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The SECURE Act poised to eliminate common estate planning technique

BY LAWRENCE J. GREGORY

According to a recent study, one in three American have less than $5,000 in retirement savings, and one in five Americans have no retirement savings at all.[1] Given this dire state, it is no wonder that increasing the ability to save for retirement is one of the few issues that has garnered bipartisan support. On May 23, 2019, the U.S. House of Representatives passed the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act") with an overwhelming majority vote of 417-3.[2] The legislation will make it easier for individuals to save for retirement, primarily through increased access to retirement vehicles and more options to contribute to tax advantaged accounts such as 401(k), 403(b), and IRAs. However, in order to pay for these new saving options, the SECURE Act restricts a popular estate planning technique

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U.S. Supreme Court addresses state income taxation of trusts in *Kaestner*

BY OLIVER R. MERRILL

On June 21, 2019, the U.S. Supreme Court issued its decision in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, unanimously holding that "the presence of in-state beneficiaries alone does not empower a State to tax trust income that has not been distributed to the beneficiaries where the beneficiaries have no right to demand that income and are uncertain to receive it." *Kaestner* simultaneously sheds light on states' jurisdiction to tax trust income while also providing a narrow opinion that is of limited precedential and practical impact. Here, we take a closer look at the Court's decision in *Kaestner*, how it impacts state taxation of trusts, and what questions arise in its aftermath.

Background

The trust at issue in *Kaestner* was an irrevocable trust created in 1992. The Kimberley Rice Kaestner 1992 Family Trust (the "Trust") first originated when Joseph Lee Rice III, Ms. Kaestner's father, formed a trust for the benefit of his children. Rice, a

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commonly used to preserve and grow qualified assets for future generations and defer its eventual taxation.

The SECURE Act

Some of the SECURE Act's more noteworthy changes to the current rules are to increase tax incentives for small employers to offer retirement plans, allow part-time workers to participate in 401(k) plans, increase the age for required minimum distributions from qualified accounts from 70½ to 72, and eliminate the prohibition on traditional IRA contributions for those 70½ or older.[3]

However, these changes come at the cost of federal tax revenues. To offset the decrease in tax revenue, the SECURE Act all but eliminates an account beneficiary's ability to take only the minimum distribution over such individual's life expectancy (the "stretch-out").[4] Instead, the SECURE Act imposes a 10-year payout for all such beneficiaries.[5] Where the life expectancy stretch-out would allow more of the account to grow tax deferred over a longer period of time, the SECURE Act would require a full withdrawal (and all income taxes paid) within 10 years.[6] This new rule will eliminate the qualified account planning most advisors use to achieve maximum tax deferral for the account owner's beneficiaries.[7] Typically, advisors will recommend an account owner's children be the beneficiaries; and in some instances, their grandchildren to utilize an even longer life expectancy. Depending on the size of the accounts and the generation appointed as beneficiary, the tax-deferred growth could be well into the millions.

There are some exceptions to the proposed 10-year payout rule. For example, the rule will not apply to a beneficiary who is: a surviving spouse, a child who has not reached majority, a person with a disability, a person with a chronic illness, or a person who is not more than 10 years younger than the account owner.[8] Any beneficiary who falls under an exception would continue to qualify for the life expectancy stretch-out.[9] Upon closer examination, however, the exceptions only appear to appreciably benefit disabled or chronically ill beneficiaries.[10] For instance, while the surviving spouse is an exception, it is of minor benefit compared to the spousal rollover rules which would still apply.[11] Additionally, the exception for a child who has not reached the age of majority is also similarly limited. The SECURE Act provides that on the day a minor beneficiary becomes of majority, the 10-year payout rule applies as of that date.[12] For example, if the age of majority is 18, the new rules will require the account balance to be fully distributed by age 28.

The Conduit Trust Vulnerability

For estate planning purposes, it is important to remember that only individuals (and certain trusts) can qualify as a beneficiary entitled to the life expectancy stretch-out upon the death of the account owner. Trusts must qualify as either a "conduit trust" or an "accumulation trust" to use the life expectancy of the trust's beneficiaries for minimum distribution purposes.[13] If the trust fails to qualify as either, then the entire qualified account balance must be withdrawn (and income taxes paid) within five years.[14]

Ever since the Treasury Regulations regarding conduit and accumulation trusts were finalized in 2002,[15] most standard revocable living trusts are now generally drafted to qualify as a conduit trust. One critical requirement of the conduit trust is that all qualified account withdrawals made by the trustee must "be paid directly to" the beneficiary, and may not be retained in the trust.[16]

By drafting a revocable living trust as a conduit trust, then depending on the beneficiary's age, only a relatively small amount of the qualified account balance must be withdrawn and distributed each

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year, allowing the remaining balance to continue to grow tax deferred.[17] Conduit trusts can also be drafted as discretionary spendthrift trusts to provide a layer of asset protection over the trust assets, including any balances remaining in qualified accounts. However, when a conduit trust's requirement to distribute all account withdrawals is applied against the SECURE Act's accelerated 10-year withdrawal rule, any discretionary spendthrift trust provisions will not apply to the fully distributed account balance after 10 years.

Therefore, unless treated, the SECURE Act's 10-year payout rule will act as a virus that infects standard revocable living trusts by leveraging their conduit (direct payment) provisions to force assets out of an otherwise healthy discretionary spendthrift trust at an accelerated rate. The vaccine, it seems, would be to hold such accounts in a trust free of any conduit provisions, such as an accumulation trust, or as discussed below, even intentionally failing the conduit or accumulation trust rules, in favor of a more flexible discretionary spendthrift trust. All trustees of both revocable and irrevocable trusts should review their current trusts and amend or modify, as applicable, though a trust protector, decanting, or other judicial or non-judicial means, to account for the resulting failure of the conduit provisions to achieve the trust's intended spendthrift objectives.

Although a trust can also be structured as an accumulation trust, which would allow for both the life expectancy stretch-out and the spendthrift protection over the amounts withdrawn from the qualified accounts, drafting a standard revocable living trust to qualify as an accumulation trust is exponentially more difficult than qualifying as a conduit trust.[18] In fact, the struggle to qualify as an accumulation trust has given rise to the prevalence of the stand-alone retirement trust.[19]

With the life expectancy stretch-out shaping up to be all but eliminated, the SECURE Act might create a scenario where the need to qualify as a conduit or accumulation trust may no longer be of primary importance.[20] Specifically, the SECURE Act's 10-year payout rule applies only to individuals (and those trusts qualifying as conduit or accumulation trusts). Any other non-qualified beneficiary remains subject to the current 5-year default payout rule.[21] In practice, the mental gymnastics necessary to qualify any given trust as a conduit or accumulation trust, and the planning restrictions inherent to those structures, is only providing the beneficiary an extra five years of tax deferred growth. Therefore, falling into the 5-year default payout rule, whether intentional or unintentional, might be a preferable in certain circumstances.

