Illinois Law: Case Decisions & Trends

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ILLINOIS LEGISLATION

1. **Public Act 100-1044: Uniform Powers of Appointment Act**
(HB4702) – effective 1/1/2019

Creates the Uniform Powers of Appointment Act. Defines terms. Adds provisions concerning: governing law, common law and principles of equity; creation of power of appointment; nontransferability; presumption of unlimited authority; rules of classification; power to revoke or amend; requisites for exercise of power of appointment; intent to exercise; donor-imposed formal requirements; permissible appointment; the selective allocation doctrine; the capture doctrine; disposition of unappointed property; appointment to taker in default; the powerholder's authority to revoke or amend exercise; disposition of trust property subject to power; disclaimer; release; power to contract; creditor claims; and other matters. Makes corresponding changes in the Probate Act of 1975. Repeals the Power of Appointment Exercise Act and the Termination of Powers Act.

2. **Public Act 100-0786: Amendment to Trusts and Trustees Act Regarding Conveyances**
(SB2309) – effective 1/1/2019

Amends the Trusts and Trustees Act. Deletes language requiring that a conveyance of real property to a trust include evidence of acceptance by the trustee. Deletes language providing that if the transferor is a trustee of the trust, an interest in real property does not become trust property unless the instrument of conveyance is recorded in the office of the recorder of the county in which the property is located.

3. **Public Act 100-0871: Automatic Revocation of Life Insurance Beneficiary Designations Upon Divorce**
(SB2437) – effective 1/1/2019

Amends the Illinois Marriage and Dissolution of Marriage Act. Provides that if a judgment of dissolution of marriage is entered after an insured has designated the insured's spouse as a beneficiary under a life insurance policy in force at the time of entry, the designation of the insured's former spouse as beneficiary is not effective unless: (1) the judgment designates the insured's former spouse as the beneficiary; (2) the insured redesignates the former spouse as the beneficiary after entry of the judgment; or (3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse. Provides that if a designation is not effective, the proceeds of the policy are payable to the named alternative beneficiary or, if there is not a named alternative beneficiary, to the estate of the insured. Provides that an insurer that pays the proceeds of a life insurance policy to the beneficiary under a designation that is not effective is liable for payment of the proceeds to the entitled person or estate only if: (A) before payment of the proceeds to the designated beneficiary, the insurer receives written notice at the home office of the insurer from an interested person that the designation is not effective; and (B) the insurer has not filed an interpleader.

Exempts life insurance policies provided under plans governed by the Employee Retirement Income Security Act of 1974, the Federal Employee Group Life Insurance Act, or any other preempting federal law.

4. Public Act 100-1079: Classification of Claims
(SB3120) – effective 8/24/2018

Amends the Probate Act of 1975 in connection with the classification of claims against the estate of the decedent. Provides that a claim for reasonable and necessary medical, hospital, and nursing home expenses for the care of the decedent during the year immediately preceding death is classified equally with claims for money due employees of the decedent for services rendered of not more than $800 for each claimant for services rendered within 4 months prior to the decedent's death. Removes expenses of attending the decedent's last illness from the class. Effective immediately.

5. Public Act 100-1059: Amendment to Presumptively Void Transfers Article
(HB5047) – effective 8/24/2018

Amends the Presumptively Void Transfers Article of the Probate Act of 1975. Includes a civil union partner within the scope of the term "family member" and includes a transfer on death instrument within the scope of the term "transfer instrument". Makes changes regarding the rebuttable presumption that a transfer instrument is void if the transferee is a caregiver and the fair market value of the transferred property exceeds $20,000. Provides that if the property in question is an interest in real property, a bona fide purchaser or mortgagee for value shall take the subject property free and clear of the action challenging the transfer instrument if the transfer to the bona fide purchaser or mortgagee for value occurs prior to the recordation of a lis pendens for an action challenging the transfer. Sets forth conditions under which a financial institution or similar entity is not liable for distributing or releasing property when the transfer is challenged. Effective immediately.

Makes changes in the notice requirement for a holder of property that is a financial institution, trust company, or similar entity. Provides that liability does not attach for a transfer of property if the distribution occurs before the holder's registered agent receives notice that a complaint has been filed. Specifies that the notice must include a copy of the complaint.

6. Public Act 100-0952: Agent Recordkeeping
(HB4879) – effective 1/1/2019

Amends the Illinois Power of Attorney Act. Provides that if the agent fails to provide his or her record of all receipts, disbursements, and significant actions taken under the authority of the agency within 21 days after a request by specified persons, a representative of the Office of the State Long Term Care Ombudsman (rather than the State Long Term Care Ombudsman) may petition the court for an order requiring the agent to produce his or her record of receipts, disbursements, and significant actions. Provides that if the court finds that the agent's failure to provide his or her record in a timely manner to a representative of the Office of the State Long Term Care Ombudsman was without good cause, the court may assess reasonable costs and attorney's fees against the agent, and order such other relief as is appropriate.

7. **Public Act 100-0761: Amendment to Principal and Income Act**
(HB4920) – effective 1/1/2019

Amends the Principal and Income Act. Provides that, only for oil or gas from non-coal formations held in non-trust estates and by legal tenants and remaindermen (instead of "with respect only to non-trust estates, for oil or gas from non-coal formations"), proceeds from the sale of such minerals produced and received as royalty, overriding royalty, limited royalty, working interest, net profit interest, time-limited interest or term interest, or lease bonus shall be deemed income. Deletes language providing that a Section concerning non-trust estates does not apply to life estates and remainder interests in oil or gas from non-coal formations, or royalties or overriding royalties created under leases of such minerals.

8. **Public Act 100-0850: Frail Elderly Individual Family Visitation Protection Act**
(HB4309) – effective 1/1/2019

Creates the Frail Elderly Individual Family Visitation Protection Act. Provides that the Act may be referred to as the Kasem/Baksys Visitation Law. Defines "family caregiver", "family member", "frail elderly individual", and "petitioner". Provides that if a family caregiver unreasonably prevents a family member from visiting the frail elderly individual, the court, upon a verified petition by the family member, may order the family caregiver to permit such visitation as the court deems reasonable and appropriate under the circumstances. Provides that in making its determination, the court shall consider specified factors. Provides that the court shall not allow visitation if the court finds that: (i) the frail elderly individual has capacity to evaluate and communicate decisions regarding visitation and expresses a desire to not have visitation with the petitioner; or (ii) visitation between the petitioner and the frail elderly individual is not in the best interests of the frail elderly individual. Adds provisions governing the appointment of a guardian ad litem for the frail elderly individual. Provides that if the court grants the petition of a family member for visitation, the court may also order the family caregiver to use reasonable efforts to notify the petitioner of the frail elderly individual's hospitalization, admission to a healthcare facility, change in permanent residence, or death. Adds procedural and notice requirements. Provides that the Act does not apply if: (i) the frail elderly individual is a person under guardianship; or (ii) the family caregiver is acting as agent under a power of attorney or acting at the direction of an agent under a power of attorney.

9. **Public Act 100-0756: Amendment to Qualifications of Guardians**
(HB4686) – effective 1/1/2019

Amends the Guardians For Adults With Disabilities Article of the Probate Act of 1975. Provides that the court shall not appoint as guardian an employee of an agency that is directly providing residential services to the ward.

10. **Public Act 100-1054: Amendment to Guardianship Visitation Provisions**
(HB4687) – effective 1/1/2019

Amends the Guardians for Adults With Disabilities Article of the Probate Act of 1975. Makes the following changes: (1) deletes language requiring the court to find that the visitation is in the ward's best interests; and (2) provides that the court shall not allow visitation if the court finds

that the ward has capacity to evaluate and communicate decisions regarding visitation and expresses a desire not to have visitation with the petitioner.

11. Public Act 100-0659: Notice of Multiple Guardianships
(HB4867) – effective 1/1/2019

Amends the Guardians for Adults With Disabilities Article of the Probate Act of 1975. Provides that the court may not appoint an individual the guardian of the person or estate of an adult with disabilities before the individual has disclosed to the court the number of adults with disabilities over which the individual is currently appointed as guardian. Provides that if the court determines that an individual is appointed guardian over more than 5 adults with disabilities, then the court shall issue an order directing the circuit court clerk to notify the Guardianship and Advocacy Commission, in a form and manner prescribed by the Commission. Provides that the clerk shall notify the Commission no later than 7 days after the entry of the order. Exempts the Office of the State Guardian and public guardians from the new provisions.

Provides that the Guardianship and Advocacy Commission shall maintain a list of all notifications it receives under the new provisions for reference by other agencies or units of government or the public.

12. Public Act 100-0713: Amends State Treasurer Act Regarding ABLE Accounts
(SB2660) – effective 8/3/2018

Amends the State Treasurer Act. Provides that unless prohibited by federal law, upon the death of a designated beneficiary, proceeds from an ABLE account may be transferred to the estate of a designated beneficiary, or to an account for another eligible individual specified by the designated beneficiary or the estate of the designated beneficiary. Provides that an agency or instrumentality of the State may not seek payment under specified provisions of the federal Internal Revenue Code from the account or its proceeds for benefits provided to a designated beneficiary. Effective immediately.

Also amends the Trusts and Trustees Act. Provides that the court or a person with a disability may irrevocably assign resources of that person to either or both of: (i) an ABLE account; or (ii) a discretionary trust that complies with the Medicaid reimbursement requirements of federal law. Provides that "resources" includes, but is not limited to, any interest in real or personal property, judgment, settlement, annuity, maintenance, minor child support, and support for non-minor children. Provides that assignment is not authorized if otherwise prohibited by law. Provides that a court may reserve the right to determine the amount, duration, or enforcement of the irrevocable assignment.

13. Public Act 100-0922: Exempts ABLE Accounts from Creditors
(SB1246) -

Adds, to the list of personal property that is exempt from judgment, attachment, or distress for rent, funds invested in an ABLE Account as defined by Section 529 of the Internal Revenue Code

ILLINOIS CASE LAW

WILLS

1. *In re* Estate of Lay, 2018 IL App (3d) 170378 (Sept. 28, 2018)

Legatee under a prior will has standing to file a will contest.

Eugene Lay executed his first will since 1979 in January, 2016, the day before he died of cancer. His new will left the entirety of his estate to Delbert Miller, who was also nominated as executor of the estate. The will was signed by two witnesses whose signatures are illegible. Lay's 1979 will had left his estate to his wife, or if she predeceased him, to his wife's siblings, including plaintiff Beverly Ann Bateman Kelton. Lay's wife did predecease him. Kelton timely filed a petition to contest the validity of Lay's 2016 will.

The trial court dismissed Kelton's will contest on the grounds that she was not an interested person under the Probate Act and therefore lacked standing to contest the 2016 will. Kelton appealed.

The appellate court reversed the dismissal. Section 5/1-2.11 of the Probate Act defines "interested person" as "one who has or represents financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative." The appellate court wrote:

> Prior to our supreme court's 2004 decision in *Schlenker*, Illinois law was clear that a legatee under a previously executed will had standing to contest a subsequently executed will as long as the legatee had section 1-2.11's requisite interest in the outcome of the matter. *Schumann*, 2016 IL App (4th) 150844, ¶ 21, 409 Ill.Dec. 153, 67 N.E.3d 365. We do not read *Schlenker* as affecting the clarity of that law.
>
> The question presented in *Schlenker* was whether an *heir* attempting to challenge a will could successfully assert a financial interest in a will contest when multiple wills in which she inherited nothing stood between her and either (1) a will further down the chain in which she *did* have an interest or (2) the interest she had by virtue of intestacy if all of the intervening wills were found invalid. The *Schlenker* majority held that an heir always has a financial interest created by the potential, however tenuous, of the estate eventually passing by intestacy. *Schlenker*, 209 Ill. 2d at 466, 283 Ill.Dec. 707, 808 N.E.2d 995. In reaching its decision, the *Schlenker* majority expressly distinguished the situation of an heir from that of a legatee under a previous will. *Id.* at 465, 283 Ill.Dec. 707, 808 N.E.2d 995. Justice Garman's special concurrence challenged the majority's ultimate conclusion as rendering superfluous the portion of section 1-2.11 that required an affected interest. *Id.* at 467-68, 283 Ill.Dec. 707, 808 N.E.2d 995 (Garman, J., specially concurring). However, because she found, citing well-settled law, that the revocation clause in the most recent will had no effect until the will contest was complete, she concurred in the finding that the particular heir had an interest affected by

> the action. *Id.* at 468–69, 283 Ill.Dec. 707, 808 N.E.2d 995. The majority articulated no disagreement with the legal principles relied upon by Justice Garman.

The appellate court held that Kelton was an "interested person" who had standing to challenge Lay's 201 will, in that "the will contest petitioner, Kelton, has alleged that she was a named beneficiary and successor executor under a will executed by the decedent in 1979 and in effect until the day before his death when he purportedly executed the will that had been admitted to probate.

2. *In re* Estate of Zivin, 2018 IL App (1st) 172883 (Sept. 13, 2018)

"Mutual Last Will and Testament" was not a joint and mutual will that became irrevocable upon the first spouse's death.

The "Mutual Last Will and Testament" executed by decedent and her husband in 1983 was not a joint and mutual will. Thus, dispositions of will, including a considerable bequest to claimant Hebrew University of Jerusalem, did not become irrevocable upon husband's death in 1984. Wife executed a will in 2004 that did not include a bequest to the claimant. The frequent use of "we" and "our" in the will is not sufficient reason to infer that testators intended their will to be irrevocable. While no language in the will specified that surviving spouse maintained the right to revoke the will or otherwise modify its bequests, the will lacked contractual terminology and did not include typical defining characteristics of an irrevocable agreement to provide for ultimate disposition of both of their estates.

