (for the fiduciary return), or additional legal services to address creditor claims, will contests, marshaling/selling/re-titling assets, addressing beneficiary inquiries, etc. "Probate costs are set, but fees can vary significantly," says Cary Lind. He suggests fees could be lower for attorneys who regularly and efficiently handle probate since most cases may go through Independent rather than Supervised Administration. "Probate is very streamlined . . . [and in Independent Administration] an attorney effectively needs to appear in Court only twice [first to open proceedings, and then to close]," he states.

4. Does the 2 year statute of limitations afford the estate sufficient protection from creditor claims?

Often, clients do not promptly consult an attorney, waiting for months or sometimes years after the death of the decedent. If the statutory two-year creditor claim period runs in six months or less, or has already passed, then probate is not needed for the purpose of truncating the creditor claim period.

5. What is the likelihood of a creditor filing legal action against the estate?

Illinois law allows creditors the right to initiate probate proceedings if the heirs do not open probate. Cary Lind states that a creditor is not likely to spend money on attorneys' fees and court costs unless the claim is large enough to outweigh the costs. In his experience, if the creditor claim is under $10,000, it is typically cost prohibitive for a creditor to file a claim.

Few decedents' estates have *unknown* creditors. Even fewer have unknown creditors with claims that are 1) valid, 2) for a significant amount of money, and 3) timely filed. The two-year statute of limitations could be an acceptable risk for small estates whose only creditor risk is a potential unknown creditor.

According to Attorney and C.P.A. Lawrence Gregory of Huck Bouma, P.C. of Wheaton, Illinois, opening probate to obtain the shortened creditor bar date may be preferable to some clients, commenting that, "Even if the creditor risk is very low, some clients may prefer probate for the peace of mind."

6. Should the heirs simply walk away from an insolvent estate?

If there are more creditors than assets, should an heir simply walk away from an insolvent estate?

Lawrence Gregory states, "If there are sufficient funds to cover the various probate fees, then money that may otherwise go to creditors could properly be used to probate the estate and give the executor or administrator confidence the creditors are properly cut off, and that he or she is discharged of office by court order."

Attorney Kevin Williams of The Law Office of Kevin Williams in Aurora, Illinois, expounds: "this option [walking away from the insolvent estate] would make sense if there is very little value in the assets of the estate. However . . . the Probate court process makes the most sense if the estate does have some value, but just not enough to pay all of the debts. To better understand these scenarios, let's see this play out in two different illustrations."

He further explains, "In illustration A, imagine that you have a loved one who passed away with $1,000 in the bank in his/her name only, rented an apartment, had no car, and had no other assets of any real value. In this illustration, your loved one has $75,000 in medical bills. To handle this estate, some might suggest using a Small Estate Affidavit to gain access to

the bank account, and then to walk away from all of the creditors while pocketing the money. This wouldn't work because a Small Estate Affidavit requires that all valid claims against the estate be paid before any distribution is made to any heir or legatee. If, on the other hand, you were to probate the estate in court, it would cost several thousand dollars in attorney's fees, court costs, and related estate expenses, and there would only be $1,000 to pay the expenses. Thus, it is advisable to simply walk away from this kind of insolvent estate."

Williams continues, "In illustration B, though, imagine the same scenario above, except instead of $1,000 in the bank, your loved one has $50,000 in the bank. In this illustration, there is still not enough to pay all of the debts of the estate, but there is definitely enough to resolve the estate through a Probate court process. Essentially, by probating the estate in court, you will be able to gain access to the $50,000, pay the attorney's fees, court costs, funeral expenses, pay . . . [the] Administrator or Executor [their] fee . . . and then use the remainder to make partial satisfaction to the creditors of the estate. Thus, the estate is resolved, and [the client and the attorney are] compensated for [their] time in handling the estate."