So, What Next?

If the SECURE Act becomes law, it will significantly curtail the ability of advisors to plan for the life expectancy stretch-out. Some techniques to mitigate the adverse effects of this change include the increased use of Roth contributions and conversions, and the implementation of a spray trust. Additionally, charitable remainder trusts ("CRT") might also be a unique planning opportunity to mimic the stretch-out rules.

Roth Conversions. For anyone over the age of 70½, contributions to Roth accounts can be recommended where appropriate,[22] since contributions to traditional accounts above such age are prohibited.[23] While traditional accounts under the SECURE Act will achieve parity with respect to the unlimited contribution age as its Roth counterpart, Roth accounts may still be beneficial as they do not require minimum distributions at any age.[24] Although the SECURE Act increases the age for required minimum distributions to 72, Roth accounts never require minimum distributions while the account owner is alive. As a result, to the extent an account owner will not need to access Roth funds during his or her lifetime, a Roth account can help maximize the amount of funds that can remain in the qualified account until the account owner's death.

In addition to contributing to a Roth account at any age,[25] another approach is to convert traditional funds to Roth funds through the Roth conversion process.[26] In a Roth conversion, traditional funds are transferred to a Roth account, and the owner pays income tax on value of the funds at the time of conversion. Whether Roth conversions will benefit any given account owner is based on a large number of different factors, so the "numbers should be run" in any given case to determine whether converting some or all of the traditional funds will garner greater tax savings in light of the possible new SECURE Act rules.

Spray Trust. With only a relatively limited window of 10-years in which to distribute qualified accounts, making the account beneficiary a spray trust might provide the trustee the ability to reduce overall income taxes amongst its beneficiaries. A "spray trust" is a trust with multiple beneficiaries, where the trustee has the discretion to distribute assets in equal or unequal proportions amongst those beneficiaries. The trustee ostensibly has the ability then to control who will receive qualified account income. The tax reduction is accomplished by shifting qualified account income on an annual basis to the specific beneficiaries in the lowest tax bracket. While increasing the taxes on the low-bracket beneficiary, the overall tax burden of the entire class of beneficiaries is reduced.[27]

Charitable Remainder Trust. The use of charitable remainder trusts ("CRT") has relatively declined in recent years given the increase in the federal estate tax exemption amount ($11.4 million for 2019). However, under the SECURE Act, these trusts may be poised for a renaissance, as CRTs can mimic some of the stretch-out benefits currently received by qualified account beneficiaries. Under a CRT, the grantor contributes assets to an irrevocable trust and bifurcates the assets into an annuity stream for the beneficiaries, and a remainder amount which eventually goes to charity. The annuity can be for the life of a beneficiary, the lives of beneficiaries in multiple succession, or if there is no measuring life, for 20 years.[28]

By making a CRT the beneficiary of a qualified account, the CRT beneficiaries will be entitled to annual annuity payments from the trust for the remainder of their lives. As an asset of the CRT, the qualified funds will grow tax deferred, and income tax will only be paid on the annual payments to the beneficiaries. The majority of the annuity payments will be ordinary income and payable over the lives of the named beneficiaries.[29] As a result, the CRT does a decent job of mimicking the current stretch-out rules.

The caveat, however, is that at least 10% of the qualified funds must eventually go to charity.[30] It is called a *charitable* remainder trust, afterall. The CRT cannot be structured so that 100% of the funds are distributed to the non-charitable beneficiaries. Additionally, under the CRT rules the annuity payments are relatively fixed,[31] and the beneficiary cannot receive more than the annuity payment in any given year. Under the current stretch-out rules, a qualified account beneficiary has the ability to withdraw more than the required minimum each year.

In short, if the grantor is willing to cut charity in for at least a 10% piece of the qualified accounts, and is comfortable with the restriction on withdrawing more than the annual annuity, he or she could mimic the maximum stretch-out the beneficiaries could have enjoyed if the SECURE Act is signed into law.

Charity as Direct Beneficiary. While naming a charity as a direct beneficiary of a qualified account has always been a planning option, such option may garner more interest as a means to completely dispose of the 10-year payout issue. If the account owner is charitably inclined, he or she can name a charity directly on the beneficiary designation form, and the account will pass to the charity upon the account owner's death. Giving a qualified account to a charity is preferable to giving other assets to the charity, since charities do not pay any income tax on the account withdrawals.

RESA and RSSA

As of the writing of this article, the SECURE Act has been sent to the Senate for consideration and possible vote. However, since 2016, the Senate has attempted to pass their version of retirement savings reform under the Retirement Enhancement and Savings Act ("RESA"). RESA was re-introduced as recently as April 1, 2019, and contains many of the same changes as the SECURE Act, with some modifications. Both the SECURE Act and RESA eliminate the age limit on contributions to traditional IRAs, and they both modify the minimum distribution payout rules.

However, RESA's 10-year payout rule is reduced to 5-years and only applies to the aggregate qualified account balances in excess of $400,000. Presumably, any amounts under $400,000 can follow the current stretch-out rules. Additionally, RESA does not have a similar provision increasing the required minimum distribution age to 72, but another bill introduced in the Senate, the Retirement Security and Savings Act (RSSA) increases the age to 75.

From what this author understands, there is no mechanism for which to reconcile these bills under a reconciliation procedure. It appears that the SECURE Act, as introduced in the Senate, must be given a vote as an entire package. As of the writing of this article, the SECURE Act apparently is being held up by disagreements on provisions of the SECURE Act unrelated to anything discussed in this article. Despite the disagreement, their remains bipartisan support for the bill and most commentators are hoping the legislation gets passed before the Senate breaks on August 2, 2019. ■