3. *In re* Estate of Cerami, 2018 IL App (1st) 172073 (Sept. 28, 2018)

Denial of motion to dismiss renunciation of will was appealable order under Rule 304(a); and limitations period for filing renunciation was tolled due to premarital agreement.

Christina and James Cerami were married for almost 20 years, until James died on January 16, 2013. James was survived by three children from a previous marriage—Salvatore, Lawrence, and Dora Ann. Upon James's death, his son Salvatore was appointed as executor of his estate. James's will was admitted to probate on March 26, 2015.

Christina and James entered into a premarital agreement, pursuant to which, the court wrote:

> the parties waived their claims and interests in various property and assets of the other party and agreed on how to separate their assets in the event of divorce or death. Specifically, James agreed to "name CHRISTINA as the person entitled to receive any survivor benefits to which he is or may be entitled as a result of having an interest in any pension, profitsharing, or retirement plan or account." He also agreed to "maintain a life insurance policy on his life in an unencumbered amount not less than $100,000 naming CHRISTINA the sole beneficiary thereunder so long as the parties remain married." The parties agreed to "file State and Federal tax returns as joint or married filing separate, whichever shall create the lesser total tax liability," and agreed to waive

> certain probate rights, including their rights "to renounce, to elect to take against, or to contest" the other party's will.

After James's death, Christina filed a claim against his estate, seeking compensation for custodial care and damages for James's breaches of their premarital agreement. Christina alleged that she had "not received all that she is entitled to under and/or in accordance with the premarital agreement, including … income earned during marriage and survivor benefits on any pension, profit-sharing, or retirement plan or account."

Three months later, Christina filed an "Amended Claim for Share of Earnings and Benefits Due to Breach/Unenforceability of Premarital Agreement," contending that "James had breached the premarital agreement in a number of ways, including that he failed to name her 'as the person entitled to receive survivor benefits' on his 'pension, profit-sharing or retirement plan or account'; that he filed 'Married Filing Separately' tax returns, despite the fact that filing jointly would have created a lesser tax burden; and that he failed to maintain a life insurance policy, naming her as the sole beneficiary." Christina sought damages for breach of the premarital agreement and requested that the court declare the premarital agreement unenforceable against her.

After extensive litigation on James's breaches of the premarital agreement and what the damages from those breaches might be, the probate court ultimately did declare the entire premarital agreement void. The court reasoned that the premarital agreement could not be enforced to foreclose Christina's marital rights against James's estate when James's had repeatedly breached the agreement, making it illusory as to him. The court's order voiding the premarital agreement, dated September 22, 2016, read as follows:

> The Premarital Agreement dated June 7, 1993 * * * is set aside and is not valid, illusory and void. Any orders arising out of the Premarital Agreement are also vacated. The decedent's spouse, Christina M. Cerami shall be allowed to file for all things allowed by spouses, including but not limited to spouse allowance, statutory share and custodial care claims, renunciation of will. … There is no just reason for delay of enforcement, and this matter is immediately appealable under 304(a).

The executor did not file a postjudgment motion or notice of appeal directed at the September 22, 2016 order.

On January 24, 2017, nearly two years after the admission of James's will to probate, but within seven months of the court's September 22, 2016 order, Christina filed her renunciation of James's will. The executor moved to dismiss Christina's renunciation of the will pursuant to section 2-619(a)(5), contending that Christina's right to renounce the will was "barred by statute of limitations" because, pursuant to section 5/2-8 of the Probate Act (755 ILCS 5/2-8(b)), a renunciation or petition for extension must be filed within seven months after the admission of the will to probate.

Christina argued that the September 22, 2016 order "explicitly allow[ed]" her to renounce the will, and that the Executor had not appealed that order. Christina also argued that she could not file a renunciation sooner because any attempt to "file for a renunciation prior to the September 22, 2016 Order would have been a violation of the Premarital Agreement," and that "therefore, the statute of limitations should be tolled for the period under which CHRISTINA was barred from exercising her right to renunciation."

Based on the explicit language of the court's September 22, 2016 order, the trial court denied the executor's motion to dismiss.

Before addressing the merits of the dismissal, the appellate court had to address its jurisdiction to hear the appeal, as Christina argued that the order denying the executor's motion to dismiss did not "finally determine[ ] a right or status of a party" under Rule 304(b)(1). Rule 304(b)(1) provides:

> (b) Judgments and Orders Appealable Without Special Finding. The following judgments and orders are appealable without the finding required for appeals under paragraph (a) of this rule:
>
> (1) A judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party.

The court wrote, "[o]ur courts have interpreted Rule 304(b)(1) as appropriate to "promote efficiency and the sound and practical administration of estates, guardianships, and other similar types of proceedings" by recognizing that "some issues in those types of lengthy proceedings must be resolved with certainty to avoid having to repeat the entire proceeding over again." "Without the Rule 304(b)(1) exception, an appeal would have to be brought after an estate was closed, the result of which may require reopening the estate and marshalling assets that have already been distributed."

Because the denial of the executor's motion to dismiss finally determined Christina's entitlement to one-third of James's estate, as a renouncing surviving spouse, the court held that the order was immediately appealable under Rule 304(b)(1) and therefore the court had jurisdiction to hear the appeal.

Regarding the executor's motion to dismiss the renunciation as untimely, Christina contended that the timeliness of her renunciation was decided in the September 22, 2016 order, which, despite containing Rule 304(a) language, was not appealed by the executor. Based on its review of the record, the court wrote that it was "abundantly clear that throughout the litigation, the trial court was considering how to deal with James's many breaches of the premarital agreement and, in light of those breaches, whether Christina should be held to her waiver of her probate rights in that agreement." The executor argued that the court had no authority to allow her to renounce the will beyond the 7-month-after-admission-of-will statute of limitations in section 5/2-8(b) of the Probate Act.

The appellate court first noted that the proper time for the executor to have challenged the court's authority to give Christina the right to renounce the will more than seven months after the will was admitted to probate would have been during the hearings leading up to the September 22, 2016, order, or in a timely motion to reconsider or a notice of appeal from that order. The executor could not seek review of that prior order in his appeal of a subsequent order entered in the same case.

The appellate court went on to say that even if the executor could challenge the timeliness issue, it would still affirm the denial of the executor's motion to dismiss. The court cited its own prior cases for the conclusion that the seven-month time period for renunciation is mandatory and is treated as a statute of limitations in Illinois. As such, concepts of equitable estoppel, tolling, and wavier apply. "Equitable tolling of a statute of limitations may be appropriate if the

defendant has actively misled the plaintiff, or if the plaintiff has been prevented from asserting his or her rights in some extraordinary way, or if the plaintiff has mistakenly asserted his or her rights in the wrong forum."

In this case, "a unique set of circumstances … warrant the application of equitable tolling." Christina had explicitly waived her right to file a renunciation pursuant to the parties' premarital agreement, which the Executor contended was valid and prevented her from exercising her probate rights. It was only after the court invalidated the premarital agreement as a whole that Christina was able to file her renunciation. This case is unlike prior cases in which the trial court did not have discretion to extend the statute of limitations, where the surviving spouse had neglect to file on time. Therefore, the executor's motion to dismiss was properly denied.

TRUSTS

1. Ely v. Pivar, 2018 Il App (1st) 170626 (May 24, 2018)

Appellate court lacks jurisdiction to consider Plaintiffs' claims as to dismissal of first amended complaint and order denying leave to file amended complaint.

Plaintiffs filed a complaint naming, among others, Ruth Pivar and Quarles and Brady, LLP, related to five trusts that were created in 1966, alleging various breaches of fiduciary duty by trustees of the trust and legal malpractice. After Quarles and Brady filed a motion to dismiss, Plaintiffs filed a first amended complaint.

At the June 21, 2016 hearing on Quarles and Brady's motion to dismiss the first amended complaint, the trial court dismissed the legal malpractice claim with prejudice, but dismissed the claims for breach of fiduciary duty and conspiracy without prejudice and granted plaintiffs the opportunity to replead with leave of court. The court did not include Rule 304(a) language in its order, and thus it was not an appealable order pursuant to Rule 304(a).

Plaintiffs then sought leave of court to replead by filing a motion to file a second amended complaint. After a hearing on February 6, 2017, the court denied plaintiffs' motion for leave to amend and found that there was "no just reason to delay enforcement or appeal of this order pursuant to Rule 304(a)." Plaintiffs appealed both the June 21, 2016 order and the February 6, 2017 order.

With respect to the June 21, 2016 order, the appellate court wrote that the trial court's judgment disposed of some of the claims in an action involving multiple parties and claims, but did not dispose of all the claims. The order was therefore subject to Rule 304(a), but no Rule 304(a) finding was included in that order. "In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable." Therefore, the appellate court ruled it lacked jurisdiction to hear an appeal of the June 21, 2016 order. The court found it irrelevant that the trial court entered a Rule 304(a) finding on the order entered eight months later, denying Plaintiffs leave to amend the counts that had been dismissed without prejudice. An order denying leave to file amended complaint is not a final judgment, even where circuit court makes a specific Rule 304(a) finding.

The court next considered whether it had jurisdiction to review the court's order of February 6, 2017, denying plaintiffs leave to file a second amended complaint. That order did contain a Rule 304(a) finding. The court held that an order denying leave to file an amended complaint

does not constitute a final judgment, even where the trial court makes a specific 304(a) finding. "[A] court's Rule 304(a) finding cannot transform a nonfinal and nonappealable judgment into final and appealable one for purposes of Rule 304(a), merely by use of the operative finding." Thus, the appellate court lacked jurisdiction to hear an appeal of the February 6, 2017 order as well.

2. Cleland v. Cleland, 2018 IL App (2d) 170949 (August 23, 2018)

Doctrine of election did not apply with multiple choices of benefits; equitable estoppel did not apply when plaintiffs did not have knowledge of prior version of trust.

Four siblings sued two of their siblings and one of their wives, in a complaint arising from their parents' 2012 trust restatements. Count I sought damages for tortious interference with inheritance expectancy, and count II sought rescission of the 2012 restatements based on their father's alleged lack of capacity.

All six siblings were beneficiaries of the trusts pursuant to the 2012 restatements. Two of the children, John and Jerry, were named as co-trustees of the trusts. The provisions in dispute involved John's rights with respect to farmland. If there was no surviving spouse, John would receive a specified 40-acre tract of farmland. The remaining farmland would be held by the trusts for seven years, during which time John had the first option to rent all or part of the farmland. If he rented it, it would be rented on a 50/50 crop share basis between him and the trusts. He also had the first option to buy all or part of the farmland, for 70% of its appraised fair market value. John further had an option to defer the purchase price, allowing him to pay over 10 years. The remaining balance of the estate was to be allocated in shares of equal value to all the surviving children.

After the death of their mother, John and Jerry emailed their siblings, informing them that the "major asset" was the farmland and that William and Louise wanted to make sure that John had the option to live on the farm and continue farming. Their e-mail also noted that William and Louise had some investments and insurance policies, and they estimated that each sibling would eventually get about $30,000 from the estate. The attorney for John and Jerry also sent a letter to the siblings noting that, while the remaining assets were to be divided equally among the siblings, "the trusts would retain sufficient funds to pay expenses, including funeral expenses, trust administration expenses, and farm expenses." In April, 2015, a distribution of $31,200.71 was made by check to each of the six siblings.

Defendants filed a motion to dismiss their siblings' complaint pursuant to 5/2-615 and 5/2-619, arguing that counts I and II "were (1) barred by the doctrine of election and (2) barred by equitable estoppel." Defendants first argued that, under the doctrine of election, any person who voluntarily accepts a distribution under a will or trust is held to ratify and confirm the will or trust. They continued that plaintiffs accepted benefits from the 2012 restatements, in the form of personal property and monetary distributions of $31,200.71, and that their acceptances triggered the doctrine of election, barring both counts. Defendants next argued that counts I and II were barred by equitable estoppel for similar reasons. That is, they argued that plaintiffs had accepted benefits from the 2012 restatements, with knowledge of the trusts' terms, and that they were therefore estopped from challenging those trusts.

Plaintiffs argued that the doctrine of election did not apply to trusts. Moreover, they argued, even if the doctrine of election applied to trusts, an election required either (1) accepting

benefits from the trust and at the same time surrendering some right, claim, or property or (2) retaining the right, claim, or property and rejecting the benefits under the trust. Because defendants had not identified any election between two different benefits, the doctrine of election was inapplicable. Plaintiffs also argued that equitable estoppel was inapplicable because a person may question the validity of a will's provisions, even though that person accepted benefits under the will, if (1) the person lacked full knowledge of relevant facts or (2) the will's provisions are contrary to law or public policy.

In support of their arguments, plaintiffs did not dispute that they received checks in the amount of $31,200.71 and some personal property from Louise's home, but they asserted that they did not have full knowledge of the relevant facts and circumstances of the distributions from the trusts. They argued, in relevant part, that prior to distributing the checks, John and Jerry never disclosed that they were withholding $200,000, never disclosed the distribution of over 640 acres of real estate, and never provided an accounting as to the extent of monies in William's and Louise's trusts. Plaintiffs argued that John and Jerry's representations were false and intended to induce acceptance of the payments. Furthermore, they argued that the benefits they accepted did not depend on the 2012 restatements and that they would have received those same benefits under prior versions of the trusts.

The trial court granted the defendant's motion to dismiss. On the doctrine of election, the trial court agreed with the defendants that the doctrine applied to trusts, which it viewed as wills substitutes. The trial court wrote that "once a beneficiary has accepted a benefit granted by the will, he will be estopped from asserting any claim contrary to the validity of the will." The trial court further found that no exceptions to the doctrine of election applied in this case.

