ILLINOIS STATE BAR ASSOCIATION

FEBRUARY 2023 VOL 69 NO. 8

# Trusts & Estates

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

Non-Illinois Residents Subject to Illinois Estate Tax
1

What Is a Trust? Part 2: Does It Matter?
1

What's the Deal With Electronic Notaries in Illinois?
5

## Non-Illinois Residents Subject to Illinois Estate Tax

BY GARY R. GEHLBACH

The Illinois Estate and Generation-Skipping Transfer Tax Act (the Act) is codified at 35 ILCS 405/1 *et seq*. The estate tax applies to property transferred at death, and the Illinois estate tax exemption is $4 million.[1]

The property of the decedent that determines the Illinois estate tax is referred to in the Act as the "transferred property,"[2] which is all the property that is subject to federal estate tax, including non-excluded lifetime gifts. Incidentally, the current federal estate tax exemption is $12.92 million.

The amount that is excluded (the "exclusion amount"[3]) from the transferred property is the $4 million exemption. This is generally interpreted to mean that if a decedent's net taxable estate for estate tax purposes is not more than $4 million, there will be no Illinois estate tax, and if the gross value of a decedent's estate does not exceed $4 million, there is no requirement to even file an Illinois estate tax return.

However, based on the Act and Illinois

*Continued on next page*

## What Is a Trust? Part 2: Does It Matter?

BY SHERWIN D. ABRAMS

*Editors' Note: The following is Part 2 of a two-part series. The first part was published in January 2023.*

Let's examine situations where it may matter whether a trust is treated as a relationship or as an entity or whether a different approach determines the outcome.

### Diversity Jurisdiction

Federal courts have jurisdiction of lawsuits involving disputes between citizens of different states.[1] The citizenship of an individual is usually the state where the individual resides. The citizenship of a corporation is the state in which it is incorporated and the state where it has its principal place of business. An entity other than a corporation takes the citizenship of each of its members. *Americold Realty Tr. v. Conagra Foods, Inc*., 577 U.S. 378, 383 (2016) ("[W]hen an artificial entity is sued in its name, it takes the citizenship of each of its members.")

*Continued on page 3*

## Non-Illinois Residents Subject to Illinois Estate Tax

CONTINUED FROM PAGE 1

Attorney General's estate tax form and instructions, these suppositions are not necessarily true for decedents who are not Illinois residents.

For example, assume that Dorothy was at the time of her death in 2023 a resident of Florida, a state that does not have an estate or inheritance tax (only Illinois and eleven other states have their own estate or inheritance taxes, in addition to the federal estate tax). Dorothy's gross estate (that is, the total value of all assets subject to federal estate tax, not including non-excluded lifetime gifts) is $10 million. Let's further assume that Dorothy's estate is entitled to $1 million of deductions and that she had made $2 million of non-excluded lifetime gifts. Dorothy's estate includes an Illinois farm titled in Dorothy's name as trustee of her trust when she died with a value at her date of death of $3 million. Clearly Dorothy's estate in Illinois is under the $4 million threshold, and arguably no Illinois estate tax return is required to be filed and no Illinois estate tax is due.

While it is true that no federal estate tax is due in Dorothy's estate, and since the gross value of Dorothy's estate for federal estate tax purposes, including non-excluded lifetime gifts, is less than the federal estate tax exemption of $12.92 million, no federal estate tax return is even required to be filed with the Internal Revenue Service.

However, it is not true that no Illinois estate tax return is required to be filed, nor is it true that Dorothy's estate does not incur any Illinois estate tax. Based on the Act[4] and the Illinois Attorney General's Form 700 and the instructions, and using the AG's estate tax calculator, the Illinois estate tax on Dorothy's estate is $240,314.70, about 8 percent of the value of Dorothy's farm.