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1. Northwestern Mutual (2018, May 8).*1 in 3 Americans Have Less Than $5,000 in Retirement Savings*. Retrieved from https://news.northwesternmutual.com/2018-05-08-1-In-3-Americans-Have-Less-Than-5-000-In-Retirement-Savings.
2. "Setting Every Community Up for Retirement Enhancement Act of 2019 (H.R. 1994): Roll Call 231." Congressional Record 165:87 (May 23, 2019) p. H4124.
3. Title I-IV of the SECURE Act.
4. IRC §401(a)(9)(B)(iii);
5. §401 of the SECURE Act.
6. Roth accounts will grow tax exempt, instead of tax deferred.
7. While technically incorrect terminology, for clarity, this article will refer to the "employee" beneficiary as the "account owner."
8. §401 of the SECURE Act.
9. IRC §401(a)(9)(B)(iii).
10. At least as it relates to tax deferral.
11. IRC §401(a)(9)(B)(iv).
12. Section 401 of the SECURE Act.
13. Treas. Reg. §1.401(a)(9)-5,A-7(c); *See also* Choate, Natalie B., "Life and Death Planning for Retirement Benefits" for a detailed and comprehensive discussion on the conduit and accumulation trust rules, and the means to qualify for both.
14. IRC §401(a)(9)(B)(ii).
15. Treas. Reg. §1.401(a)(9)-5.
16. *Id* at A-7(3).
17. Roth accounts will grow tax exempt, instead of tax deferred.
18. Treas. Reg. §1.401(a)(9)-5.
19. A stand-alone retirement trust is a trust separate and apart from a revocable living trust of which the sole purpose is to accept qualified account assets for the benefit of its beneficiaries. While the stand-alone retirement trust can be drafted as a conduit trust, its real benefit is in its ability to qualify as an accumulation trust (to allow for both the stretch out as well as the assets protection), which most revocable living trusts cannot do.
20. Treas. Reg. §1.401(a)(9)-4, A-1.
21. §401(a)(1) of the SECURE Act.
22. Pursuant to IRC §408A(c)(4), the lifetime required minimum distribution rules do not apply for Roth accounts. Additionally, Roth contributions can only be made to the extent the account owner has earned income. IRC §408A(c)(2)(A).
23. IRC §401(a)(9)(A),(C).
24. IRC §408A(c)(4).
25. To the extent the client has earned income.
26. In fact, this may be the only available mechanism of increasing Roth funds if the account owner has no earned income.
27. In order to properly shift the income tax burden amongst the beneficiaries, however, the qualified account spray trust must be a separate trust (or sub-trust) from the other assets.
28. IRC §664(d)(1)(A).
29. IRC §664(b).
30. IRC §664(d)(1)(D).
31. There are numerous variations in which payments can be made to the beneficiary such as a standard annuity (CRAT), a unitrust (CRUT), a net income makeup trust (NIMCRUT).

U.S. Supreme Court addresses state income taxation of trusts in *Kaestner*

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New York resident, formed the Trust under New York law and appointed a New York resident as Trustee (a Connecticut resident later became trustee). At the time, none of the beneficiaries resided in North Carolina. The trust agreement gave the trustee "absolute discretion" to make distributions to the beneficiaries in such amounts and proportions as the trustee might from time to time decide. The trustee was authorized to exclude beneficiaries from distributions, with the effect of cutting one or more beneficiaries out of the Trust.

Ms. Kaestner moved to North Carolina in 1997, and she and her children were residents of North Carolina during the relevant time period of 2005 to 2008. After Ms. Kaestner's move, the trustee divided the initial trust into subtrusts, including the Trust, in its current form, for the benefit of Ms. Kaestner and her children. The original trust agreement still governed the Trust, and the trustee retained absolute discretion over the management of Trust assets, as well as the timing and allocation of distributions.

From 2005 to 2008, North Carolina's sole connection to the Trust was the in-state residence of the beneficiaries. During this time, the beneficiaries did not receive distributions from the Trust. New York law continued to govern the Trust. The trustee never resided in North Carolina. The Trust's records were maintained in New York, while its assets were maintained in Massachusetts. The Trust had no direct investments in North Carolina.

North Carolina law imposes tax on trust income "for the benefit of" a North Carolina Resident.[1] North Carolina therefore asserted jurisdiction to tax the income of trusts with a resident beneficiary, without any additional contacts to the state. North Carolina assessed a tax on the accumulated (undistributed) income earned by the Trust from 2005 to 2008. The trustee paid the Trust's state income tax liability under protest, and filed suit for a refund claiming that North Carolina's tax, based on the in-state residency of a beneficiary, alone, was an unconstitutional violation of Due Process. The case made its way to the Supreme Court, where the constitutionality of state trust taxation would take center stage.

The Outcome

The Court held that North Carolina's tax, based solely on the in-state residence of discretionary beneficiaries, was unconstitutionally applied against the Trust in violation of Due Process. The opinion cited three key factors. First, the beneficiaries did not receive distributions during the years in question. Second, the trustee had absolute authority over the management and distribution of trust assets while the beneficiaries had no right to demand, control, possess, or enjoy the trust assets. Third, there was no guarantee that the beneficiaries would receive distributions in the future.[2]

A state may impose taxes only where certain "minimum contacts" exist between the state and the taxed person or entity such that the tax "does not offend traditional notions of fair play and substantial justice." The inquiry is fact-dependent; only those who derive "benefits and protection" from a state should be subject to the obligations of the state.[3] In part, the Due Process Clause limits states to imposing only taxes that bear "fiscal relation to protection, opportunities and benefits" afforded by the state. Due Process analysis requires two steps. First, and most relevant in *Kaestner*, there must be some "definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax." Second, the "income attributed to the state for tax purposes must be rationally related to 'values connected with the taxing state.'"[4] In this case, North Carolina lacked sufficient contact to the Trust to constitutionally tax the Trust's income.[5] The in-state residence of beneficiaries, with purely discretionary interests, without more, does not pass constitutional muster.

The result in *Kaestner* was certainly favorable to the Trust, however the Court's opinion is narrowly focused on North Carolina's statute, and specifically the imposition of tax stemming solely from a beneficiary's in-state residency. The fact that the in-state residence of a contingent beneficiary was the *sole* connection to the State is critical to the court's reasoning. Given both the unique factual circumstances presented and North Carolina's unique law, the effect of *Kaestner* on state trust taxation, more generally, is unclear. *Kaestner*'s implications are further limited by its purposefully narrow opinion, such that its impact may derive from the questions raised rather than those answered.

The Fallout

Narrow Holding Limits Precedential Value

North Carolina is one of only a handful of states that impose trust taxes based solely upon beneficiary residence, without more. Other states that impose tax on trusts income do so by looking at one or more additional factors. These factors include (a) the residency of the trust creator (testamentary or inter vivos), (b) the place of trust administration, and (c) the residency of fiduciaries, in addition to the residence of the beneficiaries. The *Kaestner* opinion addresses North Carolina's statute specifically, and its reliance on beneficiary residence, alone. Accordingly, the *Kaestner* decision does not say that North Carolina's statute is unconstitutional, but rather that it was unconstitutionally applied in this circumstance. It therefore offers little guidance as to the constitutionality of taxing regimes that rely on factors other than, or in addition to, beneficiary residence.