In the alternative, the trial court stated, even if the doctrine of election did not apply to trusts, general principles of equitable estoppel applied. It explained that, where a person accepted some benefit, that person could not then challenge the validity of the thing that conferred the benefit, including a trust. Because it determined that plaintiffs accepted distributions knowing the terms of the 2012 restatements, they could not challenge the trusts

On plaintiffs' appeal, the appellate court explained the doctrine of election and the theory of equitable estoppel in detail, noting that several prior cases have confused the two. The appellate court agreed with the plaintiffs that the doctrine of election did not apply in this case. The court wrote:

> "Properly understood, the doctrine of election is triggered in the context of wills only when there are two different benefits to which a person is entitled, the testator did not intend the beneficiary to take both benefits, and allowing the beneficiary to claim both would be inequitable to others having claims upon the same property or fund." (citing *In re Estate of Boyar*, 2013 IL 113655).
>
> It is "indispensable to the application of the doctrine of election, that there be, first, a plurality of gifts or two inconsistent or alternative rights or claims in property devised, the choice of one by the devisee being intended to exclude him from the benefit of the other." The supreme court has explained that the doctrine consistently involves the following choice for a devisee or legatee: (1) accepting benefits under a will and surrendering some claim, right, or property that the will undertook to

> dispose of or (2) retaining such a claim, right, or property and rejecting the provisions made by the will.
>
> * * *
>
> Our supreme court has also made clear that, even where the doctrine of election is triggered, the doctrine is not absolute. Acceptance of a benefit does not preclude someone from contending that the will contravenes law or public policy. Furthermore, the doctrine will not prevent a subsequent assertion of rights if a person made an election without full knowledge of material facts, including the contents of the will and the circumstances of its execution, and later became cognizant of those facts.

In this case, the circuit court did not identify any right, claim, or property that William and Louise intended for plaintiffs to forgo or relinquish in order to accept a monetary distribution from their trusts, and the record does not support that there was any such choice between two or more benefits for plaintiffs to make. Plaintiffs were not choosing between two or more exclusive benefits devised by their parents; they were simply accepting a benefit to which they were entitled, and therefore the doctrine of election has no application. The appellate court went on to say, "we need not decide whether the trusts were will substitutes, or whether the doctrine of election extends to trusts, because no election existed to trigger the doctrine."

Referring to case law cited by the defendants, the appellate court explained that the cases of *Kyker v. Kyker*, 117 Ill. App. 3d 547 (1983), *In re Estate of Joffe*, 143 Ill. App. 3d 438 (1986), and *In re Estate of King*, 245 Ill. App. 3d 1088 (1993) had all discussed the doctrine of election "in name only," but did not substantively analyze the doctrine as described by the supreme court in *Boyar*. Rather, those cases were applying the general doctrine of equitable estoppel. The appellate court held that the trial court erred in dismissing plaintiffs' complaint pursuant to the doctrine of election.

Moving on to equitable estoppel, the court starting by recognizing that there was "no dispute that plaintiffs accepted benefits from the trusts when they accepted monetary distributions." However, count I of the complaint did not contest the trust documents, but rather alleged tortious interference with an inheritance expectancy. It has been made clear that a will contest, or a trust contest, "is distinct from a tort action for intentional interference with testamentary expectancy," wherein the defendant would be liable for the loss and the documents would not be set aside. Therefore, the trial court erred in applying equitable estoppel to the count for tortious interference.

Regarding the trust contest contained in count II of the complaint, the appellate court starting by stating that the doctrine of equitable estoppel did apply. However, the court then discussed the "two well-recognized exceptions to the estoppel principal":

> First, estoppel does not apply where the acceptance of a benefit was made without full knowledge of the relevant facts and circumstances, including the contents of the will or trust and the circumstances surrounding the instrument's execution, or where the acceptance of a benefit was procured or induced by fraud or mistake. Second, a person who accepts benefits under a will or trust is not precluded from questioning the validity of any provisions that are contrary to law or public policy.

Plaintiffs argued that, by withholding information about trust provisions and accountings of the trust funds, John and Jerry intended to induce plaintiffs to accept the monetary distributions of $31,200.71, so that plaintiffs would be precluded from challenging the trusts later. Plaintiffs argue that they relied on John and Jerry's representations and that they were damaged when precluded from challenging the trusts.

The appellate court expressed concern about the plaintiffs' full knowledge of the relevant facts and circumstances surrounding the provisions of the 2012 restatements and the circumstances of their execution. Plaintiffs had never seen the prior versions of the trust before accepting their distributions. "Without knowledge that the substantive provisions of the trusts had changed to their detriment before they accepted the $31,200.71 disbursements, plaintiffs had no reason to challenge the trust instruments and decline the monetary distributions." Noting that "equitable estoppel is grounded in principals of fairness," the appellate court held that "it was error to dismiss count II under principles of equitable estoppel when plaintiffs did not have reason to suspect that they were harmed by the 2012 restatements prior to accepting the benefits."

EXECUTORS, ADMINISTRATORS, AND TRUSTEES

1. <u>Doermer v. Oxford Financial Group, Ltd.</u>, 884 F.3d 643 (7th Cir. 2018) (Mar. 7, 2018)

One co-trustee could not bring suit on behalf of trust without the consent of at least one other co-trustee.

Richard Doermer sued his sister Kathryn's financial advisor for allegedly giving her negligent advice that caused her to mismanage a family trust, of which they are the two beneficiaries, as well as two of the three trustees. Richard, a citizen of Illinois, sued Oxford in state court in Illinois. Oxford, a citizen of Indiana, removed to federal court, invoking diversity jurisdiction, and then moved to dismiss the case on the basis that Richard lacks the capacity to bring suit on behalf of the trust under state law.

Richard objected to removal on two grounds—that he had named Kathryn (also a citizen of Indiana) as an "involuntary plaintiff," so that there were Indiana citizens on both sides of the litigation; and that the "real party in interest" is the trust, which takes its citizenship from that of both trustees, so that (again, in his view) there were Indiana citizens on both sides of the litigation. The Seventh Circuit rejected both of Richard's arguments regarding diversity jurisdiction.

First, the court noted that joinder of parties is a procedural matter governed by federal law in federal courts, and that law doesn't permit a plaintiff to compel another party to join the litigation as an involuntary plaintiff. Nothing in Fed. R. Civ. P. 19 would allow Richard to join Kathryn as a party, and, to the extent that the issue is one of capacity rather than joinder, state law also would not permit him to make her a plaintiff involuntarily.

On the second issue, Richard fared no better. Traditional trusts like the one involved here cannot sue or be sued in their own name, so they are not "real parties in interest." Litigation involving such trusts must be brought by or against the individual trustees. So, even though Richard claimed to be suing on behalf of the trust, his citizenship was all that mattered, and it was diverse from that of the advisor.

On Oxford's motion to dismiss, Oxford argued that South Dakota's law should apply because the trust agreement provided that it is governed by South Dakota law. Richard argued for the application of Illinois law, the law of the forum state. The court noted that the outcome would be the same under the laws of either state.

The court held that Richard, as co-trustee and beneficiary of said trust, lacked capacity to bring the lawsuit. Both Illinois law, at 760 ILCS 5/10, and the trust agreement, require consent of a majority of trustees to act on behalf of a trust. Richard's attempt to make his sister an "involuntary plaintiff" was not based in law. Moreover, Richard, as trust beneficiary, could not sue a third party on behalf of the trust.

DIVORCE

1. *In re* Marriage of Larocque, 2018 IL App (2d) 160973 (Sept. 28, 2018)

Assets transferred to irrevocable trusts for estate planning purposes were not subject to distribution by the divorce court.

John and Janet Larocque were married in 1985. During the marriage, John amassed substantial wealth for the family through his efforts as a trader and investor. The parties divorced in 2014. They had a large marital estate, ultimately valued by the trial court at more than $21 million. However, the parties disputed whether the assets held in certain irrevocable trusts were also part of their marital estate.

In the mid-2000s, according to the opinion, John retained counsel for the purpose of creating a comprehensive family estate plan. Over the ensuing years, he and Janet established and funded numerous irrevocable trusts, and engaged in loan, sale, and swap transactions with the trusts. Although Janet signed documents relating to the trusts, and several federal gift tax returns, she denied knowing any of the details of the estate plan or being involved in the planning process. It was undisputed that the parties' children and further descendants will ultimately reap substantial tax benefits from this estate plan. The problem from Janet's perspective, however, was that John's estate-planning techniques substantially reduced the size of their marital estate for purposes of these divorce proceedings. Janet thus accused John of "divorce planning."

Janet insisted that it was not until discovery in this case that she learned of "the extent of the trust work John had engaged in during the course of the marriage," and that she "never signed those documents knowing the nature of what she was signing." She also discovered that she would be excluded as a beneficiary of some of the trusts in the event of a divorce from John. The court noted, however, that John would also be so excluded from the trusts of which Janet was the grantor.

John filed a motion for summary judgment related to the trusts, arguing that all of the property that was contributed to the trusts over the years was transferred by him or Janet irrevocably and with donative intent. The trial court granted John's motion. The trial court determined that the trusts at issue were "separate legal entities," in the sense that "neither party has a property interest in those trusts," and that "neither the trusts nor their assets [were] includable in the parties' marital estate or in either party's nonmarital estate." In the course of explaining its ruling, the trial court emphasized that the trusts were not illusory in form, given that they were all created by written agreements. Janet's failure to read documents before signing them was no defense. The trial court likewise determined that the trusts were not illusory in substance, because lending is a common and proper

purpose of such trusts and John repaid his loans. There was also no indication that the trusts had lost money or that the trustees had breached their fiduciary duties.

The trial court stressed that its ruling did not preclude Janet from subsequently arguing at trial that, by creating these trusts, John nevertheless committed dissipation or fraud against Janet. One of Janet's contentions during trial was that John depleted the marital estate over the course of many years by transferring large sums of money to the irrevocable trusts. The trial court entered its judgment for dissolution of marriage on November 1, 2016, rejecting Janet's argument that the trusts were part of a "divorce-planning scheme" designed to harm the marital estate. The court divided the approximate $21 million marital estate equally between John and Janet.

The appellate court affirmed the granting of John's summary judgment motion regarding the trusts, finding that "John demonstrated that the trusts were funded as part of a comprehensive estate plan designed to provide an orderly disposition of property upon the parties' deaths while minimizing exposure to estate taxation." The appellate court also wrote that Janet's "professed ignorance" regarding the documents she signed was correctly determined by the trial court not to be a defense. The appellate court also noted that, "the estate-planning process in this case was put into motion approximately six years before Janet claimed the marriage started to break down and nine years before she petitioned to dissolve the marriage." Moreover, the transactions between John and the trusts were, according to an affidavit of John's attorney, normal "features of grantor trusts," such as the power to lend to the grantor without adequate security and the power of the grantor to substitute property of an equivalent value. The appellate court held that this was not even a case of distinguishing between martial and nonmarital property, but that the assets in the trust were not even before the divorce court in the first instance and therefore not subject to distribution.

Regarding Janet's argument that John depleted the marital estate by transfers to the irrevocable trusts, the appellate court began by explaining that Janet was directing this argument toward the trial court's factual findings, and employed a manifest-weight-of-the-evidence standard on review. The appellate court wrote that "the court indeed allowed Janet to advance her depletion theory, and the court provided compelling reasons for rejecting that theory, based on the facts presented at trial." Moreover, the court wrote, "given that the [trial] court cited Janet's signature on the gift-tax returns as one of its reasons for rejecting her depletion theory, it seems that the [trial] court did not find Janet's claims of lack of knowledge of the trusts to be entirely credible." The appellate court concluded that there was no evidence that John contributed unusual amounts of money to the irrevocable trusts in anticipation of imminent divorce proceedings.

Finally, regarding Janet's separate argument regarding "dissipation" (as opposed to "depletion"), the appellate court again framed this as a factual determination to be review under a manifest-weight-of-the-evidence standard. "Dissipation" means the "use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage is undergoing an irreconcilable breakdown." The trial had made a finding that the parties' marriage began to undergo an irretrievable breakdown on February 1, 2014, despite Janet's argument and proffered evidence for an earlier date. The appellate court would not disturb the trial's court's finding regarding the date of the irretrievable breakdown of the marriage in light of the conflicting evidence, and also affirmed the trial court's ruling that John had not dissipated the marital estate in anticipation of divorce.

2. <u>Hebert v. Cunningham</u>, 2018 IL App (1st) 172135 (December 28, 2018)

Named beneficiary under ERISA plan subject to state law claim for benefits.

In *Herbert*, the decedent's ex-spouse sought to claim ownership of the decedent's 401(k) plan account after the decedent's employer and 401(k) plan trustee distributed the 401(k) plan funds

to the estate. It was the opinion of the executor and the employer-trustee of the 401(k) plan that the account should pass to the decedent's estate based on the divorce agreement. However, because the decedent did not take steps after his divorce to remove his ex-spouse as the designated beneficiary of his 401(k) plan, the ex-spouse objected. Her claim was based on the Employee Retirement Income Security Act of 1974 ("ERISA"), which mandates that plan administrators and trustees distribute one's plan account to the beneficiary or beneficiaries who are named at the time of the owner's death.

The employer removed the case to the federal district court for the Northern District of Illinois, which ruled that under ERISA the decedent's ex-spouse remained the proper beneficiary under the plan. However, the federal court proceeded to note the executor's alternative contention that, even if Betty was the proper beneficiary under ERISA, she "may only hold the proceeds as constructive trustee for the benefit of the estate because claiming the 401(k) fund is a violation of the divorce decree…." The federal court noted that the United States Supreme Court's decision in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 555 U.S. 285 (2009) "left open the question whether a common law waiver has any effect on what should happen after the funds are distributed to the designated beneficiary." The federal court recognized that the issue had since been "resolved in this circuit by *N.L.R.B. v. HH3 Trucking, Inc.*, 755 F.3d 468, 470-71 (7th Cir. 2014), holding that plan benefits, once paid to the beneficiary, are subject to legal process such as attachment or garnishment."

