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Trusts & Estates

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

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Welcome to the October 2018 newsletter

BY COLLEEN L. SAHLAS AND JENNIFER BUNKER

We are pleased to feature this month's newsletter from several distinguished contributors.

Among them are attorneys Paul Peterson and Kenneth F. Berg, who each offer their perspectives and advice about a hot topic: the Presumptively Void Transfers to Caregivers Act.

Attorney Brian J. Cohan discusses when joint trusts may be useful estate planning tools.

We are continuing to feature our Ethics Corner series providing indispensable advice on professional conduct relevant to Trusts & Estates law by attorney Richard W. Kuhn.

Additionally, Attorney Joseph P. O'Keefe provides a summary of regulatory decisions of Illinois agencies reported in the Flinn Report relates to trust and estate practices.

Thank you for subscribing to the Trusts & Estates Section's newsletter. If you have an article you would like to submit, we welcome your contributions. ■

Presumptively void transfers to caregivers – A bit of mercy please?

BY PAUL PETERSON

The Presumptively Void Transfers Article of the Illinois Probate Act (the "Transfers Article")[1] provides that the entire instrument executed on or after January 1, 2015 that contains a transfer in excess of $20,000 to a caregiver who is not a blood relative enumerated in Article IV a is presumed void. The Transfers Article essentially presumes the suspect caregiver guilty of fraud, duress or undue influence until proven innocent by clear and convincing evidence[2] and requires the caregiver to pay the cost of the proceedings including all attorney's fees if the presumption is contested but cannot be overcome.[3] The sole exception is if the caregiver proves it would have received that transfer before he or she became a caregiver. Compared to the existing financial elder abuse sections in the Probate Act, the Transfer Article has the assumption of guilty until proven innocent, more stringent burdens of proof, stricter punishments and no possibility of judicial leniency. Thus you can have completely different results with the same facts depending upon which section is used. Which section is used appears to be discretionary. Additionally, the Transfer Article runs the risk of unintended consequences when it voids the entire transfer instrument and not just the

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Income tax consequences for probate estates

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transfer.

This article asks that the burden of proof be amended, that judges be allowed to void just the transfer to the caregiver where appropriate and be given the same discretion to mitigate the loss of the entire transfer as is given in the other sections dealing with financial elder abuse in the Probate Act.

The Caregiver Problem

The Presumptively Void Transfers Article was enacted in response to a real existing problem. The scope of the problem, however, is open to debate. A study from MetLife and the National Committee for the Prevention of Elder Abuse estimated one million elders lose $2.6 billion a year due to financial abuse—and family members and caregivers are the perpetrators 55% of the time.[4] The National Council on Aging on the other hand claims elder financial abuse costs elders $36.5 billion per year.[5] Articles on specific abuse cases also highlight the problem.[6] The Transfer Article was enacted in response to a perceived need to protect the elderly from financial exploitation.

Yet there are two sides to the caregiver issue. AARP recently stated "There are more than 40 million family caregivers in the U.S. who are providing $470 billion in uncompensated care every year."[7] The legislative findings in the Family Caregiver Act[8] note that family caregivers, serving without compensation, have been the mainstay of the long-term care system, avoiding or postponing institutionalization of the state's residents, and that two-thirds of these caregivers are family and friends. Presidential proclamations since 1997 have made November the National Family Caregiver Month in recognition of the time and care given family members to the elderly. Organizations such as the National Family Caregiver Association provide training material and support to family caregivers.[9]

Comparing Different Sections of the Probate Act

The contrasts between the existing financial elder abuse sections in Article II of the Probate Act and the Presumptively Void Transfers to caregivers in Article IV of the Probate Act are stark. Completely different results can occur using the same set of facts depending upon which section you use. The presumption of innocence, the burden of proof, the punishment, the protection afforded third party purchasers and the ability of the court to mitigate the punishment differ dramatically. Which section is used appears to be discretionary.