Furthermore, the Court emphasized that its holding is limited to the specific circumstances presented by this case. The Court's decision hinged upon the contingent nature of the beneficiaries' interests in the Trust, while also noting the Trust's lack of administrative or fiduciary contact with the

state. The elements of "possession, control, and enjoyment of trust property" were central to determining whether sufficient state contact existed. As discussed, the trustee held absolute discretionary authority over trust administration, as well as the allocation and timing of distributions. The trustee did not make distributions to the beneficiaries during the relevant tax years. The trustee was not a resident of North Carolina, nor did any of the administrative or investment activities of the trust occur in-state. Because the beneficiaries did not have rights to possess, control, or enjoy assets of the Trust, nor any guarantee of such rights in the future, their residence could not, alone, justify the tax imposed. Thus, the Court's analysis depends heavily upon what the concurrence calls an "unusually tenuous" connection between the beneficiaries and the Trust's income. The Court limited its holding to the specific facts presented, and did not "imply approval or disapproval of trust taxes that are premised on the residence of beneficiaries whose relation to trust assets differs from that of the beneficiaries here." The relationship between the resident beneficiaries and the Trust's assets here was insufficient, but the Court declined to expand upon what relationship might suffice to support state taxation. Thus, not only is *Kaestner* narrowly applicable to a minority state taxing statute, but it only addresses the instance of purely discretionary beneficiaries.

The Court declined to address what sorts of beneficial interests might be sufficient to support state taxation. It remains unclear, for example, whether a state tax could be levied against a trust where a trustee holds less-than-absolute discretionary authority, as might be the case for beneficiaries entitled to distributions for an ascertainable standard. Would a state tax pass muster where a trust provides for mandatory income distributions, or grants an in-state beneficiary the right to withdraw assets upon attaining a specified age in the absence of a decanting option? The Court reserved these issues for another day.

Additionally, the *Kaestner* opinion focuses its analysis only on the Due Process clause. In fact, the Kaestner opinion does not take up the second prong of Due Process analysis as a result of the determination that the first prong was not satisfied. Prior state cases dealing with state taxation of trust income have considered the Commerce Clause in addition to the Due Process Clause. In addition to constitutional Due Process standards, taxing states must also satisfy the Commerce Clause's requirement for "substantial nexus" between the state and the activity it seeks to tax. Thus, *Kaestner* sheds little light on how the Commerce Clause or the second prong of Due Process analysis might impact the viability of state trust income taxation.

Given these limiting factors, it seems unlikely that the holding itself will provide much in the way of precedential value. The impact is particularly muted in states where trust taxing jurisdiction is rooted in additional elements of the trust-state relationship. Nevertheless, for practitioners in North Carolina or states with similar trust taxing statutes, it may provide tax planning considerations where the circumstances are substantially similar to those presented in *Kaestner*.

Limited Guidance on Other Taxation Regimes

Kaestner addressed some elements of constitutionally legitimate state taxes on trusts. The Court confirmed that a tax on trust income distributed to an in-state resident is permissible under the Due Process Clause. So, too, is a tax based on a trustee's in-state residence, as well as those focused upon the location of trust administration.[6] The Court declined to expand further upon these principles, however. The question of state taxation frequently arises in the context of a trust with multiple trustees residing in different states. Would a single trustee's residence in a state seeking to tax the trust assets be sufficient? What if the trust were "directed," or otherwise provided for fiduciaries with separate, distinct, or delegated duties? The *Kaestner* decision does not offer answers to these questions, and seems to indicate only that it would require facts and circumstances analysis.

The Court also declined to address whether state taxation of trust income on the basis of settlor-residency would pass constitutional muster. Particularly in the case of an inter vivos trust, the logic employed by the Court suggests that a settlor's residency, alone, may be insufficient where the settlor does not retain clear power to possess, control, or enjoy the trust assets. While prior cases have upheld taxation of such trusts where the settlor retained the right to revoke the trust or the power to dispose of trust property, the issue of whether a lesser degree of control by a settlor also could sustain a tax by the settlor's domicile was left unaddressed. Settlor-residence is a prevalent factor in many state taxing regimes, and despite recent state court decisions that have addressed the issue (including, notably, the 2013 Illinois case of *Linn v. Department of Revenue*), federal guidance remains elusive. The Court may have the opportunity to confront some of these questions in the pending *Fielding* case,[7] but until then the issue remains murky.

Conclusion

While the *Kaestner* decision leaves unanswered many questions about the bounds of state taxation of trusts, the implications of the Court's analysis remain important. The holding's precedential value is significantly minimized as a result of the narrowness of the opinion and the unique facts of the case. Nevertheless, it is a rare Supreme Court decision that confronts when a state may constitutionally tax the undistributed income of trusts within the bounds of the Due Process Clause. We are likely to see many more cases arising at the state level in a post-*Kaestner* world, and they will undoubtedly apply, limit, and expand upon the views expressed in the Court's opinion. Practitioners and fiduciaries should review trust "contacts" with any given state each year, to determine whether the trust may be subject to state taxation, and if there are opportunities to reduce, or eliminate, state taxes. Reviewing "trust-state contacts" may be particularly important for successor fiduciaries of existing trusts to determine whether state returns have been properly filed, and whether the trust may have potential state tax liabilities. The analysis in *Kaestner* provides significant issues to consider even if its direct impact on the world of trusts will be muted.■

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1. N.C. Gen. Stat. Ann. §105-160.2.
2. Interestingly, the Trust was initially designed to terminate in 2009. As permitted under New York's decanting statute, the trustee instead distributed the assets into a new trust, extending the termination date. The Court noted that one therefore might characterize the interests of the beneficiaries as "contingent" on the exercise of the trustee's discretion. In footnote 10, the Court expressly declined to address whether a different result might follow if the beneficiaries were certain to receive funds in the future.
3. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
4. Citing *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).
5. Footnote 5 of the opinion explains that because the Trust in *Kaestner* did not meet the first step in this analysis, the Court did not address the second.
6. Citing *Maguire v. Trefry*, 253 U.S. 12 (1920), *Greenough v. Tax Assessors of Newport,* 331 U.S. 486 (1947), *Hanson v. Denckla*, 357 U.S. 235 (1958), and *Curry v. McCanless*, 307 U.S. 357 (1939).
7. The Court has not yet indicated whether or not it take up the issues presented in *William Field, Trustee of the Reid and Ann MacDonald Irrevocable GST Trust for Maria V. MacDonald, et al. v. Commissioner of Revenue*, a Minnesota Tax Court case addressing a state statute that provides an inter vivos trust with a resident settlor at the time the trust becomes irrevocable is a "resident trust" for state tax purposes.

Grantor trust administration in Illinois: A primer—part 3

BY COLLEEN L. SAHLAS AND EMILY VIVIAN

This is the final article in a 3-part series.

This article, published in three installments, outlines the roles and duties of the acting successor trustee in Illinois trust administration of a self-declaration of trust where the grantor/settlor has become disabled or is deceased. Accordingly, it instructs you as the attorney on how to advise and assist the trustee in carrying out those duties.

The two previous installments covered the major aspects of trust administration in Illinois. This section covers the tax timeline, written by Emily R. Vivian, and optional actions in trust administration, written by Colleen L. Sahlas.

Note that this article series is based upon current Illinois law, which may be subject to change when the Illinois Trust Code at HB1471 takes effect on January 1, 2020.