Back in the Illinois court then, the executor filed a complaint containing two counts: a count for declaratory judgment and a count for breach of the divorce decree. Both counts were premised on allegations that, under the divorce decree, Betty's beneficial interest in the 401(k) account was "assigned, relinquished, waived, released, quitclaimed and/or disclaimed" to the decedent's estate, that the estate "retained sole ownership, property rights and interest in the 401(k) Funds," and that Betty was "estopped from claiming any beneficial interest in the 401(k) funds."

The executor filed a motion for summary judgment, which the trial court granted, noting that the federal court "specifically declined to assume supplemental jurisdiction over the state claims, including the Executor's counterclaim for a declaratory judgment."

The appellate court affirmed the granting of the executor's motion for summary judgment, finding that the decedent's spouse relinquished her right to retain the 401(k) benefit in the divorce decree. The divorce decree contained a very broad release provision in which both spouses forever relinquished, released, waived and quit claimed "all property rights and claims that he/she now has or may hereafter have." The divorce decree also contained a more specific provision providing that each party was to "retain sole ownership of (his/her) separate retirement assets, free and clear from any claim by the other party." The divorce settlement agreement went on to explicitly name the retirement assets each party was to keep, including the 401(k) plan account subject to the litigation.

The appellate court held that, under the explicit language of the divorce decree, the decedent's spouse waived her interest in the 401(k) account, that the 401(k) beneficiary designation to the ex-spouse was effectively nullified, and the 401(k) plan funds were properly distributed to the decedent's estate.

ELDER ABUSE AND NEGLECT

1. ***In re* Estate of Lewy; Dudley v. Ind. Aministrator**, 2018 IL App (1st) 172552

Person convicted of misdemeanor battery is not barred from seeking *quantum meruit* claim for caretaking services.

Lisa Dudley was charged with charged with committing felony criminal neglect of an elderly person, felony aggravated domestic battery, felony assault with battery of a senior citizen, and misdemeanor battery against 88-year old Alice Lewy in her home. Dudley entered into a guilty plea agreement as to the misdemeanor battery charge, and all three of the felony charges were dismissed as part of the plea agreement.

The trial court ruled that the Elder Abuse and Neglect Act (755 ILCS 5/2-6.2(b)) barred Dudley's claim for compensation from the estate of Alice Lewy, because Dudley entered into a guilty plea agreement as to the misdemeanor battery charge. Section 5/2-6.2(b) of the Act provides as follows:

> (b) Persons convicted of financial exploitation, abuse, or neglect of an elderly person or a person with a disability or persons who have been found by a preponderance of the evidence to be civilly liable for financial exploitation shall not receive any property, benefit, or other interest by reason of the death of that elderly person or person with a disability, whether as heir, legatee, beneficiary, survivor, appointee, claimant under Section 18-1.1, or in any other capacity and whether the property, benefit, or other interest passes pursuant to any form of title registration, testamentary or nontestamentary instrument, intestacy, renunciation, or any other circumstance.

Dudley argued on appeal that the trial court erred because the phrase "by reason of the death" limits the scope of the statute to claims *that arise* by reason of the abused person's death, *e.g.*, the claims of heirs and surviving joint tenants, but that Dudley's *quantum meruit* claim was not triggered by Lewy's death and could have been filed during Lewy's lifetime.

The appellate court did not even address Dudley's argument, finding that the misdemeanor conviction did not fall within the scope of the Act. Although section 5/2-6.2(b) provides that it applies to persons convicted of "financial exploitation, abuse, or neglect," for purposes of the Act those terms are defined in section 5/6-2(a). "Abuse" is defined as "any offense described in Section 12-21 or subsection (b) of Section 12-4.4a of the Criminal Code of 1961 or the Criminal Code of 2012." "Neglect" is defined as "any offense described in Section 12-19 or subsection (a) of Section 12-4.4a of the Criminal Code of 1961 or the Criminal Code of 2012." The court wrote, "[r]eading the plain language as written, the legislature intended to narrow the application of the Act to persons who have been convicted of a specific offense that is described and outlawed in one of the two specified criminal statutes."

Sections 12-19 and 12-21 of the Criminal Code was repealed effective July 1, 2011. Section 12-4.4a(a) of the Criminal Code (which applies to abuse or criminal neglect of a long term care facility resident and presumably would not apply), and section 12-4.4b of the Criminal Code are both felonies. The offense on which Dudley was convicted was battery in violation of section 12-3 of the Criminal Code, a misdemeanor. Therefore, the court held that the plain language of

the Elder Abuse and Neglect Act did not encompass Dudley's conviction and reversed dismissal of her *quantum meruit* claim.

GUARDIANSHIP

1. ***In re*** **Estate of Inez Rivera, 2018 IL App (1st) 171214 (June 21, 2018)**

Amendment to the estate plan of a disabled ward that deviates from intestacy is allowed by the Probate Act.

In *Rivera*, the appellate court was asked to decide whether a guardian's proposed amendment of a disabled adult's estate plan could deviate from intestacy. The ward was 23 years old and permanently and profoundly disabled by birth injuries, and, because of physical and cognitive delays, never had testamentary capacity, never married, and never had or adopted children. The ward was a recipient of a $12 million personal injury settlement.

Section 11a-18(a-5) of the Probate Act provides that the probate court, upon petition of a guardian, other than the guardian of a minor, and after notice to all other persons interested as the court directs, may authorize the guardian to exercise any or all powers over the estate and business affairs of the ward that the ward could exercise if present and not under disability. The ward's initial estate plan followed intestacy and benefited both parents and all full and half siblings in equal shares. The guardian filed a verified petition seeking amendment of the estate plan for Inez, which would exclude Inez's father and eight paternal half-siblings and benefit Inez's mother, sister, and three maternal half-siblings. Inez's father had the eight half-siblings with four different women, two of whom were born before her father met Inez's mother. The record indicated that neither Inez's father nor any of the eight half-siblings had visited Inez until motivated by the possibility of disinheritance.

The court, applying *Howell v. Howell*, 2015 IL App (1st) 133247, modified the plan, holding that a preponderance of the evidence indicated that it was in the ward's best interest to deviate from intestacy in favor of those family members who had a consistent and loving relationship with the ward and to exclude those family members who did not. The appellants argued that it was error to allow the amendment to the estate plan because the Probate Act does not specifically authorize amending a trust to deviate from intestacy, and that even if it did, the court should have applied a clear and convincing standard in determining the ward's best interests.

The guardian argued that clause section 11a-18(a-5)(11) provides that the ward's wishes, as best they can be ascertained, shall be carried out, whether or not tax savings are involved. The court agreed with the guardian, holding that the guardian of an estate is obligated to propose to the court an estate plan that includes as beneficiaries only individuals whom the guardian has reason to believe the ward would choose to include, if the ward was present and not under disability. The court reasoned that the Probate Act empowers and obligates an estate guardian to amend a disabled adult ward's estate plan when material circumstances change and an existing plan, whether it be an original or amended version, is no longer in the ward's best interests due to a change in circumstances.

FRAUDULENT TRANSFERS

1. Pluciennik v. Vandenberg, 2018 IL App (3d) 160726 (June 20, 2018)

Net equity in real estate is an "asset" of a debtor under the Fraudulent Transfer Act.

In Pluciennik, plaintiffs sought to invalidate certain transfers of commercial property owned by companies owned and managed by defendant Mark Vandenberg. The defendant's companies had borrowed money from the plaintiffs, among others, for various construction projects and became unable to repay their debts.

In a series of similar transactions, several LLC's owned by the defendant sold parcels of real estate to other LLC's, owned by trusts for the benefit of Vandenberg's two daughters. The sales were all at a price that was less than the debt secured by the respective property, and in each case the third-party lender agreed to accept the greater of the purchase price or the amount of the debt in exchange for a complete release of the security interest. The selling companies received no net proceeds from any of the sales.

Plaintiffs filed suit, alleging a violation of the Illinois Uniform Fraudulent Transfer Act. The Act provides relief to creditors against the fraudulent transfer of assets by debtors. It prevents debtors from defrauding their creditors by moving "assets" out of reach "with actual intent to hinder, delay or defraud any creditor of the debtor." The Act defines a "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset."

Under the Act, an "asset" is "property of a debtor, but the term does not include: (1) property to the extent it is encumbered by a valid lien." The defendant claimed the Act was not available to avoid the sales because the properties were encumbered by mortgage loans greater than the value of the properties and, therefore, were not "assets" of the debtor as defined in the Act. The defendant submitted several affidavits stating that the real estate was worth less than the loans they secured.

The court held that "[u]nder the plain meaning of the statute, the value of the property in excess of a valid lien encumbering the property is an asset." The court further held that none of the "self-serving" evidence submitted by defendant established the fair market value of the property. Consequently, it was unknown whether the properties were fully encumbered and might possess some value in excess of the value of the liens. The court sent the case back to the trial court for further proceedings to determine the fair market value of the transferred properties.

ATTORNEYS

1. Illinois State Bar Association Mutual Insurance Company v. Leighton Legal Group, LLC, 2018 IL App (4th) 170548 (May 22, 2018)

Insurer has no duty to defend intentional misconduct by attorney.

Plaintiffs, Carol McClure and Cynthia McClure, had filed a complaint in the District of Columbia against attorney G. Timothy Leighton (and the Leighton Legal Group, LLC), who served as co-

trustee of a trust of which plaintiffs were remainder beneficiaries, alleging that the attorney engaged in willful misconduct.

ISBA Mutual, the attorney's professional liability insurer, filed an action for declaratory judgment contending that it had no duty to defend because the attorney's actions constituted intentional conduct and was excluded from coverage. The trial court found that the insurer did have a duty to defend under the terms of the policy, and ISBA Mutual appealed. The appellate court reversed, finding that the attorney's conduct, as alleged in the underlying complaint, was excluded from coverage because the allegations were those of willful misconduct.

The professional liability policy provided coverage for "any actual or alleged negligent act, error, or omission in the rendering of or failure to render professional services," including conduct as a trustee, but it explicitly excluded from coverage any claim "arising out of any criminal, dishonest, fraudulent or intentional act or omission."

Joseph McClure died on July 11, 1995, leaving a trust providing a lifetime income interest for his brother, Cecil McClure, with remainder to a charity and to Cecil's children, the plaintiffs in the underlying action. Joseph's will provided that after satisfying specific bequests, the remainder of his property should be sold. The Joseph McClure Trust had specific provisions for nomination of trustees, designation of beneficiaries, use of a qualified financial institution to co-manage the trust, and instructions for distribution of the trust corpus to the remainder beneficiaries.

After Joseph's death, defendant Leighton drafted the Cecil O. McClure Irrevocable Trust and attempted to unlawfully "decant" the Joseph McClure Trust by transferring Joseph's property to the Cecil McClure Trust. The Cecil McClure Trust contained key differences from the Joseph McClure Trust, such as (1) including an *in terrorem* clause, (2) eliminating the requirement to use a qualified financial institution as a co-trustee, (3) appointing the insured as a co-trustee, and (4) eliminating the requirement to sell Joseph's property. Joseph's property had not been sold, and the Cecil McClure Trust continued to hold real estate.

After Cecil's death, Leighton told the plaintiffs that the remainder beneficiaries would receive quarterly income distributions. Plaintiffs requested the trust corpus be liquidated and the proceeds distributed to the remainder beneficiaries. The complaint asserted that the Leighton denied this request because the real estate market was poor and because plaintiffs were not entitled to any distribution of trust corpus. Instead, Leighton continued to administer the Cecil McClure Trust and give quarterly income distributions.

Plaintiffs alleged that Leighton created a "self-compensation scheme" by eliminating the requirement to use a qualified financial institution as a co-trustee and appointing himself as a co-trustee, and that thereafter Leighton and others collected excessive fees while managing the trust.

The court wrote, "[t]hroughout the underlying complaint, plaintiffs alleged willful conduct by the insured," with allegations as follows: (1) the insured "*willfully* refused to distribute the remaining trust assets;" (2) self-dealing by the insured, by refusing to liquidate the trust corpus "in order to perpetuate [his] self-compensation *scheme*;" (3) the insured "*willfully* misinformed the plaintiffs in bad faith that they were not entitled to distribution of the trust corpus;" (4) the insured "committed breach of trust by *willfully* disregarding the termination provision of the trust and refusing to distribute the trust assets;" and (5) the insured as trustee "*willfully* committed [a]

serious breach of trust in failing to fulfill [his] fiduciary duties." 2018 IL App (4th) at ¶ 17 (emphasis in original).

Leighton argued that an insurer has a duty to defend against an underlying complaint if the "allegations fall within, *or potentially within*, the policy's coverage." Leighton contended that "to the extent that the allegations have any merit, they are much more likely to be the result of mere negligence," and therefore ISBA Mutual had a duty to defend.

The court stated that the construction generally afforded to intentional act exclusions is to deny coverage where the insured has (1) intended to act and (2) specifically intended to harm a third party. In discussing the element of intent, the court noted that "[t]he word 'intent' for purposes of exclusionary clauses in insurance policies denotes that the actor desires to cause the consequences of his action or believes that the consequences are substantially certain to result from it." 2018 IL App (4th) 170548 at ¶ 48.

Noting that the insurer may refuse to defend only if it is clear from the face of the underlying complaint that the allegations fail to state facts that bring the cause within — or potentially within — coverage, the appellate court agreed with the insurer that it had no duty to defend because the alleged actions were "dishonest, intentional, and fraudulent and therefore excluded from coverage." The court explained that phrases in the underlying complaint such as mislead, conceal, scheme, deceive, intentionally, or willfully are the "paradigm of intentional conduct and the antithesis of negligent actions," so that the alleged conduct could not be the result of mere professional negligence, but was intentional conduct. As a result, the insurer did not have a duty to defend.