Sections 2-6.2, titled "Financial exploitation, abuse or neglect of an elderly person," and Section 2-6.6, entitled "Person convicted of or found civilly liable for certain offenses against the elderly or a person with a disability," (together the "Article II Sections") are similar. Both apply if there has been a conviction under Sections 17-56 or Section 12-4.4a of the Criminal Code of 2012 which relate to financial exploitation, abuse or neglect of the elderly. Both apply if the accused is found by a preponderance of the evidence to have financially exploited the elderly in a civil case, either before or after the elder's death. In both, the penalty for the abuser is to be treated as having predeceased the elder.[10] Such a penalty may result in the exploiter's descendants receiving the exploiter's share if the exploiter was a descendant of the exploited elder under the anti-lapse sections of the Probate Act.[11] Both sections provide the elder may effectively ratify the transfer after a conviction or finding of civil liability if it is shown by clear and convincing evidence that the elder knew of the conviction or finding of civil liability. However, in both sections "The court may, in its discretion, consider such facts and circumstances as it deems appropriate to allow the person found civilly liable for financial exploitation … to receive a reduction in interest or benefit rather than no interest

Trusts & Estates

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or benefit…"[12] Note also that both sections protect transferors of property.[13]

Contrast the sections in Article II with the Presumptively Void Transfers provisions of Article IV. Instead of a plaintiff having to prove financial exploitation by a preponderance of the evidence, Article IV presumes a caregiver receiving more than $20,000 is in essence guilty of fraud, duress or undue influence unless the caregiver can prove by a preponderance of the evidence that he would have received an equal or greater amount under a transfer instrument in effect prior to the caregiver becoming a caregiver or the caregiver can prove by clear and convincing evidence that the transfer was not the product of fraud, duress or undue influence.[14] It has been suggested that an attorney prepare an affidavit as to such facts, either upon execution of the transfer instrument or subsequently if the issue is recognized. Remember that innocent until proven guilty is inapplicable. If the caregiver unsuccessfully contests the presumption, the caregiver "…shall bear the costs of the proceedings, including, without limitation, reasonable attorney's fees."[15] If the presumption is not rebutted, the entire instrument is deemed void. The court has no discretion relative to the punishment. The Transfer Article applies only to transfers effective on death. The sections in Article II may be used both when the elder is alive and after his death.

Thus you can have the same facts but significantly different results depending upon which section of the Probate Act is used.

Unintended Consequences from Voiding the Entire Instrument

Per an ABA article[16] it appears that Illinois is the fourth state to legislate a presumption as to gifts to caregivers. However, the article notes that Illinois appears to be the only state that presumes the entire instrument, and not just the transfer to the caregiver, void. The ABA article noted that voiding the entire transfer may have "unintended consequences."

Voiding the entire instrument presumes the caregiver exerted not just enough undue influence as to get a specific gift, but enough undue influence on the testator to thwart the entire estate plan of the testator. Consider the following fact patterns.

- The voiding of a trust agreement providing for the care of the settlor during his or her life and upon death giving a relatively minor portion of the estate or trust to a caregiver and the bulk of the trust to charity or providing for the care of a disabled child. Is the trust agreement void at execution or upon the death of the settlor? What of conveyances or mortgages or payments made by the trustee during the life of the settlor? Must the trustee consider liability for a statutory trust certification asserting the validity of the trust if the trust is set aside as void because of a gift to a caregiver?[17]
- A will containing transfer to a daughter-in-law who took care of her husband's parents. Who now is the executor, is the statutory bond still waived, are the tax savings provisions of the will ineffective and what about the provisions for minor children or grandchildren. Note that the testator or his or her attorney may not have known of the Transfer Article and may not have recognized that a daughter-in-law was a suspect caregiver since she is not a child of the testator for the purposes of the Probate Act.[18]
- A payable on death clause in a savings account in favor of a caregiver. Per the Transfer Article, that would void the entire savings account agreement.
- An innocent third party purchaser should take free and clear of a voidable transfer but not a void transfer. It should be made clear that the instrument is voidable, not void.

Holders and Purchasers

The Transfer Article does not have a clause protecting holders transferring to caregivers. It is suggested that clauses similar to those found in the Article 2 sections be added to the Transfer Article.