7. Not all creditors of the estate are adversarial. They could be your client or the estate beneficiaries

Two of the seven classes of creditor claims cannot be barred and are highest in priority of payment:

a. First class claims (755 ILCS 5/18-10), including expenses of administration, such as fees to the administrator (who is likely your client) and reimbursement of funeral expenses (likely paid by your client); and
b. Second class claims: surviving spouses' and dependent child's awards (755 ILCS 5/18-12).

The estate administrator and estate beneficiaries could have the right to claim as creditors these two types of claims mentioned, and will have priority of payment over other creditors. If your client has paid for the funeral and related expenses, then those are first class claims (755 ILCS 5/18-10) and he/she is first in line to get paid before any other third party creditor. Perhaps there is a surviving spouse award or dependent child's award(s) which could be effectuated (755 ILCS 5/18-12). Opening probate could enforce these creditor claims and ensure that their priority is placed above any lower priority creditor.

8. Opening probate may not alleviate the estate from its obligation to pay valid creditor claims

Opening probate may not alleviate the estate of its obligation to pay valid creditors if the court or jury determines that the claim must be paid by the estate. Valid creditor claims must either be settled and paid or disallowed and set for hearing for the Court to settle the claim.

If a Small Estate Affidavit is used, the Probate Act at 755 ILCS 5/25-1 10.5 now requires Affiants to affirm the following: "I understand that all valid claims against the decedent's estate described in paragraph 7 must be paid by me from the decedent's estate before any distribution is made to any heir or legatee."

Paragraph 7 of the Small Estate Affidavit requires the affiant to list the seven classes of creditor claims at 755 ILCS 5/25-1(b) [which substantially mirror those at 755 ILCS 5/18-10, "Claims against the estate,"] as follows:

- Class 1: funeral and burial expenses, which include reasonable amounts paid for a burial space, crypt, or niche; a marker on the burial space; and care of the burial space, crypt, or niche; expenses of administration; and statutory custodial claims;
- Class 2: the surviving spouse's award or child's award, if applicable;
- Class 3: debts due the United States;
- Class 4: money due employees of the decedent of not more than $800 for each claimant for services rendered within 4 months prior to the decedent's death and expenses attending the last illness;
- Class 5: money and property received or held in trust by the decedent which cannot be identified or traced;
- Class 6: debts due the State of Illinois and any county, township, city, town, village, or school district located within Illinois; and
- Class 7: all other claims.

9. Consider the liabilities of utilizing the Small Estate Affidavit

As mentioned earlier, Illinois small estates can avoid probate via a Small Estate Affidavit if the gross value of the decedent's entire personal estate does not exceed $100,000.[3]

Often, an heir will discover the decedent's assets and creditors through the passage of time as the heirs collect the decedent's mail each month and slowly sort through what might be piles of paperwork and documents left in the decedent's home or safe deposit box, etc.. This cautions the usage of a Small Estate Affidavit unless a sufficient period of time has passed to discover all the decedent's assets and creditors.

A Small Estate Affidavit is a sworn statement from the affiant reciting the decedent's total assets and creditors. It is advisable then to wait until the affiant is certain that all assets and creditors have been discovered before completing the Small Estate Affidavit. Potentially, an undiscovered asset could raise the total value of the estate and exceed the statutory threshold amount, thus requiring the estate to open probate proceedings. Similarly, if the affiant of a Small Estate Affidavit pays out the balance of the estate to the heirs, they risk a creditor coming along after the fact and filing suit against the affiant.

The affiant of a Small Estate Affidavit will take on significant liabilities when utilizing this form in lieu of probate. The affiant of a Small Estate Affidavit must indemnify and hold harmless all creditors of the decedent's estate, the decedent's heirs and legatees, and other persons, corporations, or financial institutions relying upon the affidavit who incur any loss because of reliance thereon, up to the amount lost because of any act or omission by the affiant - including attorney's fees and expenses of legal action.[4]

While the affiant of a Small Estate Affidavit is personally liable to creditors of the decedent's estate, the court appointed representative is not personally liable to creditors if the representative acts in good faith to determine and give notice

to creditors of a decedent. 755 ILCS 5/18-12(d) provides an exception to the representative's personal liability: "Except with respect to a claimant whose claim is known to the representative and is not paid or otherwise barred under this Section."