2. <u>Donkle v. Lind</u>, 2018 IL App (1st) 171915 (June 28, 2018)

Attorney does not owe a duty to a client represented in a fiduciary capacity in the client's individual capacity.

Plaintiff Michele Donkle filed a complaint for legal malpractice, alleging that defendant attorney owed her a duty to inform her of a claim for caretaking services she had against her mother's estate during course of defendant's representation of her in a lawsuit filed by Michele's sister. Defendant filed a motion to dismiss under 5/2-619(a) on the basis that he represented plaintiff only in her capacity as trustee of her mother's trust, and did not represent her in her individual capacity, and thus defendant had no duty to inform plaintiff of her individual claim against her mother's estate.

The trial court granted the attorney's motion to dismiss. In plaintiff's amended complaint, she acknowledged that "[t]he allegations of the underlying Chancery Action related to Plaintiff's conduct of her duties as the Successor Trustee and Executor of Louise Pranno's will. Specifically, Plaintiff's sister alleged that Plaintiff improperly distributed the assets of the Estate and otherwise was committing waste as to the Estate property." Nevertheless, plaintiff argued that "[d]efendants, in effect, undertook to represent Plaintiff in the defense of the Chancery Action both in Plaintiff's capacity as Trustee and in Plaintiff's individual capacity." The underlying complaint named plaintiff as a defendant only in her fiduciary capacity.

In addition, the engagement letter prepared by the attorney and his firm specifically referred to Michele as trustee, and the appearance in the matter on her behalf specifically referred to Michele as trustee.

The appellate court unanimously affirmed the dismissal of the plaintiff's complaint against the attorney and his firm. The Court agreed with the defendant's arguments that the scope of the attorney's engagement as counsel for the plaintiff in her capacity as trustee of the trust did not impose a duty on the attorney to provide the plaintiff with any legal advice or services about a claim the plaintiff could assert to recover compensation from the trust in her individual capacity. The record established that the plaintiff as trustee was the attorney's client and therefore, the attorney did not owe the plaintiff any duties regarding claims she could assert as an individual, distinct from her role as trustee. The court wrote, "plaintiff is attempting to have this court impose a requirement for an attorney to inform a nonclient about potential claims that the nonclient has, to the detriment of its client, no less."

After the court determined that the trial court was correct in finding that plaintiff was not defendant's client in her individual capacity, the court declined to address defendant's alternative argument that requiring them to advise plaintiff of her claim under the Probate Act would have resulted in a conflict of interest that would have violated the Rules of Professional Conduct.

3. Nichols v. Fahrenkamp, 2018 IL App (5th) 160316 (July 9, 2018)

GAL is not entitled to quasi-judicial immunity from negligence suit by ward.

Nichols involved a personal injury settlement for a plaintiff when she was a minor. The plaintiff's mother was appointed as the guardian of her person and her estate, and the court was required to approve any disbursements of the settlement fund until the plaintiff turned eighteen. The court also appointed a guardian *ad litem*. Over the next few years, the mother made requests for disbursements to pay for expenses related to the minor, the guardian *ad litem* recommended approval of several of these requests, and the probate court approved the disbursements.

After she turned eighteen, the plaintiff claimed that her mother dissipated the settlement funds, essentially by lying in the disbursement requests about what the money would be used for or how much was needed. The plaintiff sued her mother, but did not recover everything she thought she should, largely because the court would not reexamine or go behind the probate court orders approving each disbursement. Plaintiff did not appeal that decision but sued the guardian *ad litem* for negligence.

The guardian *ad litem* moved for summary judgment, arguing he was subject to quasi-judicial immunity as an agent of the court. Appellate courts for the First and Second District have each held that a "child representative" in divorce or custody proceedings (who performs more functions than a guardian *ad litem* in such proceedings) is entitled to quasi-judicial immunity. The trial court followed these and other decisions to find that the immunity applied. The plaintiff appealed.

On appeal, a divided panel of the appellate court reversed, finding guardians *ad litem* may have immunity in divorce or custody proceedings, but not in probate proceedings. The Appellate Court held that the guardian *ad litem* "owed a duty to plaintiff to render advice and to protect plaintiff's assets and interests arising out of the underlying personal injury settlement." This meant that the guardian *ad litem* "had a duty to act as an advocate on behalf of plaintiff." In light of this duty, summary judgment was inappropriate because a question of fact remained as to whether the guardian *ad litem* "fulfill[ed] his role as plaintiff's advisor, advocate, negotiator, or evaluator."

The Appellate Court distinguished a probate guardian *ad litem* from guardians *ad litem* in dissolution of marriage and child custody proceedings, writing that the guardian *ad litem* in this case "was not simply a neutral party…. [He] was a licensed attorney, an officer of the court, who should have understood the need to protect the assets of his ward," and he had a duty "independent of merely acting as an arm of the court." Further, relying on *Vlastelica v. Brend*, 2011 IL App (1st) 102587, the appellate court explained that the only rationale for immunity in divorce and child custody proceedings was to allow guardians *ad litem* to fulfill their obligations without worry of harassment or intimidation from dissatisfied parents—and this rationale did not apply in this case.

A dissenting opinion argued that the majority's determination that the guardian *ad litem* was not entitled to qualified or absolute immunity "runs contrary both to sound authority and is impractical in practice in our trial courts." The dissent believed the majority's decision would have adverse consequences to the effective administration of justice, such as requiring trial judges "to provide specificity in directions to the guardian *ad litem*, which may or may not be effective, may or may not cover the factual situation at issue, and may very likely be premature in the development of the litigation in which the guardian *ad litem* is acting, since the guardian *ad litem*'s appointment would likely be early in the litigation and prior to development of facts and issues;" and imposing upon the guardian *ad litem* "duties and requirements, not well defined," increasing the likelihood "that future guardians *ad litem* be blindsided by duties not specific or implied in the trial judge's appointment and subsequent orders," and deterring attorneys from accepting appointments to be guardians *ad litem*.

Following the appellate court's decision here, the guardian *ad litem* petitioned the Illinois Supreme Court to hear the case, which agreed to do so. Oral argument was heard on March 13, 2019.

4. <u>Johnson v. Filler</u>, 2018 IL App (2d) 170923 (August 2, 2018)

Dismissal of action against attorney for aiding and abetting tortious interference was proper where allegations do not show attorney knew of tortious interference and substantially assisted it.

After death of their father, three adult children filed probate action against their two siblings, an accountant, and an attorney, contesting will and trust of their father and asserting other civil claims. One of the claims was for aiding and abetting tortious interference with inheritance expectancy, which was filed by one of the children, Steven, against the attorney Filler, who prepared the will and trust that were the subject of the probate action. Following a settlement between the siblings in the probate action, the trial court dismissed Steven's claim against Filler. Steven appealed.

Lawrence and Ruth Johnson had each owned a one-half interest as tenants in common in 410 acres of farmland in McHenry County, which they had titled in a trust. A 116-acre parcel was known as the "Home Farm." In Ruth's trust, she granted a life estate in her one-half interest in the farmland to Lawrence, with a remainder in her interest in the Home Farm to Steven and a remainder in her interest in the remaining farm property to all siblings equally. Ruth named Lawrence and one of her children, Carolyn, as co-trustees.

Lawrence's will gave his estate equally to four of his children, excluding Steven. Lawrence executed a quitclaim deed, prepared by Filler, of his one-half interest in the Home Farm to his grandson James (Carolyn's son). At about the same time, Lawrence attempted to sell Ruth's

one-half interest in the Home Farm, conveyed under Ruth's trust, to James. Filler wrote to Lawrence's son Larry and his attorney that there had been a *bona fide* appraisal of Ruth's one-half interest in the Home Farm, and that the trust document authorized the co-trustees to sell it.

Steven's third amended complaint included a claim against Filler for aiding and abetting Carolyn's tortious interference with inheritance expectancy. Specifically, Steven alleged that Carolyn tortiously interfered with his inheritance expectancy by exerting undue influence over Lawrence, causing Lawrence to (1) convey his one-half interest in the Home Farm to James, (2) execute the 2013 will that disinherited Steven, and (3) attempt to sell Ruth's interest in the Home Farm to James. Steven alleged that Filler aided and abetted Carolyn's tortious interference with his inheritance by (1) drafting the 2013 will, (2) preparing the quitclaim deed granting Lawrence's one-half interest in the Home Farm to James, and (3) preparing the paperwork related to the attempt to sell Ruth's one-half interest in the Home Farm to James.

The trial court granted Filler's motion to dismiss under 5/2-615, and the appellate court affirmed the dismissal. "In order to state a claim for aiding and abetting, a plaintiff must allege the following: (1) the party whom the defendant aided performed a wrongful act that caused an injury; (2) the defendant was generally aware of his role as part of the overall or tortious activity when he provided the assistance; and (3) the defendant knowingly and substantially assisted the principal violation."

Steven's complaint alleged that Filler "(1) knew that Lawrence was "susceptible" to undue influence, (2) "should have known" that the conveyance of Lawrence's share in the Home Farm to James was "presumptively fraudulent," and (3) "should have made a reasonable and good faith determination as to whether Carolyn was unduly influencing Lawrence."

The court held that Steven's claim for aiding and abetting tortious interference failed to state a cause of action, reasoning that the allegations did not show that Filler knew of the undue influence and substantially assisted it. "In fact, the allegations imply that Filler did not know of any undue influence but would have found out if he had investigated." Further, there were no allegations that Filler actively participated in the alleged tortious activity.

The court rejected Steven's argument that "should have known" is sufficient to allege a claim for aiding and abetting, citing recent cases referring to the standard of actual knowledge, not constructive knowledge, including *Thornwood Inc. v. Jenner & Block*, 344 Ill. App. 3d 15 (1st Dist. 2003). The court went on to write, "even if there were circumstances such that Filler should have suspected undue influence, there are still no allegations that Filler substantially assisted it," finding that drafting documents requested by his client would not be enough.

5. <u>Doyle v. Hood</u>, 2018 IL App (2d) 171041 (Sept. 28, 2018)

Two-year statute of limitations applies to trustee's action against attorneys when injury occurs at death of client.

Harry Doyle retained the defendants, attorney Thomas Hood and Thomas B. Hood Law Offices, P.C., to prepare his will and a revocable living trust for his disabled wife, Patricia. The living trust established a supplemental needs trust, with Patricia as its beneficiary. Upon Harry's death in January 2012, his son, Michael, became executor of his will and trustee of both trusts. In late 2013, Patricia was admitted to a long-term-care facility. Six months after that, an application for long-term benefits was filed on her behalf before the Department of Human Services. The DHS subtracted a $2,000.00 asset allowance from the supplemental needs trust,

and imposed a spend-down of the remaining funds. An appeal was filed on Patricia's behalf, but the DHS found instead that a considerably higher penalty was owed.

Michael, as trustee, sued the defendants for professional negligence in May 2017. He alleged that no penalty would have been assessed if the defendants had created the trust from Harry's will instead of the living trust. The defendants moved to dismiss, arguing that the claim was time-barred because it was filed more than two years after Harry's death. The trial court granted the motion, and Michael appealed. The appellate court agreed with the defendants that the two-year statute of limitations applied, since the injury in this case occurred "when the Supplemental Trust could no longer be amended or revoked and was actually funded, both of which occurred upon Harry's death." Section 5/13-214.3(d) of the Code of Civil Procedure provides, "[w]hen the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action may be commenced within 2 years after the date of the person's death…."

The appellate court relied on two supreme court opinions, *Wackrow v. Niemi*, 231 Ill. 2d 418 (2008), and *Snyder v. Heidelberger*, 2011 IL 111052, which demonstrate that the supreme court approaches the question of the applicable statute of repose by looking at when the allegedly flawed legal documents become effective. Further, the appellate court followed the holding from *Wackrow* that section 13-214.3(d) creates an exception to and applies instead of, foreclosing the application of, the section 13-214.3(c) six-year repose period. Further, the trustee of a trust is the only person who can bring an action on the trust's behalf, and the disability of the beneficiary of trust does not toll statute of limitations. Because the complaint was not filed within two years of the testator's death, it was untimely.

ESTATE TAX

1. <u>Parmar v. Madigan</u>, 2018 IL 122265 (May 24, 2018)

State of Illinois and its officers have sovereign immunity from lawsuit to recover estate tax payment.

Surinder Parmar died on January 9, 2011, leaving an estate valued at over $5 million. Due to the one-year repeal of the federal estate tax in 2010 and the Illinois estate tax statute basing its tax on the "state death tax credit" available for Illinois decedents, Illinois effectively had no estate tax for 2010, or for any year thereafter – until January 13, 2011, when the Governor signed a bill that had been adopted by the General Assembly on January 11, 2011, reviving the Illinois estate tax for the estates of decedents who died after December 31, 2010. The latest period of time covered by the prior version of the statute was for persons "dying after December 31, 2005 and on or before December 31, 2009."

Plaintiff, the decedent's son, had paid $560,000 to the Illinois Treasurer in September and October of 2012. In April 2013, plaintiff requested a waiver of penalties, which the Illinois Attorney General granted in September 2013.

The "Certificate of Discharge and Determination of Tax" issued by the Attorney General on July 24, 2015, stated that the estate's tax liability, including interest and penalties, had been paid and that the certificate was evidence of the complete release of all estate property from lien imposed by the Estate Tax Act and the discharge from personal liability of the executor for the estate tax, penalties, and interest. Shortly thereafter, plaintiff filed another amended return, based on his

belief that the amendment to the Estate Tax Act did not apply to his mother's estate and no tax was due.