A clause adding protection to a third party purchaser or mortgagor for value and "without actual knowledge" should also be added. Using the term "bona fide purchaser" may impose a constructive notice duty or an inquiry notice duty upon a purchaser to inquire as to whether or not a transferor was a caregiver or the entity making the transfer included an undisclosed beneficiary caregiver not excluded by 4a-5(1). The presumption that the entire instrument is void affects a purchaser or mortgagee whose grantor or mortgagor's authority is based upon an instrument such as a trust agreement[19] or even a will that can be attacked as void after the transfer.

Conclusion

Caregivers are a necessary and desired part of our society. Yet some caregivers are guilty of fraud, duress or undue influence. It is hoped that this article will lead to further reflection on the issue and hopefully to amendments to the Presumed Void Transfer article that will deal with the unintended consequences of the article and will give the courts the ability to give mercy and justice where mercy and justice are due. Specifically, it is recommended that modifications of 755 ILCS 5/2-6.2 (c) providing for holder non-liability for distribution prior to actual notice of conviction and 2-6.2(f) giving a court discretion to void only the transfer and allow a reduction in the penalty, be added to 755 ILCS 5/4a.

An amendment to Article IV tracking 2-6.2(f) appears appropriate. Such an amendment could read as follows:

The court may, in its discretion, consider such facts and circumstances as it deems appropriate (i) to allow the transfer instead of the transfer instrument to be found void; (ii) to allow a caregiver presumed guilty under this article to receive a reduction in interest or benefit rather than no interest or benefit as stated this Article or (iii) to allocate costs of the proceedings as it sees fit. ■

1. 755 ILCS 5/4a-5 et. seq.
2. 755 ILCS 5/4a-15.
3. 755 ILCS 5/4a-25.
4. http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf.
5. https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/ accessed Nov. 15, 2017.
6. Janana Hannah, *When caregivers take*, 102 Illinois Bar Journal 366 (2014).
7. *Where They Stand*, 57 AARP Bulletin 10 (2017) (introduction to question to Hillary Clinton and Donald Trump).
8. 320 ILCS 65/1 et. seq.
9. See www.caregiveraction.org.
10. Note that if the abuser and the elder hold title in joint tenancy, the abuser keeps his share of the property as if title was held as tenants in common.
11. 755 ILCS 5/2-1 for intestate estates and 755 ILCS 5/4-11 as to testate estates.
12. 755 ILCS 5/2-6.2(f); 755 ILCS 5/2-6.6(f).
13. 755 ILCS 5/2-6.2(c)(1) protects a transferor who transfers to the exploiter prior to conviction or a finding of civil liability.755 ILCS 5/2-6.6(b) protect transferors who transfers to the exploiter (without the corresponding prior to conviction or a finding of civil liability. 755 ILCS 5/2-6.2(c)(2) and 755 ILCS 5/2-6.6 protects financial institutions, trust companies and similar institutions if the transfer is made to the exploiter prior to written notice of a conviction or a finding of civil liability of the exploiter.
14. 755 ILCS 5/4a-15 provides "The rebuttable presumption established by Section 4a-10 can be overcome if the transferee proves to the court either: (1) by a preponderance of evidence that the transferee's share under the transfer instrument is not greater than the share the transferee was entitled to under the transferor's transfer instrument in effect prior to the transferee becoming a caregiver; or (2) by clear and convincing evidence that the transfer was not the product of fraud, duress, or undue influence."
15. 755 ILCS 5/4a-25.
16. Lisa M. Lukaszewski and Stacie T. Lau, *Gifts to Caretakers: Acts of Gratitude or Disguised Malfeasance? New Statutes May Decide For Us by Robert Barton*, 29 ABA Probate and Property Magazine (May/June 2015).
17. 760 ILCS 5/8.5 provides in part that the certification must state that the trust "exists," disclose "the revocability or irrevocability of the trust" and certify that the trust "…has not been revoked, modified, or amended in a manner that would cause the representations …to be incorrect." The certification does not need to disclose the current or contingent beneficiaries or whether one is a caregiver.
18. As noted in *Gifts to Caretakers*, supra, defining or recognizing suspect caregivers is not as easy as it sounds.
19. An interesting question is whether a purchaser from a trustee is protected if the deed in trust contained the third parties protected, need not inquire as to the authority of the trustee language in the commercial land trust deed in trust forms. Naturally, that language is not in the deeds in trust of many of the revocable living trusts where the grantor is the trustee. Also at issue is whether a trustee's certification pursuant to 760 ILCS 5/8.5 would protect a purchaser pursuant to "(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct." The certification does not appear to make any clear representations with respect to a subsequent voiding of the trust agreement because of a gift to a caretaker.