Tim Midura challenges you to consider the extent to which the representations made by a small estate affiant "taint that Affiant individually." He finds probate compelling because, unlike the use of a Small Estate Affidavit, no single individual takes unwarranted risk in probate.

He also says that he reserves Small Estate Affidavits only to simple and very contained circumstances. He further warns that, ". . . small estates affidavits are over used and have unappreciated peril with their usage."

Advise your client of the potential liabilities and risks and allow your client the opportunity to decide whether and to what extent they are willing to bear them.

10. Can creditor claims be negotiated outside of probate court?

Priority of claims comes into play regardless of whether letters of office are issued. As mentioned earlier, the recently amended Illinois Small Estate Statute now provides for classification of claims, allowing them to be listed by class within the Small Estate Affidavit. In probate and with a Small Estate Affidavit, if the decedent's total debts outweigh assets, then the lower/lowest classification of creditors may not be entitled to receive anything at all. So, why not use a Small Estate Affidavit in lieu of probate to negotiate creditor claims?

Kevin Williams and Tim Midura caution against using a Small Estate Affidavit to negotiate creditor claims stating that the affiant may not have authority to negotiate. Midura says if the affiant does negotiate claims through a Small Estate Affidavit, then the affiant could potentially be "at peril," and be liable to a subsequent, court-appointed administrator for the estate for making a bad deal.

Williams explains, ". . . it is conceivable that a Small Estate Affidavit could resolve an insolvent estate. But, if there are unhappy beneficiaries involved (or more likely, unhappy creditors), then handling the estate out-of-court with a Small Estate Affidavit could potentially turn into a mess for the affiant. For instance, what if the affiant settles all of the claims with the known creditors of an insolvent estate a month after the decedent dies, thus leaving no funds left in the estate, only to have a higher class claimant come forward two months later demanding payment and claiming the affiant goofed? I don't think the Small Estate Affidavit offers the affiant much protection in situations like this, or any other number of potential problems with the estate."

He further explains, "Another issue . . . is whether a creditor will even negotiate a claim, particularly a large one, with an individual with no court-approved authority to act on behalf of the estate. With a probate court proceeding, the creditors, beneficiaries, and any other interested party to the estate, have the peace of mind in the end knowing that a judge has approved the court-appointed representative's inventory of estate assets, final accounting, and proposed payments to the creditors, which would all then be filed with the court as public record for all future reference. None of this would even be required outside of court with a Small Estate Affidavit."

11. How familiar is your client with all of the estate's assets and debts?

Often, administrators already know the identity of estate creditors, particularly if the administrator had been managing the decedent's finances (for example, paying bills and tracking expenses) prior to decedent's death.

Generally speaking, I've encountered two types of clients. Client A is nominated by the will as executor of his/her recently deceased parent. Client A lives out of State, had a distant relationship with his/her aloof parent and was not privy to the parent's financial affairs. Client A has no knowledge of the assets and debts of the parent, and can only discover it by reading through the decedent's financial statements and incoming mail. Because this client was completely unfamiliar with their parent's assets and debts prior to the parent's death, the risk of unknown creditors of the estate is likely increased.

The second type is Client B who was not only a caretaker for his/her parent but also acted as agent with Power of Attorney for Property, managing his/her parent's finances prior to the parent's death. This client has a complete financial snapshot of what his/her parent owned and owed, and has an organized box of bills and asset statements. Because Client B had been managing the day-to-day finances of the decedent prior to decedent's death, the risk of an unknown creditor coming out of the woodwork for this decedent's estate is fairly low.