The tentative Illinois estate tax is computed on the net value of Dorothy's estate for federal estate tax purposes plus adjusted taxable gifts. That tentative Illinois estate tax is then multiplied by the percentage that the gross value of Dorothy's property with an Illinois tax situs bears to the gross value of her estate regardless of where sited. In this example, the tentative Illinois estate tax is $801,049. Multiplying this amount by thirty percent (30 percent) (the value of the Illinois farm, $3 million, divided by the gross value of her estate for federal estate tax purposes, $10 million) yields an Illinois estate tax of $240,314.70. (If Dorothy had been a resident of Illinois at the time of her death, her net estate of $9 million plus lifetime transfers of $2 million would have been subject to Illinois estate tax, the amount of which would have been $801,049.)

Dorothy could have avoided this result. Under the Act, "[t]he Illinois estate tax is imposed on every taxable transfer involving transferred property having a tax situs in Illinois."[5] Furthermore, "in the case of a decedent who was not a resident of this State at the time of death, the transferred property having a tax situs in this State, including any such property held in trust, is only the real estate and tangible personal property physically situated in this State."[6]

In the above example, Dorothy held title to her Illinois farm in her trust, so the Act would deem the farm to have a tax situs in Illinois. However, quite arguably the result would be different and Dorothy's estate would have avoided any Illinois estate tax if she had instead held title to the farm in a limited liability company (LLC). However, if the LLC was a single-member LLC with Dorothy as the only member (owner), it is likely that the LLC, similar to a trust, would be disregarded, and the result would be the Illinois estate tax shown above. Dorothy could have structured the LLC to include another member, perhaps a close family member or friend, at, say, a 1 percent interest, provided that the ownership of that 1 percent member was not illusory.■

*Gary R. Gehlbach is a former chair of the ISBA Trusts & Estates Section Council and practices with the firm of Ehrmann Gehlbach Badger & Considine, LLC in Dixon, Illinois.*

Trusts & Estates

This is the newsletter of the ISBA's Section on Trusts & Estates. Section newsletters are free to section members and published at least four times per year. Section membership dues are $30 per year.

To join a section, visit www.isba.org/sections or call 217-525-1760.

**OFFICE**
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

**EDITORS**
Mia O. Hernandez
Jennifer Bunker Skerston

**PUBLICATIONS MANAGER**
Sara Anderson
sanderson@isba.org

**TRUSTS & ESTATES SECTION COUNCIL**
Patrick D. Owens, Chair
Kathryn S. Van Eeuwen, Vice-Chair
Colleen L. Sahlas, Secretary
George L. Schoenbeck, III, Ex-Officio
Susan T. Bart
Charles G. Brown
Steven M. Dawson
Brian L. Dobben
Amber Drew
Alyx Paige Durachta
Zisl Taub Edelson
Michael L. English
Aaron David Evans
Shanise Antoinette Evans
Daniel P. Felix, CLE Coordinator
Nancy Franks-Straus
Neil T. Goltermann
Caroline Erika Hecht
Mia O. Hernandez, Newsletter Co-Editor
Thomas E. Herr
David R. Hughes
MacKenzie A. Hyde
Allen Injijian
Dennis J. Jacknewitz
Edward Jarot, Jr.
Robert W. Kaufman
Philip E. Koenig
Sarah M. LeRose
James M. Lestikow
Cameron T. Lythberg
Stephanie A. Macuiba
Oana Lavinia Militaru
Jonathan D. Morton
Joseph P. O'Keefe
Katherine M. Oswald
Kerry R. Peck
Tiffanie B. Powell
Raymond W. Prather
Marcos A. Resendiz
Hon. Elizabeth M. Rochford
Amina A. Saeed
Bryan Joseph Schrempf
Jennifer B. Skerston, Newsletter Co-Editor
Angelica W. Wawrzynek
Sarah J. Woollen
Heather A. McPherson, Board Liaison
William A. Peithmann, Associate Member

DISCLAIMER: This newsletter is for subscribers' personal use only; redistribution is prohibited. Copyright Illinois State Bar Association. Statements or expressions of opinion appearing herein are those of the authors and not necessarily those of the Association or Editors, and likewise the publication of any advertisement is not to be construed as an endorsement of the product or service offered unless it is specifically stated in the ad that there is such approval or endorsement.