Tax Filings and Issues in Trust Administration

By Emily R. Vivian

Fiduciaries, whether they be executors, trustees or administrators, are often surprised to learn that they are required to file income tax returns for the entities that they represent (*i.e.*, estates and trusts). While a fiduciary can often get by with filing a single trust income tax return, in many cases a fiduciary is required to file several trust income tax returns. Specifically, if the trust administration is relatively simple, straightforward and can be wrapped up in a single tax year, the fiduciary may only need to file one trust income tax return. However, if the trust is complicated or is structured to last for multiple years, the fiduciary will need to file multiple trust income tax returns. Accordingly, there are many different tax matters to consider when representing fiduciaries.

Tax Returns in Trust Administration

So what types of tax returns are fiduciaries required to file when administering a trust? And when are such tax returns due?

Decedent's Final Income Tax

The tax year for a decedent closes as of the date of his or her death. Obviously, the decedent cannot file his or her own final income tax return, so someone else must handle that responsibility. It makes sense that the responsibility would fall to the executor of the decedent's estate, as the executor is already responsible for managing the decedent's assets and liabilities. However, many times when a decedent dies and the bulk of his or her assets are titled in the name of his or her trust, a probate estate is not required to be opened and no executor is appointed. Rather, the decedent's financial affairs are handled strictly through trust administration. Because taxes are considered a debt of a decedent and tax refunds are considered an asset of the decedent, the trustee is required to satisfy any outstanding taxes and collect any potential tax refunds.

The due date for the decedent's final income tax return is April 15 following the year in which the decedent died. For example, if the decedent died March 20, 2019, his or her final income tax return will be due April 15, 2020, and will cover the period of January 1, 2019, to March 20, 2019. If the decedent died November 2, 2019, his or her final income tax return will be due April 15, 2020, and will cover the period January 1, 2019, to November 2, 2019.

Also, if the decedent was married at the time of his or her death, the surviving spouse can file as married filing jointly for the year in which the decedent died. So, if Johnny and June are married and Johnny dies on January 2, 2019, June can file as married filing jointly for 2019 (the returns for which will be due April 15, 2020).

Fiduciary Tax Return

As Colleen L. Sahlas pointed out in part 1 of this primer, a trust becomes a separate taxpaying entity as of the date of the decedent's death (or earlier if the decedent ceases being a trustee of his or her trust). So, in addition to taking responsibility for decedent's final income tax return, the

trustee is also responsible for filing the fiduciary *(i.e.*, the trust) income tax return.

Calendar Year vs. Fiscal Year

An estate may choose either a calendar tax year or a fiscal tax year. If an executor or administrator elects a fiscal year, he or she may choose to end the tax year on the last day of any month, as long as such tax year ends on or before the last day of the month immediately preceding the month in which the decedent died. For example, if a decedent died on June 16, the estate could elect to have a fiscal year ending May 31, in which case the fiduciary income tax return would be due on September 15 (as a fiduciary income tax return is due on the 15th day of the fourth month following the fiscal year end).

There are several advantages to choosing a fiscal year end as opposed to a calendar year end. For one, the representative is granted flexibility in allocating losses/gains and income/expenses among beneficiaries by considering different tax years. In addition, if the estate is fairly simple and can be closed within a relatively short period of time, an estate may be able to file just one fiduciary income tax return. For example, assume a decedent dies November 6. The 6-month claims period does not end until at least May. If the estate fails to elect a fiscal year, the representative would have to file two income tax returns, one with a tax year ending December 31 of the year in which the decedent died, and one with a tax year ending December 31 of the following year. If, however, the estate elects a fiscal year ending October 31, the representative may only need to file one income tax return.

This discussion is beneficial if we are representing the representative of *an estate*, but what if we are representing the trustee of *a trust*?

Election to Treat Trust as an Estate

In general, a trust's tax year is a calendar year. However, pursuant to Code § 645, a qualified revocable trust may elect to be treated as part of the decedent's estate for income tax purposes, and, thus, can elect a fiscal year.[1] As with an estate, the first day of the tax year begins the day after the decedent's death and ends on the last of a month, so long as such month is not more than eleven months following the decedent's death.

A "qualified revocable trust" is a trust (or any portion thereof) which was treated as owned by the decedent by reason of a power in the grantor, (this includes most revocable living trusts).

To elect to treat the estate and trust as a single taxpayer, the trustee should file Form 8855, Election to Treat a Qualified Revocable Trust as Part of an Estate, with the IRS. This election must be made no later than the due date of the first federal income tax return (including extensions), and once the election made, it is irrevocable.

Who Is a Fiduciary?

Generally, responsibility for filing income tax returns in estate administration falls on the fiduciary. This term is broadly defined in Code § 7701(a)(6) to include "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in a fiduciary capacity for any person."[2] (Although the subject for a different article, when the administration of a decedent's estate involves responsibility for filing an estate tax return, Code § 2203 defines "executor" as "the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent.")[3]

Options to Consider in Trust Administration

By Colleen L. Sahlas

DECLINING TO SERVE AS TRUSTEE

The trustee may decline to serve. In that event, the vacancy must be filled as follows:

> Sec. 13. Vacancy - Successor Trustee. In the event of the death, resignation, refusal or inability to act of any trustee:
>
> (1) the remaining trustee, if any, shall continue to act, with all the rights, powers and duties, of all of the trustees; or
>
> (2) if there is no remaining trustee, a successor trustee may be appointed by a majority in interest of the beneficiaries then entitled to receive the income from the trust estate or, if the interests of the income beneficiaries are indefinite, by a majority in number of the beneficiaries then eligible to have the benefit of the income of the trust estate, by an instrument in writing delivered to the successor, who shall become a successor trustee upon written acceptance of the appointment, but no beneficiary who is appointed as a successor trustee shall have any discretion to determine the propriety or amount of any distribution of income or principal to himself or to any person to whom he is legally obligated. [4]

TRUSTEE RESIGNATION

The trustee can choose at any time to resign but must do so in writing.

> Sec. 12. Resignation. A trustee may resign at any time by written notice of the resignation to the settlor, if living, to a co-trustee, if any, and to the beneficiaries then entitled to receive or eligible to have the benefit of the income from the trust estate.[5]

APPOINT A CO-TRUSTEE

The Trustee may choose to appoint a co-trustee as appropriate unless the trust forbids it.