12. Could a bond in lieu of probate be utilized?

If the sole asset is real estate, or if there is real property but the gross value of the decedent's entire personal estate does not exceed $100,000, *and* all the heirs (or in the case of a will, all legatees) are *all* willing to sign the deed, then a bond (issued by a title company) in lieu of probate may be an option. Often, a bond in lieu of probate is not an option because all the heirs must be in agreement about selling the real estate and willing to sign the deed. All valid creditor claims must first be paid, and payment can be made at the closing through proceeds of the sale. An affidavit of heirship and a copy of the will, if one exists, are provided to the title company. Cary Lind states, "You cannot use one if the Estate contains more than $100,000 in personal property or if Probate is otherwise necessary, such as where there is a will, will contest, citation proceedings, heirship issues, etc." He continues, "[A bond in lieu of probate] requires a personal undertaking from all distributees, whereby the distributees agree jointly and severally to indemnify the title company against all claims, fees, expenses, etc., from any claims which may be asserted against it. That is well and good, but what if a legatee skips town, blows the money, and is uncollectible? The title company's second requirement is a bond to insure its risk, thus the phrase 'bond in lieu of Probate.' The bond [is typically] is two percent of the value of the decedent's interest in the real estate during the first twelve months after death and one percent during the second twelve months. After two years, all claims are barred, so no bond is necessary." Lind

states that the bond will insure against 3 potential interested parties, including: 1) heirs or distributees who claim they had an interest in the real property, 2) creditors and 3) the United States Government with regard to taxes.

Cary Lind asks, "which costs less?" He points out that the purchase of the bond may exceed the cost of probate if the real property's value is above a certain amount. Thus, a more costly bond would undermine its purpose in avoiding probate. If the cost of probate is less than purchasing the bond, then open probate to ensure that all interested parties' rights or claims are either properly addressed or cut off.

In Lind's own practice, he rarely recommends a bond in lieu of probate, as the cost of probate for a majority of his cases is equal to or less than a bond in lieu of probate and probate accomplishes many more case objectives than its alternative.

13. Opening probate isn't a foolproof guarantee against all creditor claims

Cary Lind discusses in his article, "Lane Change for Claims in Estates," that barring creditors is not as easy as publishing statutory notice pursuant to Section 18-3 and waiting out the 6 months, hoping the creditor fails to timely file a claim. A creditor who was reasonably ascertainable but not properly notified could file a claim after the six months bar date, and the estate could still be required to pay it. 755 ILCS 5/18-3 requires the representative to mail or deliver a notice to each creditor of the decedent whose name and post office address are known to or are reasonably ascertainable by the representative and whose claim has not been allowed or disallowed as provided in Section 18-11. If the creditor files a claim after the 6 month period expires but can show they were reasonably ascertainable had the administrator used minimum standards of diligent inquiry, then that claim may not be barred.[5]

Tim Midura calls attention to another exception to the 6 months creditor bar date found at 755 ILCS 5/18-12(c), stating, "It is little known or rarely actively considered that the 6 months claims period is not applicable when there is insurance covering the liability. . . . the existence of liability insurance (and "tail" insurance) keeps the statutory period open to two (2) years."

Closing Remarks

Resist the urge to oversimplify a legal strategy for small or insolvent estates. Don't jump for the Small Estate Affidavit simply because the total value of an estate doesn't exceed the statutory threshold amount. And don't probate all small or insolvent estates simply to truncate the creditor claim period. Carefully analyze your individual matters in the initial stages and advise your clients of the risks, benefits, obligations, rights and costs of each legal course of action. It could save you and your client from difficulties down the road. ■

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1. 755 ILCS 5/25-1(b)(6).
2. The complete statutory requirements to bar creditor claims are listed at 755 ILCS 5/18-3 and 755 ILCS 5/18-12(a).
3. 755 ILCS 5/25-1(b)(6).
4. 755 ILCS 5/25-1.
5. *Tulsa v. Pope. Estate of Anderson*, 246 Ill. App.3d 116, 615 N.E.2d 1197, 186 Ill.Dec. 140 (1993).

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