Articles are prepared as an educational service to members of ISBA. They should not be relied upon as a substitute for individual legal research.

The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

1. 35 ILCS 405/2.
2. *Id.*
3. *Id.*
4. 35 ILCS 405/5(a)(2).
5. 35 ILCS 405/3(a).
6. 35 ILCS 405/5(a)(2).

## What Is a Trust? Part 2: Does It Matter?

CONTINUED FROM PAGE 1

But how do we determine the citizenship of a trust? Given the traditional view of trusts, it is the trustee who is the proper party to litigation, and it is the trustee's citizenship that counts for federal diversity jurisdiction. If a trust is an entity, then the trust takes on the citizenship of each of each of its members. *Americold Realty.* It is unclear whether members are the beneficiaries or the beneficiaries and the trustees. In any event, if a trust is a distinct legal entity, its citizenship for diversity jurisdiction purposes will not be that of just the trustees.

### Proper Litigants

Who sues: John Smith as Trustee of the Mary Jones Trust or the Mary Jones Trust? Whom do you sue: Doris Dixon as Trustee of the David Darling Trust or the David Darling Trust? If a trust is not an entity, then the trustee is the proper party. If a trust is an entity, then the trust itself is the proper party. What if you are in a jurisdiction that holds that a trust is not an entity, but it is the trust that is named as a litigant? Is the suit a nullity? Should the suit be dismissed due to the plaintiff's lack of capacity to sue? Should the court grant leave to amend? What if the statute of limitations has run after suit was filed but before the proper party was substituted by amendment?

The Reporter's Notes on section105 of Restatement (Third) of Trusts takes the position that either the trustee or the trust is a proper litigant. In those jurisdictions where it has been held that a trust has no capacity to sue, the Restatement argues that leave to amend should be granted so that "third parties are not thrown out of court for this technical transgression in pleading".

### Service of Summons

If a trust is just a relationship, and someone wants to sue the trustee, the plaintiff would serve summons on the trustee regardless of whether the trustee was being sued in its individual or its fiduciary capacity. If a trust is an entity and is named as a defendant in a lawsuit, how should the trust be served with summons? A corporation or a LLC can be served by serving either's registered agent; but no law requires a trust to maintain a registered agent.

In *McArdle as Tr. of Barbara M. McArdle Tr. & Christensen as Tr. of Raymond H. Christensen Irrevocable Tr.*, 2019 IL App (3d) 170858, the defendant as trustee was sued for breach of a contract to buy real estate. The contract included an address for the defendant. Summons was delivered to that address and was served on a person who resided there. The trustee did not reside there. Although the plaintiff named the trustee, not the trust, as defendant, the plaintiff argued that the trust was the true defendant.

The court noted that the Code of Civil Procedure does not state a method for service on a trust or on a trustee. Citing *Sullivan v. Kodsi*, the court held that a trust is an entity, that service on the trustee was unnecessary, and that delivery of summons at the address stated in the contract was proper service. If the court had adhered to the traditional notion of trust as a relationship and not an entity, service on the trustee in the manner for service on an individual would have been required.

### Privilege Against Self Incrimination

*Americold Realty* distinguished between a traditional trust and a trust treated as an entity. Courts have taken a more nuanced approach when deciding whether a trustee can claim the Fifth Amendment privilege against self-incrimination.