The Presumptively Void Transfers to Caregivers Act in Illinois: Mercy with justice

BY KENNETH F. BERG

The January 2018 issue of the ISBA Real Estate Newsletter contains a thoughtful article by Paul Peterson, "Presumptively Void Transfers to Caregivers – A Bit of Mercy Please?" Mr. Peterson recommends that the Presumptively Void Transfers to Caregivers Act ("PVTA")[1] be amended to give judges discretion to mitigate the effect of its application. This article expresses an opposing view defending the PVTA as passed by the Illinois Legislature.

There is a Consensus That Caregiver Abuse is a Real Problem

The PVTA amended Article IV of the Illinois Probate Act, making presumptively void certain instruments executed after January 1, 2015, that transfer property to caregivers in excess of $20,000.[2] Blood relatives often provide care during a senior's lifetime for which they are not compensated and frequently are acknowledged with a special bequest in the decedent's Will. The PVTA recognizes these contributions of blood relatives by excluding "family members" from the definition of a "caregiver."[3] However, there is consensus that millions of seniors lose billions of dollars each year due to abuse and financial exploitation by non-relative caregivers.[4]

The Law Has Long Recognized the PVTA's Solution of a Rebuttable Presumption

The PVTA is unfairly criticized for presuming that the suspected caregiver is guilty until proven innocent. The PVTA does no more—but no less—than create a "rebuttable presumption" that the transfer instrument is void. The presumption is rebutted by evidence that the caregiver would have received at least the same amount, or by evidence that there was no fraud irrespective of the amount the caregiver receives.[5] For over a century, courts have applied a similar evidentiary presumption to attorneys who benefit under documents they prepared for their clients.[6] The PVTA simply extends this evidentiary presumption to caregivers. Typically, the suspect transfer document changes a prior estate plan or other expected distribution of the decedent's assets quite dramatically away from the decedent's blood relatives or a charity, and to an unrelated caregiver who became involved with the decedent shortly before he or she passed away.

Evidentiary presumptions are common generally and a part of will contests in particular. They are not a "presumption of guilt," but rather a considered public policy decision by courts or the legislature to

require that the party with the most personal knowledge of the facts come forward with evidence. The PVTA applies only to a "legal document intended to effectuate a transfer effective on or after the transferor's death …."[7] Consequently, after the decedent has passed, it is likely that a caregiver who stands to benefit from the transfer document will be the person with the most knowledge as to the circumstances surrounding the execution of the document and his or her relationship with the decedent. The party challenging the validity of the transfer document, usually a disinherited legatee or a displaced heir at law, often cannot present competent evidence to prove the involuntary nature of the document's execution. By creating a presumption of invalidity, the Illinois Legislature quite rightly understood that the caregiver is in the best position to tell a fact-finder what happened.

For the PVTA presumption to apply, the party challenging the document must allege or prove these basic facts: (i) the document is a transfer document; (ii) the other party is a caregiver; and (iii) the caregiver will receive at least $20,000. The PVTA does not create a conclusive presumption of the caregiver's guilt. The PVTA's rebuttable presumption is not evidence, but to avoid summary judgment the caregiver must come forward with some evidence that he or she would have received the inheritance anyway or there was no fraud. If the caregiver meets the burden of persuasion by the requisite quantum of proof, the presumption metaphorically "bursts" and the burden to prove fraud or undue influence by a preponderance of the evidence reverts to the party challenging the document. This is an equitable distribution of the evidentiary burden in a typical caregiver case.