> Sec. 4.05. To designate or appoint a trustee to act in any other jurisdiction as sole trustee or co-trustee of any part or all of the trust estate located in such other jurisdiction; to confer upon the appointed trustee any or all of the rights, powers and duties of the appointing trustee; and to remove the appointed trustee.[6]
>
> Sec. 4.10. To delegate to a co-trustee for any period of time any or all of the trustee's rights, powers and duties.[7]

SEVER THE TRUST

Sec. 4.25. Severance and consolidation. To sever any trust estate on a fractional basis into 2 or more separate trusts for any reason; to segregate by allocation to a separate account or trust a specific amount or gift made from any trust to reflect a partial disclaimer, to reflect or result in differences in federal tax attributes, to satisfy any federal tax requirement or election, or to reduce potential generation-skipping transfer tax liability, in a manner consistent with the rules governing disclaimers, such federal tax attributes, such requirements or elections, or any applicable tax rules or regulations, and income earned on a segregated amount or gift after segregation occurs shall pass to the designated take of such amount or gift; and to consolidate 2

or more trusts having substantially similar terms into a single trust. In managing, investing, administering, and distributing the trust property of any separate account or trust and in making applicable tax elections, the trustee may consider the differences in federal tax attributes and all other factors the trustee believes pertinent and may make disproportionate distributions from the separate trusts created. A separate account or trust created by severance or segregation shall be treated as a separate trust for all purposes from and after the date on which the severance or segregation is effective, and shall be held on terms and conditions that are substantially equivalent to the terms of the trust from which it was severed or segregated so that the aggregate interests of each beneficiary in the several trusts are substantially equivalent to the beneficiary's interests in the trust before severance, provided, however, that any terms of the trust before severance that would affect qualification of the trust for any federal tax deduction, exclusion, election, exemption, or other special federal tax status must remain identical in each of the separate trusts created. The provisions of this amendatory Act of 1993 apply to all trusts created, and actions taken before, on, or after the effective date of this amendatory Act of 1993.[8]

TERMINATE A SMALL TRUST

Sec. 4.26. Small trust termination. To terminate the trust and distribute the trust estate, including principal and accrued and undistributed income, if the trustee determines, in the trustee's sole discretion with the consent of the recipients, that the market value of a trust is less than $100,000 and that the costs of continuing the trust will substantially impair accomplishment of the purpose of the trust.

Distribution shall be made to the persons then entitled to receive or eligible to have the benefit of the income from the trust in the proportions in which they are entitled thereto, or if their interests are indefinite, to those persons per stirpes if they have a common ancestor, or if not, then in equal shares. The trustee shall give notice to the persons at least 30 days prior to the effective date of the termination.

If a particular trustee is an income beneficiary of the trust or is legally obligated to an income beneficiary, then that particular trustee may not participate as a trustee in the exercise of this termination power; provided, however, that if the trust has one or more co-trustees who are not so disqualified from participating, the co-trustee or co-trustees may exercise this power.

This Section shall not apply to the extent that it would cause a trust otherwise qualifying for a federal or State tax benefit or other benefit not to so qualify, nor shall it apply to trusts for domestic or pet animals.

The provisions of this amendatory Act of the 95th General Assembly apply to all trusts created before, on, or after its effective date.[9]

DELEGATE INVESTMENT FUNCTIONS TO AN INVESTMENT AGENT

It is prudent for the trustee to delegate investment functions to an investment agent, and thereby shift the liability onto the investment agent. The trustee must conduct an investigation of the investment agent and send written notice to the beneficiaries of the same, and it shall take effect 30 days thereafter.

- Conduct an investigation of the investment agent:
  - For an overview, check out the U.S. Securities & Exchange Commission website. SEC's website says, "Before you invest or pay for any investment advice, make sure your brokers, investment advisers, and investment adviser representatives have not had disciplinary problems or been in trouble with regulators or other investors. You also should check to see whether they are registered or licensed. This is very important, because if you do business with an unregistered securities broker or a firm that later goes out of business, there may be no way for you to recover your money — even if an arbitrator or a court rules in your favor. . . To find out about an investment adviser and whether it is properly registered, read its registration form, called 'Form ADV.' Form ADV has two parts. Part 1 contains information about the adviser's business and whether the adviser has had problems with regulators or clients. Part 2 sets out the minimum requirements for a written disclosure statement, commonly referred to as the "brochure," which advisers must provide to prospective clients initially and to existing clients annually. The brochure describes, in a narrative format, the adviser's business practices, fees, conflicts of interest, and disciplinary information. Before you hire an investment adviser, always ask for and carefully read both parts of the Form ADV."[10]
  "You can view an adviser's most recent Form ADV online by visiting the Investment Adviser Public Disclosure (IAPD) website.[11] You can also obtain copies of Form ADV for individual advisers and firms from the investment adviser, your state securities regulator, or the SEC, depending on the size of the adviser. You'll find contact information for your state securities regulator on the website of the North American Securities Administrators Association." [12]
- Conduct a search on the SEC's Investment Adviser Public Disclosure website.[13]
- If some advisors are also brokers, conduct a search with Brokercheck website.[14]
- Conduct a search to see if the brokerage firm is a member of the Securities Investor Protection Corporation (SIPC): The SEC's website states, "If your brokerage firm goes out of business and is a member of the Securities Investor Protection Corporation (SIPC), then your cash and securities held by the brokerage firm may be protected up to $500,000, including a $250,000 limit for cash. When a SIPC member becomes insolvent, SIPC will ask a court to appoint a trustee to supervise the firm's

liquidation and to process investors' claims. SIPC covers most types of securities, such as stocks, bonds, and mutual funds. But SIPC does not protect you against losses caused by a decline in the market value of your securities. And it does not provide protection for investment contracts not registered with the SEC." [15]

- Send Written notice to the beneficiaries
  - A sample written notice is included at the end of this article.

Sec. 5.1. Duty not to delegate.

(a) The trustee has a duty not to delegate to others the performance of any acts involving the exercise of judgment and discretion, except acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances. The trustee may delegate those investment functions to an investment agent as provided in subsection (b).

(b) For a trustee to properly delegate investment functions under subsection (a), all of the following requirements apply:

(1) The trustee must exercise reasonable care, skill, and caution in selecting the investment agent, in establishing the scope and specific terms of any delegation, and in periodically reviewing the agent's actions in order to monitor overall performance and compliance with the scope and specific terms of the delegation.

(2) The trustee must conduct an inquiry into the experience, performance history, professional licensing or registration, if any, and financial stability of the investment agent.

(3) The investment agent shall be subject to the jurisdiction of the courts of the State of Illinois.

(4) The investment agent shall be subject to the same standards that are applicable to the trustee.

(5) The investment agent shall be liable to the beneficiaries of the trust and to the designated trustee to the same extent as if the investment agent were a designated trustee in relation to the exercise or nonexercise of the investment function.

(6) The trustee shall send written notice of its intention to begin delegating investment functions under this Section to the beneficiaries eligible to receive income from the trust on the date of initial delegation at least 30 days before the delegation. This notice shall thereafter, until or unless the beneficiaries eligible to receive income from the trust at the time are notified to the contrary, authorize the trustee to delegate investment functions pursuant to this Section

(c) If all requirements of subsection (b) are satisfied, the trustee shall not otherwise be responsible for the investment decisions or actions of the investment agent to which the investment functions are delegated.