The privilege may be asserted only by an individual, not by an entity. In *United States v. Fridman*, 974 F.3d 163 (2d Cir. 2020), *cert. denied,* 210 L. Ed. 2d 907 (June 14, 2021), the court held that a trustee could not invoke the privilege in an effort to avoid complying with a subpoena to produce documents, stating: "Because the Fifth Amendment privilege protects only natural persons, collective entities such as corporations or partnerships may not invoke it to evade document requests." *Fridman* at 180. This is known as the collective entity rule. *Fridman* analyzed a traditional trust and held that it was a collective entity for purposes of the rule. Thus, the trustee, although an individual, could not assert the privilege. *Fridman* eschewed reliance on the relationship - entity dichotomy.

### UCC-1 Financing Statement

Section 9-502 of the Uniform Commercial Code requires that the name of the debtor be stated in a UCC-1 financing statement. One might wonder whether it is the name of the trustee or the name of the trust that is required. Fortunately, we do not have to ask whether a trust is a relationship or an entity for UCC-1 purposes. Section 9-503 provides specific rules as to how the debtor should be named if the collateral is held in trust. If the trust is registered (e.g., a Delaware statutory trust) then the registered name must be used on the financing statement. If the trust is not registered and the trust agreement gives it a name, then that name must be used. If the trust is neither registered nor named, then the settlor's name must be used, and the financing statement must indicate that the collateral is held in trust. If the settlor is trustee of more than one trust, the financing statement must include information sufficient to distinguish the trusts.

### Subjecting the Trust Estate to Tort Claims

As we have seen, treating a trust as an entity helps explain the policy behind section 1010(c) of both the Uniform Trust Code and the Illinois Trust Code.[2] That section states:

A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's

fiduciary capacity, whether or not the trustee is personally liable for the claim.[3]

Section 1010(c) means that if during administration of a trust the trustee breaches a contract entered into as trustee or commits a tort that causes injury to a third person, that person can collect damages from the assets of the trust estate. At common law, the trust estate was not subject to the claims of a third party who was injured by the trustee.[4] The Official Comments to the UTC acknowledge that section 1010(c) changes common law, stating: "Subsection (c) alters the common law rule that a trustee could not be sued in a representative capacity if the trust estate was not liable."[5]

What are the policy reasons for this dramatic change in the law? Two reasons are sometimes given. First, if the trustee is liable to the third person, the trustee can often be indemnified from the trust estate. Allowing the third person to collect directly from the trust estate avoids a circuity of actions while achieving the same economic result. The second reason given is that 1010(c) encourages third parties to do business with a trustee.[6]

Neither of these justifications for 1010(c) with respect to the trustee's torts is very satisfying. A trustee might not be entitled to indemnity from trust property, and the injured third person most likely is not someone who was doing business with the trustee. The downside to 1010(c), of course, is that it is the innocent beneficiary who bears the burden of the trustee's tort.

You might say that the same downside occurs with application of the principles of respondeat superior: the employer and its innocent shareholders bear the burden of an employee's tort. But there is a difference. An employer can exercise control over the employee; a beneficiary has no control over the trustee.

Were there reasons, other than those already stated, why NCCUSL[7] and Illinois adopted 1010(c)? Perhaps there is a feeling that a trust is an entity, a juridical being much like a corporation, with the trustee as an agent of the trust. Just as a corporation is liable for the acts of its agents, so the thinking may go, so should a trust be liable for the acts of its representative, the trustee. The problem with this reasoning is that, historically, a trust has not been thought of as an entity.

Section 1010(c) creates an inconsistency in Illinois law. The estates of decedents, minors, and other wards are not subject to claims of third parties injured due to the estate's representative's negligence while a trust estate is subject to claims of third parties injured due to the trustee's negligence. The Uniform Probate Code[8], not adopted in Illinois, would subject those other estates to claims of third parties.