The effect of a rebuttable presumption in the context of a will contest was clearly explained by the Illinois Supreme Court in Franciscan Sisters Health Care Corp. v. Dean, 95 Ill. 2d 452, 460-461, 448 N.E.2d 872, 875-876 (1983).[8]

The determination of whether a jury should be instructed as to the existence of a presumption must be made by the trial court …. With regard to the procedural effect of presumption, most jurisdictions in this county follow the rule that a rebuttable presumption may create a prima facie case as to the particular issue in question and thus has the practical effect of requiring the party against whom it operates to come forward with evidence to meet the presumption. However, once evidence opposing the presumption comes into the case, the presumption ceases to operate, and the issue is determined on the basis of the evidence adduced at trial as if no presumption had ever existed. [Citation omitted.] The burden of proof thus does not shift but remains with the party who initially had the benefit of the presumption. … "[I]t would naturally follow that no mention of the presumption would be made in the instructions to the jury, and issue is submitted without any knowledge on the part of the jury of the special legal significance of the basic fact from which the presumption originally arose." [Citation omitted.]

The PVTA's Remedy Achieves a Just Solution with Mercy

A recent actual case litigated by this author shows that the PVTA not only reached the result intended by the Illinois Legislature, but a just result would not have been achieved if its effects were mitigated.

A survivor of the Holocaust (call him "David") sought refuge in Israel before coming to this country and becoming a citizen in the 1940s. David operated a successful business in upstate New York and at 95 years of age still owned assets of significant value. David's wife of many years had predeceased him, but two adult children with whom he was not particularly close survived him. Several wills executed before 2012 left each child a modest specific bequest and named two charities identified with the state of Israel as residuary beneficiaries. After 2012, David was involved in several bizarre incidents where the local police were called and two estate practitioners, including David's long-time attorney, refused to draft new wills because they questioned David's competence. In 2015, David's friends whom he knew from childhood asked their son (call him "Jonathan") who lived in Illinois to assist David with managing his daily affairs. Jonathan traveled to New York, contacted a third lawyer, and personally paid the lawyer to have executed new powers of attorney for health care and finances, and a new will (the "2015 will") that named Jonathan as executor and left all of David's assets to Jonathan. Jonathan closed all of David's existing financial accounts and transferred the assets to accounts over which Jonathan had exclusive authority. David was then moved to Illinois without notice to his family or friends. Jonathan looked after David in an independent living facility and paid his bills until David passed away six months later in Illinois. Even after some questionable transactions while David was still alive, his estate consisted of several hundreds of thousands of dollars that would all go to Jonathan under the 2015 will. Jonathan filed the 2015 will for probate in Illinois and was appointed executor, but he did not contact David's children when he died or notify the specific beneficiaries under the 2012 will or the charity residuary beneficiaries. The executor nominated under David's 2012 will notified the charities and the charities commenced an action to challenge the 2015 will.

Due to application of the PVTA presumption of invalidity, the charities' complaint survived a motion to dismiss. To avoid summary judgment, the burden shifted to Jonathan to produce some evidence that there was no fraud or undue influence. Of course, Jonathan could not prove that he would have received the entire estate even before the 2015 will was executed. The effect of the PVTA presumption was to facilitate a just settlement that secured the lion's share of David's estate for his two children and the charities, and reduced the cost of the litigation to David's estate. Without the PVTA's presumption, this result would not have been achieved because of the insurmountable difficulties involved with the charities presenting competent evidence of fraud or undue influence.

If the effect of the PVTA is mitigated by giving judges more discretion as some advocate, the uncertainty injected into the process would eliminate the settlement

leverage created by the PVTA. There is sufficient judicial discretion already as to whether the caregiver has rebutted the presumption and whether or how a jury should be instructed as to the presumption. Similarly, if the PVTA's remedy is changed to invalidate just the bequest to the caregiver, the intent of the legislature would not be realized. It is not uncommon for the new transfer document to leave everything to the perpetrator of financial abuse. As the above case demonstrates, if only the bequest to Jonathan was invalidated, the charities would not have inherited anything and David's longstanding intent would not have been realized.[9]

This author also opposes the view that the PVTA be amended to make its effect the same as under the elder abuse provisions in Article II of the Probate Act.[10] Aside from the obvious criticism that it is unnecessary to have two statutes that achieve the same result, there are other problems with this proposal. For the remedies in Article II to apply, there must be a criminal conviction or civil finding of misappropriation. Although this author has litigated such a case,[11] such a conviction or finding is rare, indeed. Accordingly, the financial elder abuse provisions, while necessary in extreme circumstances, will not apply to most caregiver situations; therefore, they do not adequately address the scope of the problem affecting millions of seniors.