(d) On and after July 1, 1992, this Section applies to all existing and future trusts, but only as to actions or inactions occurring after that date.[16]

(SAMPLE DELEGATION FORM BELOW)

DELEGATION OF INVESTMENT FUNCTIONS BY TRUSTEE TO INVESTMENT ADVISOR

Pursuant to 760 ILCS 5/5.1 (b), _____(name), Trustee of The _____Trust dated _____, hereby notifies you, _____, as income beneficiary and principal beneficiary of the aforementioned Trust, of the Trustee's intention to begin delegating investment functions under this Section to _____(name of investment advisor) of _____ (investment broker firm name).

_____ (investment advisor) of _____ (investment broker firm name) was the trusted financial investor and advisor to the Settlor(s) of the aforementioned trust, _____ (Settlor's name), and therefore for the sake of continuity of the assets and retention of the same trusted advisor, all investment functions shall be delegated to _____ (investment advisor). The scope of his/her functions shall be those outlined in 760 ILCS 5/5 concerning Securities and the Prudent Investor Rule (see below). The Trustee, _____, has investigated the investment advisor's professional experience, licenses, and performance history and has attached a detailed Broker Report consisting of __ pages for your review.

In 30 days, this notice shall thereafter, until or unless the beneficiaries eligible to receive income from the trust at the time are notified to the contrary, authorize the trustee to delegate investment functions pursuant to 760 ILCS 5/5.1 (b) (statute recited below).

Date: _____

Signed:_____

Recitation of Statute

Sec. 5.1. Duty not to delegate.

(a) The trustee has a duty not to delegate to others the performance of any acts involving the exercise of judgment and discretion, except acts constituting investment functions that a prudent investor of comparable skills might delegate under the circumstances. **The trustee may delegate those investment functions to an investment agent as provided in subsection (b).**

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(2) The trustee must conduct an inquiry into the experience, performance history, professional licensing or registration, if any, and financial stability of the investment agent.

(3) The investment agent shall be subject to the jurisdiction of the courts of the State of Illinois.

(4) The investment agent shall be subject to the same standards that are applicable to the trustee.

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(d) On and after July 1, 1992, this Section applies to all existing and future trusts, but only as to actions or inactions occurring after that date.■

Emily R. Vivian is a partner with Ehrmann Gehlbach Badger & Considine, LLC, and practices in Dixon and the Edwardsville/Glen Carbon areas. She handles primarily transactional work, such as estate planning and administration, business law and both residential and commercial real estate.

Colleen L. Sahlas is a partner with her father, David E. Hoy, of The Law Offices of Hoy & Sahlas, LLC, in Oak Brook, Illinois, and has focused her practice in estate planning, decedent's estates, real estate, and business since 2000. She has been a member of the Illinois State Bar Association's Trusts and Estates Council since 2015 and is managing editor of its newsletter.

1. 26 US Code 645.
2. 26 US Code 7701(a)(6).
3. 26 US Code 2203.
4. 760 ILCS 5/13 (Source: P.A. 78-625).
5. 760 ILCS 5/12 (Source: P.A. 78-625).
6. 760 ILCS 5/4.05 (Source: P.A. 86-1475).
7. 760 ILCS 5/4.10 (Source: P.A. 86-1475).
8. 760 ILCS 5/4.25.
9. 760 ILCS 5/4.26 (Source: P.A. 95-605).
10. https://www.sec.gov/reportspubs/investor-publications/investor-brokershtm.html
11. https://www.adviserinfo.sec.gov/
12. http://www.nasaa.org/about-us/contact-us/contact-your-regulator/
13. https://www.adviserinfo.sec.gov/
14. https://brokercheck.finra.org/
15. https://www.sec.gov/fast-answers/werssipchtm.html
16. 760 ILCS 5/5.1 (Source: P.A. 87-715; 87-895).

Thank you to our authors

BY COLLEEN L. SAHLAS AND JENNIFER BUNKER SKERSTON

We, Colleen L. Sahlas as managing editor and Jennifer Bunker Skerston as articles editor of the ISBA Trusts & Estates Section Newsletter, would like to thank the below-named individuals that donated their time to contribute one or more articles to this newsletter during the 2018-2019 year. The Trusts & Estates Section Council is truly appreciative of not only the time the authors spent in drafting these articles, but also of the quality of the writing, the timeliness of the content, and the usefulness in every day practice of the information contained therein. It is because of the generousness of our authors that this newsletter has been published with quality articles every month for the past five years.

We especially applaud Sherwin D. Abrams on his recent article, "Justice Hyman's Wish," published in June 2019, to which Justice Michael B. Hyman himself has expressed to Mr. Abrams and this managing editor his highest praise.

Archived newsletters can be obtained at the following website address: http://www.isba.org/sections/trustsestates/newsletter.

If you are interested in authoring an article for publication with the newsletter and would like more information, please do not hesitate to contact Colleen L. Sahlas, managing editor, via email at Colleen@Sahlas.com or by telephone at (630)575-0400.

July 2018

1. Chair's Column – David C. Thies
2. Four Tips on Avoiding Trust & Family Breakdowns – Daniel P. Felix
3. Ethics Corner: Ethical Issues in Illinois Estate Planning and Trust/Estate Administration – Richard W. Kuhn
4. Co-Editors' Note – Jennifer Bunker Skerston and Colleen L. Sahlas
5. A Summary of the Trusts and Estates Section's April 2018 Business Meeting – Colleen L. Sahlas
6. hank You to Our Authors – Jennifer L. Bunker and Colleen L. Sahlas

August 2018

1. Problems with Powers of Attorney – John R. Russell
2. Ethics Corner: Ethical Issues in Illinois Estate Planning and Trust/Estate Administration – Richard W. Kuhn
3. Big Bank v. Little Client: How to Deal with Unreasonable Requests and Demands – Michael J. Fleck
4. Quis Custodiet Ipsos Custodes? – Sherwin D. Abrams
5. Co-Editors' Note – Colleen L. Sahlas and Jennifer Bunker Skerston

September 2018

1. Ethics Corner: Ethical Issues in Illinois Estate Planning and Trust/ Estate Administration – Richard W. Kuhn
2. Income Tax Consequences for Probate Estates when Resolving Claims for Less than Full Amount – Derek M. Johnson
3. Appellate Court's Estate Planning Advice – Michael J. Maslanka
4. Presumptions and Powers of Attorney – Patrick M. Kinnally
5. What Every Illinois Estate Planner Should Know About Elder Mediation – Roselyn L. Friedman