Plaintiff filed a complaint in the circuit court of DuPage County against defendants, the Attorney General and the Treasurer of the State of Illinois, challenging the application and constitutionality of the amendment to the Illinois Estate and Generation-Skipping Transfer Tax Act ("Estate Tax Act") with respect to his mother's estate, who had died before the amendment was enacted, and seeking a refund of all monies paid to the Treasurer. Plaintiff claimed that retroactive application of the statutory amendment to the estates of persons who, like his mother, died after December 31, 2010, but before January 13, 2011 (the effective date of the amendment), was contrary to section 4 of the Statute on Statutes (5 ILCS 70/4) and would violate the due process and takings clauses of the Illinois and United States Constitutions, as well as the *ex post facto* clause of the Illinois Constitution.

Defendants filed a combined motion to dismiss pursuant to section 2-619.1. Defendants first argued that the complaint should be dismissed under section 2-619(a)(1) of the Code because the circuit court lacked jurisdiction. Defendants maintained that, because the complaint seeks a money judgment against the State, it is barred under sovereign immunity principles embodied in the State Lawsuit Immunity Act (745 ILCS 5/1) and the complaint must be filed in the Illinois Court of Claims. Defendants also argued that the complaint should be dismissed under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9)) because the voluntary payment doctrine bars recovery. Finally, defendants argued that certain counts of the complaint should be dismissed pursuant to section 2-615 of the Code for failure to state a claim upon which relief may be granted.

In response, plaintiff argued that his suit was properly brought in the circuit court because section 15 of the Estate Tax Act (35 ILCS 405/15) vests jurisdiction in the circuit court to hear all tax disputes arising under the Estate Tax Act. Plaintiff also argued that he was not seeking payment from the State because his claim is not against the General Revenue Fund. Rather, his claim is against the Estate Tax Refund Fund, a special fund created under section 13 of the Estate Tax Act. Plaintiff further argued that his complaint was not barred by the voluntary payment doctrine because he made the tax payments under "implied duress" created by the threat of penalties imposed by the Estate Tax Act. Plaintiff also defended the sufficiency of his constitutional claims.

The circuit court dismissed the complaint for lack of jurisdiction, pursuant to the State Law Immunity Act (745 ILCS 5/0.01 et seq.). The appellate court reversed the circuit court and remanded the case for further proceedings; but the Illinois Supreme Court reversed the appellate court, affirming the dismissal by the circuit court.

First, regarding sovereign immunity, the court cited the State Lawsuit Immunity Act, 745 ILCS 5/1, which provides as follows:

> Except as provided in the Illinois Public Labor Relations Act, the Court of Claims Act, the State Officials and Employees Ethics Act, and Section 1.5 of this Act, the State of Illinois shall not be made a defendant or party in any court.

The Court of Claims Act creates a forum for actions against the State, and provides with limited exceptions, that the Illinois Court of Claims "shall have exclusive jurisdiction to hear and

determine … [a]ll claims against the State founded upon any law of the State of Illinois." 705 ILCS 505/8(a).

Because the plaintiff filed suit against the Attorney General and the Treasurer in his or her "official capacity," the court wrote that the bar of sovereign immunity would "seemingly apply in this case." The appellate court had reversed the circuit court based on the "officer suit exception" to sovereign immunity, which requires that a State officer's conduct violates statutory or constitutional law or is in excess of his or her authority. However, the Supreme Court found, that the Estate Tax Act, on its face, is applicable to the estates of decedents who died after 2010. "[t]he Attorney General is responsible for administering and enforcing the Estate Tax Act, and the Treasurer is responsible for receiving and refunding moneys collected pursuant to the Estate Tax Act."

The plaintiff alleged that defendants' conduct was unlawful because they acted pursuant to an unconstitutional statute. To this, the Supreme Court responded that one of the principles of the "officer suit exception" to sovereign immunity is that it applies to enjoin future conduct (i.e., a State officer's actions contrary to law), not redress for past wrongs. "[A] complaint seeking damages for a past wrong does not fall within the officer suit exception to sovereign immunity."

The plaintiff also argued that section 15 of the Estate tax Act provides for jurisdiction and venue in the circuit court. Section 15(a) provides:

> (a) Jurisdiction. Jurisdiction to hear and determine all disputes in relation to a tax arising under this Act shall be in the circuit court for the county having venue as determined under subsection (b) of this Section, and the circuit court first acquiring jurisdiction shall retain jurisdiction to the exclusion of every other circuit court.

The court agreed with the State that the jurisdictional provision in the Estate Tax Act did not operate as a waiver of sovereign immunity, but was "only intended to fix jurisdiction and venue for all disputes that do not implicate sovereign immunity."

Next, Plaintiff argued that even if section 15 of the Estate Tax Act does not constitute a waiver of sovereign immunity, a judgment in his favor would not result in a judgment against the State and, therefore, his complaint does not implicate sovereign immunity. Rather, a judgment in favor of plaintiff would by payable from a special "Estate Tax Refund Fund" created under section 13(c) of the Estate Tax Act. Indeed, the defendants did not dispute that if a judgment could be satisfied by moneys in the refund fund, then plaintiff's complaint would not implicate principles of sovereign immunity.

The statutory framework for estate tax refunds in Illinois requires that an application for refund be filed with the Treasurer. Section 14 of the Estate Tax Act provides as follows:

> In case it appears that the amount paid with respect to any taxable transfer is more than the amount due under this Act, then the State Treasurer shall refund the excess to the person entitled to the refund, provided that no amount shall be refunded unless application for the refund is filed with the State Treasurer no later than one year after the last date allowable under the Internal Revenue Code for filing a claim for refund of any part of the related federal transfer tax or, if later, within one year after the date of final determination of the related federal transfer tax.

The court concluded that plaintiff's claim for refund, filed in the circuit court, did not fit within the statutory framework for an estate tax refund, even finding that "[p]laintiff's claim is not predicated on a reduction of the 'state tax credit,' as provided in section 7(b) of the Estate Tax Act." "Nor is plaintiff's claim based on an overpayment of taxes with respect to a 'taxable transfer,' as provided in section 14." Rather, plaintiff's claim was predicated on the notion that no taxable transfer occurred. "In other words, this is not a case where a downward adjustment to the estate's tax liability has occurred, requiring the filing of an amended return under section 7(b), and the subsequent filing of an application for refund with the Treasurer, pursuant to section 14."

The appellate court held that, because plaintiff paid the taxes involuntarily, he was not required to seek recovery under the State Officers and Employees Money Disposition Act (Protest Moneys Act) (30 ILCS 230/1 et seq.). The Supreme Court pointed out that the plaintiff could, indeed, have litigated his claims in the circuit court had he followed the procedures for paying taxes under protest pursuant to the Protest Moneys Act. However, under the Protect Moneys Act, the "person who has paid the money under protest has 30 days in which to obtain a temporary restraining order or a preliminary injunction restraining the transfer of the money into the State treasury or other fund into which the money would have been transferred absent the protest."

A complaint filed in accordance with the Protest Moneys Act would name State officers but would operate outside the bar of sovereign immunity. Indeed, the court noted, the statutory procedure under the Protest Money Act has been utilized to challenge the retroactive application and constitutionality of an amendment to the Estate Tax Act (*McGinley v. Madigan*, 366 Ill. App. 3d 974 (2006) and to challenge the construction of an amendment to the Estate Tax Act (*Brooker v. Madigan*, 388 Ill. App. 3d 410 (2009). Plaintiff could have availed himself of the statutory procedure under the Protest Money Act but failed to do so.

Finally, the appellate court had rejected defendants' alternative argument that dismissal of plaintiff's complaint was proper pursuant to the voluntary payment doctrine. Under this common law doctrine, "a taxpayer may not recover taxes voluntarily paid, even if the taxing body assessed or imposed the taxes illegally" unless "such recovery is authorized by statute." The plaintiff argued that he did not make the tax payments voluntarily, but under duress due to the prospect of penalties, interest, and personal liability under the Estate Tax Act. Defendants argued that if the voluntary payment doctrine can be avoided by pointing to a subjective fear of the mere possibility of incurring penalties and interest, then the doctrine is eroded to the point of irrelevance. The Supreme Court wrote that the appellate court in this case took "an expansive view of duress," but declined to address this issue further because it was not necessary to the resolution of this case.

The Plaintiff filed a writ of certiorari to the United States Supreme Court, which denied to hear the case.

ILLINOIS PROPOSED BILLS

1. HB 1471: Illinois Trust Code

Synopsis As Introduced

Creates the Illinois Trust Code. Provides that the Code applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. Defines terms. Adds provisions governing: judicial proceedings; representation; creation, validity, modification, and termination of trusts; creditor's claims; spendthrift and discretionary trusts; revocable trusts; the office of trustee; duties and powers of the trustee; the Illinois Prudent Investor Law; life insurance; affiliated investments; liability of trustees and rights of persons dealing with a trustee; total return trusts; trust decanting; the Uniform Powers of Appointment Law; perpetuities; and application of the Code to existing trusts. Repeals the Trusts and Trustees Act, the Trusts and Dissolutions of Marriage Act, the Uniform Powers of Appointment Act (added by Public Act 100-1044), the Statute Concerning Perpetuities, the Perpetuities Vesting Act, and the Trust Accumulation Act. Makes corresponding changes in the Public Use Trust Act, the Township Code, the Corporate Fiduciary Act, the Community-Integrated Living Arrangements Licensure and Certification Act, the Title Insurance Act, the Illinois Funeral or Burial Funds Act, the Mental Health and Developmental Disabilities Code, the Illinois Marriage and Dissolution of Marriage Act, the Probate Act of 1975, the Illinois Power of Attorney Act, the Common Trust Fund Act, the Religious Corporation Act, and the Illinois Pre-Need Cemetery Sales Act. Effective January 1, 2020.

Status: 3/20/2019 House Third Reading - Short Debate - Passed 114-000-000
3/20/2019 Senate Referred to Assignments

2. HB 347: Amends the Probate Act to Expand Disinheritance for Abuse

Synopsis As Introduced

Amends the Probate Act of 1975. Provides that a person convicted of assault, aggravated assault, battery, or aggravated battery of an elderly person shall not receive any property, benefit, or other interest by reason of the death of that elderly person.

Status: 4/10/2019 House Third Reading - Short Debate - Passed 112-000-000
4/10/2019 Senate Referred to Assignments

3. HB 836: Guardianship and Administrative Separation

Synopsis As Introduced

Amends the Probate Act of 1975. Defines "administrative separation". Provides that the court lacks jurisdiction to proceed on a petition for the appointment of a guardian or standby guardian of a minor if it finds that the minor has a living parent whose parental rights have not been terminated, unless, among other things, the parent or parents, in the event of an administrative separation, are not presently located in the United States and are unable to consent as

evidenced by a sworn affidavit. Provides that a parent or guardian shall not appoint a short-term guardian of a minor if the minor has another living parent whose parental rights have not be terminated, unless, among other things, the parent or parents, in the event of an administrative separation, are not presently located in the United States and are unable to consent as evidenced by a sworn affidavit. Makes conforming changes. Effective immediately.

House Floor Amendment No. 1

Replaces everything after the enacting clause with the provisions of the introduced bill with the following changes: (1) changes the definition of "administrative separation"; (2) provides that the court lacks jurisdiction to proceed on a petition for the appointment of a guardian or standby guardian of a minor if the minor has a living parent, adoptive parent, or adjudicated parent, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions, unless the parent or parents, due to an administrative separation, are unable to give consent to the appointment in person or by a notarized, written document as evidenced by a sworn affidavit describing the parent's or parents' inability to receive notice or give consent (rather than the parent or parents, in the event of an administrative separation, are not presently located in the United States and are unable to consent as evidenced by a sworn affidavit describing the present location of the parent out of the country and the attempts made to contact the parent); (3) deletes language providing that a parent or guardian shall not appoint a short-term guardian of a minor if the minor has another living parent, adoptive parent, or adjudicated parent whose whereabouts are known, and who is willing to carry out day-to-day child care decisions unless the parent or parents in the event of an administrative separation, are not presently located in the United States and are unable to consent as evidenced by a sworn affidavit describing the present location of the parent out of the country and the attempts made to contact the parent; (4) provides that a short-term guardian who was appointed as the result of an administrative separation may renew a short-term guardianship for an additional 365 days from the date the initial appointment expires if the administrative separation is still in effect, unless the written instrument provides for the appointment to terminate upon a different date or event; (5) deletes language providing that the petition for guardian or standby guardian of a minor must state the facts concerning any administrative separation proceeding; (6) provides specific facts that the petition for guardian or standby guardian of a minor must include and that documentation related to an administrative separation shall be attached to the petition as an exhibit; and (7) deletes language providing that failure to give notice to any relative or parent out of the country is not jurisdictional if the petitioner can attest to specific factors. Makes conforming changes. Effective immediately.

Status: 3/28/2019 House Third Reading - Short Debate - Passed 089-019-000
4/3/2019 Senate Referred to Assignments

4. HB 2461: Amends the Revised Uniform Unclaimed Property Act

Synopsis As Introduced

Amends the Revised Uniform Unclaimed Property Act. Provides that an heir or agent who files an unclaimed property claim in which the decedent's property does not exceed $100 may submit an affidavit attesting to the heir's or agent's capacity to claim in lieu of submitting a certified copy to verify a claim. Provides that the affidavit shall be accompanied by a copy of other documentary proof that the State Treasurer requests. Provides that the State Treasurer may change the maximum value by administrative rule. Effective immediately.

Status: 4/10/2019 House Third Reading - Short Debate - Passed 113-000-000
4/10/2019 Senate Referred to Assignments

5. HB 3677: Uniform Partition of Heirs Property Act

Synopsis As Introduced

Creates the Uniform Partition of Heirs Property Act. Defines terms. Provides for: applicability; relation to other law; service; notice by posting; commissioners; determination of value; cotenant buyout; partition alternatives; considerations for partition in kind; open-market sale, sealed bids, or auction; and report of open-market sale. Makes conforming changes in the Code of Civil Procedure. Effective immediately.