Does the PVTA's Presumption Apply if One Becomes a Caregiver Only After Execution of the Transfer Document?

There may be an ambiguity in the PVTA that should be resolved through judicial interpretation and application. In the above case, arguably the facts showed that Jonathan did not become David's caregiver until after the 2015 will was executed. Jonathan argued that the PVTA did not apply because a person must be a caregiver before the challenged transfer document was executed. There is no available legislative history on the PVTA and there are as yet no published court decisions interpreting the PVTA. In this author's opinion, the PVTA should not be interpreted by courts to apply only when the facts show care was given before the transfer instrument was executed. As enacted, the PVTA applies to anyone who is a caregiver at any time—before, at the time of, or after the challenged transfer document was executed. The plain language of the PVTA states that it applies when: (i) the transferee "is" a caregiver, and (ii) the transferee will receive at least $20,000. The PVTA is silent as to when in relation to execution of the transfer document the person became a caregiver. It would be unfortunate if courts interpreted the PVTA to require proof that a person was a caregiver before the transfer document was executed. Inducing a senior to execute a new will from which the abuser benefits by promising that he or she will care for the senior should be covered by the PVTA presumption; otherwise, the perpetrator could use the suspect document itself as evidence that the abuser would have received the same before he became a caregiver. If the caregiver ceased giving care long before the transfer document was executed, it will be easy for the caregiver to rebut the PVTA presumption by showing there was no fraud in the execution. If the caregiver began giving care long after the transfer document was executed, it will be easy for the caregiver to rebut the presumption by showing that he or she would have received the same amount.

Conclusion

Illinois' version of a caregiver statute is unique.[12] As a practical litigation tool, the PVTA strikes the right balance between protecting seniors and permitting caregivers to receive bequests. With thoughtful application by Illinois courts, it will achieve the purpose intended by the Illinois Legislature without amendment. ■

Mr. Berg is a partner with the law firm of Ulmer & Berne LLP. *© All rights reserved by Kenneth F. Berg, March 2018.*

1. 755 ILCS 5/4a-5 et seq.
2. 755 ILCS 5/4a-10(a). "In any civil action in which a transfer instrument is being challenged, there is a rebuttable presumption … that the transfer instrument is void if the transferee is a caregiver and the fair market value of the transferred property exceeds $20,000."
3. 755 ILCS 5/4a-5(1) defines "caregiver" as "a person who voluntarily, or in exchange for compensation, has assumed responsibility for all or a portion of the care of another person who needs assistance with activities of daily living. 'Caregiver' includes a caregiver's spouse, cohabitant, child, or employee. 'Caregiver' does not include a family member of the person receiving assistance."
4. Paul Peterson, Presumptively Void Transfers to Caregivers – A Bit of Mercy Please?, ISBA Real Property Newsletter, Jan. 2018, at 1.
5. 755 ILCS 5/4a-15. "The rebuttable presumption … can be overcome if the transferee proves to the court either: (1) by a preponderance of evidence that the transferee's share under the transfer instrument is not greater than the share the transferee was entitled to under the transferor's transfer instrument in effect prior to the transferee becoming a caregiver, or (2) by clear and convincing evidence that the transfer was not the product of fraud, duress, or undue influence."
6. See, e.g., *Wunderlich v. Buerger*, 287 Ill. 440, 122 N.E. 827 (1919). (discussing presumption of undue influence where attorney drafted will for client that left a substantial bequest to the attorney).
7. 755 ILCS 5/4a-5(3).
8. The Illinois Supreme Court quotes *Diederich v. Walters*, 65 Ill. 2d 95, 100-03, 357 N.E.2d 1128 (1976).
9. 755 ILCS 5/2-1(b).
10. 755 ILCS 5/2-6.2 and 5/2-6.6.
11. In that case a court found that a brother diverted $1 million from his mother's estate that was intended to be deposited in a special needs trust for the benefit of his mentally disabled sister by depositing the funds in a trust for the brother's benefit and the benefit of his children. The court found that the brother committed civil theft by diverting the funds. The Article II provisions would not achieve the donor mother's intent. The result would be that the mother's estate would be distributed as if the brother had predeceased the mother and the brother's share would go to his children instead of going to the special needs trust for the disabled sister.
12. Robert Barton et al., *Gifts to Caretakers: Act of Gratitude or Disguised Malfeasance? New Statutes May Decide for Us*, Probate and Property Magazine, May/June 2015.