## Conveyances

No doubt the best practice is to convey property to the trustee rather than to the trust, and the grantor of property held in trust should be the trustee, not the trust. To be clear, it should be "John Smith as Trustee of the Mary Jones Trust" not "the Mary Jones Trust". But what if a deed identifies a grantor or grantee as "the Mary Jones Trust"? Would that invalidate the deed? We are unaware of any Illinois case, but several states have anticipated the problem and dealt with it by statute. Such statutes provide in essence that a deed should name the trustee rather than the trust, but a deed to or from a trust will be deemed to have been made to or by the trustee. Here is a Maine statute[9] for example:

1. **Conveyance to a trust.** In any conveyance of real property or any interest in real property in this State, if the grantee or one or more of the grantees is named as a trust, whether the trust is created under the laws of this State or of any other jurisdiction, and no trustee of that trust is named as a grantee, then the conveyance is deemed to have been made to all of the trustees of the trust in their capacity as trustees of the trust, as though they had been named as grantees instead of the trust.
2. **Conveyance from a trust.** In any conveyance of real property or any interest in real property in this State, if the grantor or one or more of the grantors is named as a trust, whether the trust is created under the laws of this State or of any other jurisdiction, and no trustee of that trust is named as a grantor, then the conveyance is deemed to have been made by all of the trustees of the trust who signed the instrument of conveyance as trustees of the trust, as though they had been named as grantors instead of the trust.

## Conclusion

Is a trust an entity? It depends on whom you ask. Does it matter? It certainly can; but in most cases, it shouldn't. Except for statutory trusts, whose enabling statutes expressly designate them as entities, the law should be guided by the U.S. Supreme Court's decisions in *Anericold Realty* and *N. Carolina Dep't of Revenue* and the Illinois Supreme Court's decision in *Schumann-Heink*: "A trust is no entity at all".[10] On the other hand, people should not be punished for referring to a trust instead of to a trustee. There may be no pressing need for it, but a statute such as Maine's would forestall problems with title to property. Such a statute should be extended to execution of contracts and to how parties are identified in litigation. Illinois should reconsider ITC section 1010(c) to the extent that it subjects the trust estate to damages for the trustee's torts.

Meanwhile, if opposing counsel argues that a trust is an entity, and if the outcome of the case depends on that, hope that the judge is an opera buff; and remind the court of Ernestine Schumann-Heink.■

---

*Sherwin D. Abrams is a partner in Abrams & Chapman LLP. He thanks his law partner, Terry Chapman, for his editing assistance. Sherwin and Terry Chapman have been practicing law together for 46 years and have more than a century of legal experience between them. Sherwin continues to bicycle along the quiet country roads of McHenry County.*

1. 28 USC §1332.
2. 760 ILCS 3/101 *et seq.*
3. *Id.*
4. *Schmidt v. Kellner*, 307 Ill. 331 (1923).
5. For an excellent explanation of the common law rule, *see* Timothy L. Bertschy, *Personal Liability of an Executor or Trustee - Time for A Change*, 98 Ill. B.J. 140 (2010).
6. While arguing for the change brought about by 1010(c), Mr. Bertschy candidly acknowledges that the real reason is to prefer the injured party to the innocent beneficiary.
7. National Conference of Commissioners on Uniform State Law, also known as the Uniform Law Commission.
8. UPC Sections 3-808 and 5-430.
9. 33 M.R.S.A. § 851-A.
10. *Schumann-Heink v. Folsom*, 328 Ill. 321, 327 (1927).

# What's the Deal With Electronic Notaries in Illinois?

BY RAY PRATHER

On July 23, 2021, Gov. Pritzker signed Public Act 102-0160 amending the Illinois Notary Public Act. The amendments permanently allow notary publics to perform remote notarial acts, bring electronic notary publics to Illinois, and add education and journal requirements. But it's now February 2023, and Public Act 102-0160 has not yet become effective. Here's a short update on the status of these changes and when they might become effective.