Status: 3/29/2019 House Third Reading - Short Debate - Passed 095-000-000
4/3/2019 Senate Referred to Assignments

6. SB 147: Amends Child Labor Law Regarding Child Performers

Synopsis As Introduced

Amends the Child Labor Law. Provides that, before a child may be issued a permit to work as a child performer, a trust account must be established providing, at a minimum, that: at least 15% (or a greater percentage as determined by rule) of the gross earnings of the child performer shall be deposited into the account; the funds in the account shall be available only to the child performer; the funds shall be held by a bank, corporate fiduciary, or trust company, as those terms are defined in the Corporate Fiduciary Act; and the funds in the account shall become available to the child performer upon the child performer attaining the age of 16 years. Provides that the new provisions do not apply to an employer of a child performer employed to perform services as an extra, services as a background performer, or services in a similar capacity. Provides that the Department of Labor shall adopt rules to implement the provisions.

Senate Floor Amendment No. 1

Provides that funds placed into a trust account for a child performer shall remain in the account until the child performer attains the age of 18, instead of 16, or until the child performer is declared emancipated. Requires trusts to meet the requirements of the Illinois Uniform Transfers to Minors Act. Provides that if a parent or guardian fails to provide to an employer information necessary to transfer funds into a trust account within 30 days after the expiration of a temporary employment certificate, the employer shall transfer the funds to the State treasurer in accordance with the Revised Uniform Unclaimed Property Act.

Status: 4/11/2019 Senate Third Reading - Passed; 057-000-000
4/11/2019 House Referred to Rules Committee

7. SB 182: Feasibility of Statewide Registry for Advanced Directives; Electronic Declarations

Synopsis As Introduced

Amends the Department of Public Health Powers and Duties Law of the Civil Administrative Code of Illinois. Provides that the Department of Public Health shall study the feasibility of creating a statewide registry of advance directives and Practitioner Order for Life-Sustaining Treatment forms. Amends the Illinois Living Will Act, the Health Care Surrogate Act, the Mental Health Treatment Preferences Declaration Act, and the Powers of Attorney for Health Care Law of the Illinois Power of Attorney Act. Provides that various types of documents may be in hard copy or electronic format. Provides that electronic declarations may be revoked, among other things, by deletion in a manner indicating the intention to revoke and in a manner that meets the requirements for a deletion by a provider deleting an entry in the electronic medical record. Provides that signature and execution requirements are satisfied by written signatures or initials and electronic signatures or computer-generated signature codes that meet the requirements for a signature by a provider making an entry into the electronic medical record. Provides that a person who enters information in an electronic system under the persona of the principal shall be held civilly liable. Makes conforming changes.

Senate Floor Amendment No. 1

Replaces everything after the enacting clause with the provisions of the introduced bill, and makes the following changes: Provides that the Department of Public Health shall also consult with a statewide bar association, a national bar association with an Illinois chapter that concentrates in elder and disability law, and a not-for-profit organ procurement organization that coordinates organ and tissue donation in the study of the feasibility of creating a statewide registry of advance directives and POLST forms. Provides that the study must be filed with the General Assembly on or before January 1, 2021. Provides that an electronic declaration may be created, signed, or revoked electronically using a generic, technology-neutral system in which each user is assigned a unique identifier that is securely maintained and in a manner that meets the regulatory requirements for a digital or electronic signature. Deletes language providing that the signature and execution requirements are satisfied by electronic signatures or computer-generated signature codes that meet the requirements for a signature by a provider making an entry into the medical record. Deletes language providing that an electronic declaration may also be revoked by the principal's deletion in a manner indicating the intention to revoke and in a manner that meets the requirements for a deletion by a provider deleting an entry in the electronic medical records. Amends the Electronic Commerce Security Act. Deletes language providing that provisions regarding electronic records and electronic signatures shall not apply to any rule of law governing the creation or execution of a living will or healthcare power of attorney.

Status: 4/11/2019 Senate Third Reading - Passed; 058-000-000
4/12/2019 House Referred to Rules Committee

NON-ILLINOIS CASES

STATE ESTATE TAXATION OF QTIP TRUSTS

BACKGROUND

Consider the fundamental “contract” underlying the federal estate tax marital deduction. The basic requirement of all forms of qualified marital deduction transfer (outright transfer, or a general-power-of-appointment, estate, or QTIP marital trust) is “payback” inclusion in the estate of the surviving spouse (under Section 2033, 2041, or 2044). Congress has, in effect, said that “We won’t tax these assets in your estate, provided that you leave them in a form that will cause inclusion in your spouse’s estate.” As a result, the marital deduction is not designed to reduce the estate tax for a married couple. Instead, it merely defers the tax until death of the surviving spouse.

The equity of this “payback” notion is illustrated by *In re Estate of Bracken*, 290 P.3d 99 (Wash. 2012), a state death tax case in which the Washington court denied the Washington State Department of Revenue’s effort to require inclusion of QTIP trusts in the estates of surviving spouse decedents, because there was no state law QTIP marital deduction allowed (because there was no state death tax) in the estates of the trust settlors. These trusts *did* qualify as marital deduction QTIP trusts in the estate of the first spouse to die for *federal* estate tax purposes, and the state death tax was a piggyback on the federal inclusion. But because the trusts garnered no state death tax benefit in the settlor’s estate, *Bracken* held that it was not appropriate for the Department to seek payback inclusion when the surviving spouse beneficiary died.

In response to *Bracken*, the Washington legislature amended its Estate and Transfer Tax Act to specifically allow the Washington Department of Revenue to tax QTIP trusts, regardless of when created or whether the state had granted a marital deduction in the estate of the settlor spouse. *See* Wash. Rev. Code §83.100.048. This amendment was upheld as constitutional in *Estate of Hambleton v. Dep’t of Revenue*, 335 P.3d 398 (Wash. 2014), notwithstanding that it puts the “contract” in a different light than exists for federal estate tax purposes.

Consistent with the Washington legislation, *Estate of Ackerley v. Dep’t of Revenue*, 389 P.3d 583 (Wash. 2017), subsequently held that federal gift tax included in a decedent’s federal gross estate under Section 2035(b) (the so-called “gross up” rule) also is subject to state estate tax, because the state tax piggybacks on the federal taxable estate. Essentially these developments reveal an effort to tie state estate tax to the federal estate tax return, making whatever is includible for federal purposes also includible for state estate tax purposes. And they indicate that the state death tax posture is fundamentally different from that at the federal level.

In this context, then, consider first the facts in *Estate of Brooks v. Commissioner of Rev. Servs*, 159 A.3d 1149 (Conn. 2017), in which the settlor of two QTIP trusts died in Florida, which has no state estate tax. These trusts qualified for the federal estate tax marital deduction but served no state death tax deferral function because there was no state death tax to be deferred. The surviving spouse relocated to and subsequently died in Connecticut, which does have an estate tax. These QTIP trusts didn’t garner a deferral of Connecticut estate tax either, because the trust settlor had not died in Connecticut. Nevertheless, Connecticut successfully imposed its estate tax on these QTIP trusts when the surviving spouse died, based on the logic in both

Bracken and *Ackerley* that the state estate tax piggybacks on the federal gross estate and QTIP trusts are includible in the federal gross estate of a surviving spouse. The lack of deferral and notions of payback notwithstanding, the court also stated that termination of the surviving spouse's life estate is a "sufficient 'shifting at death of particular incidents of property' to properly impose an excise tax" on the transfer of wealth.

1. Comptroller of the Treasury v. Taylor, 189 A.3d 799 (Md. Ct. Special App. 2018).

Maryland court holds that a QTIP trust of a decedent who died domiciled elsewhere is not subject to state estate tax when the surviving spouse dies.

In *Taylor*, which is contrary to *Brooks* (although never citing it), the settlor died in Michigan and created a QTIP trust, and a QTIP election was made for both state and federal tax purposes. The surviving spouse died in Maryland, which has an estate tax. Nevertheless, the court held that the QTIP trust was *not* includible in the survivor's estate for state estate tax purposes, notwithstanding that it was includible for federal purposes. Potentially unique about *Taylor* is that Maryland's estate tax references a "*transfer* of the Maryland estate" of a Maryland domiciliary and there is no actual transfer when the survivor's income interest terminates. More important is Code of Maryland – Tax – General §7-309(b)(6)(i):

> For purposes of calculating Maryland estate tax, a decedent shall be deemed to have had a qualifying income interest for life under §2044(a) of the Internal Revenue Code with regard to any property for which a marital deduction qualified terminable interest property election was made for the decedent's predeceased spouse on a timely filed Maryland estate tax return.

The rationale for this provision appears to reflect Code of Maryland – Tax – General §7-309(b)(5)(ii), which allows a Maryland QTIP election, separate from that made for federal purposes, causing Maryland estate tax inclusion of a trust that was not subject to Section 2044 inclusion for federal purposes. The state argued "that Maryland could tax the assets of a QTIP for which no Maryland election was made," which the court rejected as "not plainly within the statute's language" and that "[t]he fiction created by the QTIP election, which includes the trust in the estate of the surviving spouse, is explicitly limited to those instances where an election has been made to create it" for state estate tax purposes. There having been no Maryland marital deduction and no Maryland QTIP election in *Taylor* meant that there could be no payback inclusion in the survivor's Maryland estate.

2. **In re Estate of Seiden, 2018 NY Slip Op 32541(U) (NY County Surr. Ct. Oct. 9, 2018).**

New York court holds that a QTIP trust of a decedent who died in 2010 is not subject to state estate tax when the surviving spouse dies.

Again applying the "piggyback" concept of *Ackerley* and *Brooks*, but this time to the state's disadvantage, is *Seiden*, in which the settlor of a QTIP trust died in 2010, when the federal estate tax was in hiatus, and the estate therefore did not need to make a QTIP election to qualify for the federal estate tax marital deduction. As a result, Section 2044 did not require inclusion of the QTIP trust in the survivor's gross estate when the surviving spouse subsequently died. However, the estate of the settlor *did* make a New York-only QTIP election upon settlor's death in 2010.

New York Tax Law §954(a) expressly provides that the New York gross estate of a deceased resident "means his or her federal gross estate," a typical piggyback form of state estate tax. Therefore, because the QTIP trust was not includible in the survivor's federal gross estate, the estate did not include it in the survivor's New York gross estate either, which the court held to be correct. The opinion does not indicate what the New York estate taxation of the settlor's estate entailed, nor whether a state QTIP election had been made that could have meant that payback inclusion in the estate of the survivor would be appropriate. The court simply dismissed the state's argument for New York estate tax inclusion because of the very clear piggyback nature of the New York statute.

Comment. A case lacking the specific legislation in *Taylor* may not be as easy for a taxpayer to win, and the *Seiden* opinion essentially invited the New York legislature to amend its statute, saying "the legislature could still amend the Tax Law to apply to future estates." Also, query the result in *Brooks* if the facts had been reversed, and the surviving spouse had qualified for the estate tax marital deduction in Connecticut but then moved to and died in Florida. The *Seiden* opinion noted this anti-payback result, saying that "it is not guaranteed that all or even part of any QTIP trust would be subject to New York estate tax at the death of the surviving spouse under present law. The trust property might decrease in value; it might be distributed and spent down; or the surviving spouse might change domicile to another state."

The fundamental notion articulated in *Brooks* is that the law of the surviving spouse's domicile at death is the applicable law for purposes of the state death tax imposed, again regardless of the federal payback concept. That notion is worth considering when planning the estate of a surviving spouse, which (as between two spouses) is the estate in which tax liability is more likely to be incurred.

STATE INCOME TAXATION OF TRUSTS

1. Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Dept. of Revenue, 814 S.E.2d 43 (N.C. June 8, 2018), *aff'g* 789 S.E.2d 645 (N.C. App. 2016).

A state statute that taxes trust income solely on the basis of the residence of a beneficiary violates the Due Process Clause as applied.

Joseph Lee Rice, III (the "Settlor"), a resident of New York, created the Joseph Lee Rice, III Family 1992 Trust (the "Family Trust") for the benefit of his children. William B. Matteson, also a resident of New York, served as the initial Trustee. The trust agreement provided that the Family Trust was to be governed by the laws of the State of New York. In 1997, Kimberley Rice Kaestner ("Kaestner"), one of the Settlor's children, moved to North Carolina. William B. Matteson resigned as Trustee in 2005, and David Bernstein ("Bernstein"), a Connecticut resident, became Trustee.

In 2006, pursuant to the terms of the Family Trust Agreement, Bernstein divided the Family Trust into separate trusts for each of the three children. One of the separate trusts was the Kimberley Rice Kaestner 1992 Family Trust (the "Kaestner Trust"). The Kaestner Trust benefited Kaestner as well as her three children, each of whom resided in North Carolina from 2005 to 2008, the years at issue. The contingent beneficiaries of the Kaestner Trust were Kaestner's siblings, none of whom resided in North Carolina.

From 2005 to 2008 the Kaestner Trust's assets were held by a custodian in Boston, Massachusetts. The ownership documents for some of the assets were located in New York, along with financial and legal records. Tax returns and trust accountings were all prepared in New York. The Kaestner Trust provided that all income and principal distributions from the trust were in Bernstein's discretion. Neither Kaestner nor her children received distributions from the Kaestner Trust between 2005 and 2008, although the Kaestner Trust made two loans during the same period, a $250,000 loan to Kaestner for an investment and another loan to a separate trust "to enable [that trust] to make a capital call on a limited partnership interest" held in that trust. Both loans were eventually repaid to the Kaestner Trust. Kaestner and Bernstein communicated regularly regarding Kaestner's need for distributions and investment of the trust assets. In 2009, Bernstein transferred the Kaestner Trust assets to a new trust, the KER Family Trust.