October 2018

1. The Best of All Possible Worlds or Curb Your Enthusiasm?: Joint Trust Basis Considerations for Common Law Jurisdictions – Brian J. Cohan
2. Ethics Corner: Ethical Issues in Illinois Estate Planning and Trust/ Estate Administration – Richard W. Kuhn
3. Flinn Report Summary – Mar 2, 2018 through April 27, 2018 – Joseph P. O'Keefe
4. Presumptively Void Transfers to Caregivers – A Bit of Mercy Please? – Paul Peterson
5. The Presumptively Void Transfers to Caregivers Act in Illinois: Mercy with Justice – Kenneth F. Berg
6. Welcome to the October 2018 Newsletter – Jennifer Bunker Skerston and Colleen L. Sahlas

November 2018

1. A Summary of the Trusts & Estates Section's June 2018 Business Meeting – Colleen L. Sahlas
2. Consider the Single-Fund QTIP Trust for your Farmer Clients – Alan E. Stumpf
3. Ethics Corner: Ethical Issues in Illinois Estate Planning and Trust/ Estate Administration – Richard W. Kuhn
4. Flinn Report Summary – May 4, 2018 through, July 27, 2018 – Joseph P. O'Keefe
5. Consider the Single Fund QTIP Trust for Your Clients – Alan E. Stumpf

December 2018

1. A Summary of the Trusts & Estates Section's September 2018 Business Meeting – Colleen L. Sahlas
2. Estate Planning for the Second Marriage – Richard W. Kuhn
3. Flinn Report Summary – August 3, 2018 through October 26, 2018 – Joseph P. O'Keefe
4. Estate Planning for Non-Human Animals by Human Animals – Timothy S. Midura
5. What is the Valuation Standard for Valuation of a Minority Interest in an Illinois LLC? – George Bellas and Jillian Tattersall

January 2019

1. A Summary of the Trusts & Estates Section's November 2018 Business Meeting – Colleen L. Sahlas
2. Ethics Corner: Estate Planning for the Second Marriage – Richard W. Kuhn
3. Estate Planning for Non-Human Animals by Human Animals – Timothy S. Midura
4. The Effect of an Order Declaring Heirship – Paul Peterson
5. Use It or Lose It: The IRS Proposed Regulations Will Not Clawback Sunsetting Exemption Amounts – Lawrence J. Gregory

February 2019

1. Ethics Corner: Estate Planning for the Second Marriage – Richard W. Kuhn
2. Disinheritance – Michael H. Erde
3. Flinn Report summary – November 2, 2018 through December 28, 2018 – Joseph P. O'Keefe
4. Illinois ABLE Accounts and Supplemental Needs Trusts – Kevin O'Flaherty

March 2019

1. Ethics Corner: Estate Planning for the Second Marriage – Richard W. Kuhn
2. Does a Guardian Ad Litem have Immunity in a Minor's Guardianship Proceeding – Patrick Kinnally
3. Transferring Adult Disabled Guardianship Between States – Michael J. Fleck
4. A Summary of the Trusts & Estates Section's December 2018 Business Meeting – Jennifer Bunker Skerston
5. Short-Term Guardian Form – J. Amber Drew

April 2019

1. Ethics Corner: Estate Planning for the Second Marriage – Richard W. Kuhn
2. Who Owns the Decedent's Real Estate? – Sherwin D. Abrams
3. Flinn Report summary – January 4, 2019 through March 15, 2019 – Joseph P. O'Keefe
4. Estate and Income Planning Tips and Checklists – Dennis J. Jacknewitz

May 2019

1. Ethics Corner – Jennifer Bunker Skerston and Colleen L. Sahlas
2. A Summary of the Trusts & Estates Section's February 2019 Business Meeting – Jennifer Bunker Skerston
3. Grantor Trust Administration in Illinois a Primer – Colleen L. Sahlas
4. Why File the Last Will and Testament – Michael J. Maslanka

June 2019

1. Grantor Trust Administration in Illinois: A Primer – Colleen L. Sahlas
2. Justice Hyman's Wish – Sherwin D. Abrams ■

Summary of the April 2019 Trusts & Estates Section Council meeting

BY JENNIFER BUNKER SKERSTON

CLE

This fall, the Section Council will provide a basics of estate planning program. A program on the Uniform Trust Code will also be provided as it will take effect on January 1, 2020.

Case Law Update

Ray Prather presented *Chicago Police Sergeants' Association v. Pallohusky*.

Technology

We have a subcommittee on Electronic Wills Uniform Act. It's waiting on the ULC to move forward.

Legislation

Statute of Repose – The ISBA had a special committee appointed to look at the Act and made a recommendation. It was presented to the Board of Governors, and they approved it. The proposed statute will now move onto the Assembly. The recommendations are making good progress. There will be a recommendation from the Board of Governors to approve it.

The following House and Senate bills were discussed:

- HB11 – Estate Tax; no position.
- HB820 – Estate Tax; no position
- HB836 – Relates to guardianship – Passed house.
- HB1455 – Disputes over remains – House supported unanimously.
- HB1487 – Estate Tax; no position.
- HB2348 – Adult Guardians – Effectively dead.
- HB2404 – Estate Tax; no position.
- HB2442 – Claims against estate by public guardian – Effectively dead.
- HB2461 – RUUPA – Administrative changes sought by Treasurer; approved by House; in Senate.
- HB2573 – RUUPA – Moved to Rules Committee – Effectively dead.
- HB2661 – Probate Appointment report signed by licensed psychologists. Effectively dead.
- HB2664 – Unclaimed Property Pensions – Effectively dead.
- HB2677 – Unclaimed Property – 2nd Reading but not scheduled for 3rd yet. May move forward but time is running out on it.
- HB2816 – GAL Fees – Court has discretion to allocate GAL fees between petitioner and ward – Effectively dead.
- HB2837 – ABLE Accounts – Designated representative can be the account owner's guardian of the person. Passed House and moving to the Senate.
- HB2853 – Unclaimed Property – Effectively dead.
- HB3042 – Public Aid Subpoena power – Effectively dead.
- HB3353 – Funeral and Burial Funds – Effectively dead.
- HB3677 – Partition of Heirs Property – House approved. Council members believe that corporate fiduciaries support it and the Farm Bureau is also interested in taking a position. It is a uniform law and gives a right a first refusal to other family members. The Council voted to support.
- SB182 – Electronic Health Directives – The Council strongly opposes.
- SB221 – Illinois Trust Code – Waiting on Senate.
- SB1464 – Prepaid burial funds – Presumes prepaid plans are abandoned 40 years after the contract is entered. On calendar for 3rd Reading.
- SB1518 – Adult Guardianships - Senate passed; extensions for guardianships. The Council decided to take time to study the bill and take no position at this time.
- SB1823 – College Savings Pool – A motion was made and approved by the Council to support the Bill provided that the legislature considers the tax impact of the legislation. The following language was suggested to alert the legislature to potential tax issues: "The legislature should know that without further changes to the Illinois statue, this will allow taxpayers to make contributions to an IL 529 program, claim the Illinois income tax deduction, and the shortly thereafter withdraw the funds to pay K-12 tuition."