Public Act 102-0160 becomes effective upon the Illinois Secretary of State's Office adopting "the rules necessary to implement this Act".[1] On April 15, 2022, approximately 100 pages of proposed rules were published in the Illinois Register, and a public comment period began running. The public comments were numerous – the Secretary of State's Office received about 150 comments from individuals and organizations affected by the amendments. In December 2022, the Secretary of State's Office published substantial changes to the proposed rules based on the public comments they received and sought approval to adopt them from the Joint Commission on Administrative Rules (JCAR).

On January 13, JCAR objected to finalizing the rules stating, "[M]aking changes of this volume and complexity to a rulemaking without additional public review would circumvent a full public comment process. The Secretary of State has indicated its intent to withdraw this rulemaking and refile the latest agreed-upon version as a new rulemaking so that all interested parties have the opportunity to comment again." [2] Thus, the process will begin anew with the Secretary of State's Office publishing new proposed rules in the near future.

The proposed rules as of December 2022 include important developments for attorneys. Public Act 102-0160 adds provisions requiring notary publics to maintain a journal, but left the specifics of the journal requirements to the rulemaking process. Under the proposed rules, a notary must open their journal for inspection to any person who requests,[3] and notaries must keep custody of their journals even when changing employers.[4] Obviously these two provisions create problems for an attorney's duty of confidentiality when a law office notarizes documents for clients.

Due to comments by the ISBA Trusts and Estates Section Council and others on this issue, the Secretary of State's Office added the following provision:

(e) Notwithstanding any other subsection of this Part to the contrary, a notary employed by an attorney or law firm is not required to keep a journal of notarizations performed during of the notary's employment if the attorney or law firm maintains a copy of the documents notarized. No attorney or law firm shall be required to violate attorney-client privilege by allowing or authorizing inspection of any notarizations that are recorded in a notary's journal. Journals of notarizations performed solely within the course of a notary's employment with an attorney or law firm is the property of the employing attorney or firm.[5]

Thus, attorneys and employees of law firms will likely be exempt from the journal requirements when the rules are adopted.

As a practical matter, law firms should be cognizant of notarizing documents that are unrelated to the client's matter. For example, a client represented by a law firm in the administration of an estate of a family member might request a law firm's employee notarize a beneficiary designation form for their own IRA. Many firms would provide this service, but under Prop. Rule Sec. 176.900(e), the law firm must maintain a copy of the document in the client's file even though it may be unrelated to the client's matter.

Eventually proposed rules will be adopted, and Public Act 102-0160 will become effective. Given JCAR's position that the public must be allowed to comment on the changes to the proposed rules again, it will be a while longer. But the proposed rules (if enacted as they currently stand) should be a relief to attorneys and law firms determining how they will implement the new journal requirement.■

*Ray Prather is former chair of the Trusts & Estates Section Council. He is also a CPA. Mr. Prather practices with the firm of Prather Ebner Wilson LLP in Chicago, Illinois.*

1. Public Act 102-0160, Sec. 99.
2. The Flinn Report, Vol 47, Issue No. 2, January 13, 2023.
3. Prop. Rule Section 176.950.
4. Prop. Rule Section 176.940.
5. Prop. Rule Sec. 176.900(e).

# AGRICULTURAL APPRAISALS OF ILLINOIS, INC.

***Farm Equipment and Livestock Appraisals***

Personal property appraiser for farm equipment & livestock. Thirty years' experience as a licensed insurance agent. Also available for insurance policy review.



**Marshall Eccher | (618) 444-4273 | ag.appraisalsofillinois@gmail.com**

*LET US PROMOTE,* ***You!***

Clients contact us and we refer them to you.
*IT'S THAT EASY!*

Join the ISBA's Lawyer Referral Service *TODAY*

***PREMIUM MEMBERSHIP***
*Just $50 per year*

With a Premium Membership, your name and contact information will be given out to consumers who call the ISBA's live operators seeking paid legal assistance in specific areas of law.



ILLINOIS STATE BAR ASSOCIATION® *ISBA.ORG/ILLINOISLAWYERFINDER*