Each year, from 2005 to 2008, the North Carolina Department of Revenue (the "State") taxed the Kaestner Trust on its income. The Kaestner Trust paid the taxes and sought a refund, which the State denied in 2011. Section 105-160.2 of the North Carolina statutes provides, in relevant part, that the state may tax the income of a trust "that is for the benefit of a resident of [North Carolina]." The Kaestner Trust sued, alleging that this statute was unconstitutional under the Due Process and Commerce Clauses of the United States Constitution as well as Article I, Section 19 of the North Carolina Constitution. The Commerce Clause argument was not addressed by the Court of Appeals and was therefore not addressed in the Supreme Court decision either.

The "minimum contacts" component of the Due Process Clause requires "some definite link, some minimum connection, between a state and a person, property or transaction [the government] seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In addition, the income attributed to the State for tax purposes must be rationally related to values connected with the taxing state. *Id.* And "it is essential in each case that there be some act by which the [party] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Skinner v. Preferred Credit*, 638 S.E.2d 203, 210-11 (N.C. 2006).

The *Kaestner* court found it critical in this case that a trust is an entity legally independent from its beneficiary, and that it was the trust beneficiaries, not the trust, that were North Carolina residents. Given the separate legal entities, the Court found that the beneficiaries' residence in North Carolina was irrelevant and the trustee's contact with North Carolina was insufficient to satisfy due process.

The court chose not to follow cases from Connecticut and California that had held that taxation of a trust did not violate due process when the beneficiary was a resident of that state. *Chase Manhattan Bank v. Gavin*, 773 A.2d 782 (Conn. 1999), *cert. denied*, 528 U.S. 965; *McCulloch v. Franchise Tax Board*, 390 P.2d 412 (Cal. 1964). The *Kaestner* court found those decisions unpersuasive because they failed to consider the separate legal existence of the trust in the analysis, and they imputed a benefit received by the beneficiary to the trust.

The Department of Revenue also argued that Bernstein restructured the trust at Kaestner's request and communicated with her regarding management of the assets, and that this indicated a continuing relationship with a North Carolina resident. The court found that the communication was infrequent, the meetings were held outside the state of North Carolina, and the restructuring occurred after the years at issue. The court reiterated that the trust, not the

beneficiary, would have to avail itself of the benefits and protections of the state to satisfy the requirements of due process.

The North Carolina Business Court, Court of Appeals, and Supreme Court all focused on the unique facts of the case in finding that the statute is unconstitutional as applied to the trust. The Supreme Court emphasized that its opinion is limited to an "as applied" standard, meaning the court considered only whether the statute is constitutional as applied to the trust. In responding to the trust's continued challenge to the constitutionality of the statute, on its face, the North Carolina Supreme Court noted the presumption that "any act passed by the legislature is constitutional" and stated that "any individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the Act would be valid." Because the trust presented only facts and evidence relevant to it, the North Carolina Supreme Court did not (and could not) consider whether the statute is unconstitutional on its face.

Dissent. Justice Samuel J. Ervin IV (whose grandfather, Senator Sam Ervin, had chaired the Senate Select Committee on Presidential Campaign Activities, known as the Watergate Committee, in 1973 and 1974) dissented in *Kaestner*, believing that the Connecticut and California cases of *Chase Manhattan Bank v. Gavin* and *McCulloch v. Franchise Tax Board* supported North Carolina's effort to tax accumulated trust income. The dissent did not address the possibility that *McCulloch* was distinguishable because the trustee in that case was also a resident of California.

Justice Ervin's dissent also noted the advancements of modern technology related to communications online and by telephone, rather than in person. He opined that a traditional analysis of physical presence in a state may need to be amended to reflect those changes in determining whether a taxpayer "purposefully" directs its activities to a state. His view is especially interesting in light of the decision of the United States Supreme Court only 13 days later in *South Dakota v. Wayfair*.

2. <u>Fielding v. Commissioner of Revenue</u>, 2018 WL 3447690 (Minn. July 18, 2018), *aff'g* 2017 WL 2484593 (Minn. T.C. 2017).

A tax residency statute violates the Due Process Clause when applied to a trust with insufficient connections to the state.

Reid V. MacDonald ("Grantor"), a resident of Minnesota, formed four grantor trusts (the "Trusts") in 2009, retaining the power to substitute trust assets. The Trusts were funded with shares of common stock in Faribault Foods, Inc., a Minnesota S corporation. The trustee, trust administration, and all but one of the beneficiaries of the Trusts were always located outside of Minnesota.

The Grantor gave up the power to substitute trust assets in 2011, and (according to the court) the Trusts then became irrevocable. Under Minnesota Statute §290.01, subd. 7b(a)(2), Minnesota law defines a "resident trust," in part, as "an irrevocable trust, the grantor of which was domiciled in this state at the time it became irrevocable." At the time the Trusts became irrevocable, the Grantor was domiciled in Minnesota.

On August 1, 2014, the trustee sold the stock held by the Trusts, resulting in substantial deposits in each of the Trusts' accounts. Under the trust terms, the trustee made distributions to each beneficiary during 2014. Each Trust timely filed a 2014 Minnesota income tax return as a

Minnesota "resident trust" and paid the reported tax under protest, including a statement asserting that the statutory definition of a "resident trust" was unconstitutional. Each Trust then filed an amended 2014 Minnesota income tax return without treating itself as a Minnesota "resident trust," and requested a refund.

The Trustee argued that Minnesota's definition of a "resident trust" violated the due process provisions of the Minnesota and United States Constitutions. Due process analysis imposes two constraints on state taxation. There must be both "a minimum connection" between a state and the person, property, or transaction subject to tax and a rational relationship to the benefits conferred on the taxpayer by the State. *Luther v. Commissioner of Revenue*, 588 N.W.2d 502 (Minn. 1999).

The Minnesota Tax Commissioner cited the following as factors requiring taxation:

1. Reid MacDonald was a Minnesota resident when the trusts were created.

2. Reid MacDonald was domiciled in Minnesota when the trusts became irrevocable and was still domiciled in Minnesota in 2014.

3. The trusts were created in Minnesota with the assistance of a Minnesota law firm, which drafted the trust documents and until 2014 retained the trust documents.

4. The trusts held stock in a Minnesota S corporation.

5. The trust documents provided that questions of law arising out of the trust documents were to be determined in accordance with Minnesota law.

6. One beneficiary had been a Minnesota resident through the tax years in question.

The Trustee, on the other hand, noted that:

1. No trustee had been a Minnesota resident.

2. The trusts had not been administered in Minnesota.

3. The records of the trust assets and income were maintained outside of Minnesota.

4. Some of the trusts' income was derived from investments with no direct connection to Minnesota.

5. Three of the four beneficiaries of the trusts lived outside of Minnesota.

As a result, the contacts between the trusts and Minnesota from 2014 on were tenuous. The trusts had no contact with Minnesota during the applicable tax year. All trust administration activities by the trustees occurred outside Minnesota.

Largely following the reasoning of the Minnesota Tax Court, the Minnesota Supreme Court concluded that the contacts on which the Tax Commissioner relied were either irrelevant or too attenuated to establish that Minnesota's tax on the trusts income from all sources complied with due process requirements. The court held that the statute failed the due process analysis for three reasons.

First, the court held that the Grantor's residence at the time the Trusts became irrevocable was

> not relevant to the relationship between the Trusts' income that Minnesota seeks to tax and the protection and benefits Minnesota provided to the Trusts' activities that generated that income. The relevant connections are Minnesota's connection to the trustee, not the connection to the grantor who established the trust years earlier.

Thus, the court looked largely to each trust's independence as a legal entity, separate from the grantor or beneficiary. *See Greenough v. Tax Assessors of Newport*, 331 U.S. 486 (1947).
Second, the Trusts owned no physical property in Minnesota that might serve as a basis of taxation. *See*, *e.g.*, *Westfall v. Dir. of Revenue*, 812 S.W.2d 513 (Mo. 1991). The stock of a Minnesota company was intangible property held and controlled outside the state of Minnesota which could not be the basis for taxation.

Third, the court did not find any contacts with Minnesota by the Grantor, the Trusts or the beneficiaries that occurred prior to the tax year at issue, including the decision to use a Minnesota law firm, to be relevant. Citing *Luther*, the court determined that the relevant facts for evaluating the sufficiency of a taxpayer's contacts must be drawn from the tax year at issue. In addition, the Minnesota residency of one beneficiary did not establish the necessary minimum connection to justify taxing the trusts income.

Under *Fielding*, residence of a trust beneficiary would allow Minnesota to tax trust income distributed to that beneficiary, regardless of its source. But, consistent with *Kaestner*, some other nexus must exist for Minnesota to tax trust income not distributed to Minnesota domiciliaries. Residence of the grantor at the time the trust was created, however, was not a sufficient nexus to tax income that is not sourced to Minnesota. The Minnesota Tax Court had stated that "state protections must be contemporaneous with the accumulation of the income to be taxed" and "[i]t is unsurprising that courts universally rejected state efforts to tax trusts as 'residents' based solely on the domicile of the grantor at the time an *inter vivos* trust became irrevocable." The Minnesota Supreme Court added that "[t]he relevant connections are Minnesota's connection to the trustee, not the connection to the grantor" or, for that matter, to the beneficiaries. It is the state's relationship between the income of the trust "and the protection and benefits Minnesota provided to the [trust's] activities that generated that income."

Thus there are a number of factors that might cause a state to have a sufficient nexus: domicile of beneficiaries, trustees, or settlor, along with source income. In *Kaestner* there was only one factor – domicile of the beneficiaries – and it alone was held not to be sufficient. In *Fielding* there was an additional factor – domicile of the grantor at the time the trust became irrevocable – and it also was not sufficient.

The *Fielding* opinion viewed irrevocable *inter vivos* trusts as distinguishable from testamentary trusts for purposes of finding a tax nexus. The court agreed with this notion expressed by some:

> The case for asserting jurisdiction to tax a testamentary trust based on the domicile of the decedent … is probably a stronger one because of the connection that a testamentary trust has to the state's probate courts … given the continuing supervisory relationship which [state] courts have with respect to administration of such a trust.

The court added:

> [U]nlike cases in other states that considered testamentary trusts, the *inter vivos* trusts at issue here have not been probated in Minnesota's courts and have no existing relationship to the courts distinct from that of the trustee and trust assets.

The court did not explain how long after the death of the settlor this distinction would hold up.

Dissent. A dissent argued that it cannot violate due process to tax a trust created by a resident invoking Minnesota law:

> First, there is a "minimum connection" between Minnesota and the Trusts. From their creation, the Trusts were Minnesota residents. They were created by Reid MacDonald, a Minnesota resident. The Trusts were created to hold almost exclusively Minnesota assets – the common stock of a Minnesota S corporation – over which Minnesotan MacDonald retained control. Further, the trust instruments themselves instruct the trustee – wherever located – to apply the Minnesota Revised Uniform Principal and Income Act and to resolve all questions of law arising under the trust agreements according to "the laws of the State of Minnesota."
>
> Most importantly, when MacDonald made the Trusts irrevocable in 2011, he did so as a Minnesota domiciliary. He was on statutory notice that, as a Minnesotan, his decision would cause the Trusts to become Minnesota "resident trusts." *See* Minn. Stat. §290.01, subd. 7b(a)(2) (2016). When a Minnesota grantor knowingly chooses to create a Minnesota resident trust and the trust itself incorporates Minnesota law, why would it be unconstitutional for Minnesota to tax that trust? Put another way: how can it violate due process for a state to tax its residents (in this case, the Trusts) as residents?

A note on South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (June 21, 2018).

States may charge sales tax on internet purchases even where the seller does not have a physical presence in the state.

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Supreme Court held that the Dormant Commerce Clause barred states from compelling retailers to collect sales or use taxes from mail order and internet sales made to their residents unless those retailers have a physical presence in the taxing state. Given the post-1992 boom of electronic commerce, states were losing a lot of revenue. South Dakota alone, it seems, was losing between $48 and $58 million in sales and use taxes from the application of *Quill*. So the South Dakota Legislature enacted a law requiring out-of-state sellers to collect and pay sales tax "as if the seller had a physical presence in the State." The Act applied only to sellers that delivered more than $100,000 of goods or services

annually into South Dakota or engaged in 200 or more separate transactions annually for the delivery of goods or services into South Dakota. A group of online retailers with no employees or real estate in South Dakota filed suit in state court, claiming the Act's requirements violated *Quill*. The trial court granted their motion, and the South Dakota Supreme Court affirmed.

But in *Wayfair*, 13 days after *Kaestner* and 27 days before *Fielding*, the United States Supreme Court reversed (in a 5-4 decision), declaring that because the physical presence rule of *Quill* is unsound and incorrect, *Quill* is hereby overruled. Writing for the majority, Justice Kennedy noted that the physical presence rule from *Quill* has long been criticized as giving out-of-state sellers an advantage. Physical presence is not required, just that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." A business need not have physical presence in a state to satisfy the requirements of due process. Here, the Act applies only to sellers who engage in a significant quantity of business in South Dakota, and respondents are large, national companies that undoubtedly maintain an extensive virtual presence.

Justice Kennedy observed that 41 states, two territories, and the District of Columbia have asked the Court to overrule *Quill*. He wrote:

> Helping respondents' customers evade a lawful tax unfairly shifts an increased share of the taxes to those consumers who buy from competitors with a physical presence in the State. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. And it is also essential to the confidence placed in the Court's Commerce Clause decisions. By giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes, *Quill*'s physical presence rule has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.

Justices Thomas, Ginsburg, Alito, and Gorsuch joined Justice Kennedy in the majority. Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan dissented.