The best of all possible worlds or curb your enthusiasm?: Joint trust basis considerations for common law jurisdictions

BY BRIAN J. COHAN

Introduction

Since the passage of the Tax Reform Act of 1976 the default platform for estate planning for married couples has been the ubiquitous A/B trust arrangement. Due to of the absence of what we now refer to as "portability" married clients were penalized an entire unified credit equivalent when they married. Simply stated, a husband and wife who left assets for each other in joint tenancy would get an unlimited marital deduction and no estate tax bill at the first spouse's death; however, the survivor would be left with the combined spousal assets with only one estate tax exemption. Bypass trusts were established in order to afford each spouse through the trust framework an opportunity to utilize his or her unified credit the same as unmarried persons. Clients with otherwise modest estates would undertake aggressive gifting campaigns, and perhaps set up an irrevocable life insurance trust or some tool with an even more arcane acronym—a GRAT, CRAT, or CRUT—could perhaps be used.

In the generic A/B arrangement the bypass trust (or "credit shelter" or "B" trust) would be funded with the full exemption amount, exposing it to the estate tax, and provide a mechanism where the corpus could be passed on without further estate taxation. Any amounts typically not dedicated to the B trust would be allocated to a marital trust (perhaps one featuring a power or appointment with a right of withdrawal or perhaps a "QTIP" trust) that qualified for the marital deduction and allows the survivor to defer the estate tax until his or her death while enjoying access to the trust. This marital trust would be taxable at the survivor's death. If a couple optimally divided assets between the trusts they could maximize the exemption equivalents and pass on the maximum amount estate-tax-free to the next generation.

With the advent of portability and the enormous federal estate tax exemptions carved out in the Tax Cuts and Jobs Act, clients now have an inflation adjusted exclusion amount which leave even truly wealthy clients without federal estate tax concerns. Irrespective of state estate tax considerations, having to equalize estates to gain maximization of exclusion amounts have also been at the very least diminished when considering the federal estate tax applicability.

In this largely estate-tax-free environment the assumptions that led to the A/B default platform, particularly through the prism of the income, rather than the estate tax, have come under increased scrutiny. It is argued by some that it is now the income tax (and not the estate tax) that should be at the forefront of the estate planning discussion. After all, it is the capital gains tax, and not the estate tax which will be triggered when the great masses have to sell assets to pay for maintaining lifestyle and medical care for increasingly longer lives. One thing does seem certain: many married clients react more favorably to this arrangement as opposed to the A/B arrangement as it provides a more understandable vehicle in which to manage assets as there is no need to split assets between trusts which can lead to significant client uneasiness.

When should joint trusts be considered? How should we be advising clients on the usefulness of these trusts and associated pitfalls? In particular, how should we be advising clients on the possibility of achieving a double step-up in trust assets as is afforded residents of community property states under Code Section 1014(a)(6)?

Joint Trust Tax Background

The joint trust technique in common law jurisdictions was originally intended to provide a method for married common law taxpayers to achieve a full 100 percent step up in basis upon the first settlor's death, with another full 100 percent adjustment on the survivor's death, just as the code treats residents of community property states under Section 1014(a) (6). Generally, in non-community property states only half of any joint spousal property is afforded a full step-up in basis under Section 2040(b) with an exception for pre-1977 transfers. In rulings that have been widely criticized, the service has denied this full basis adjustment approach. It is the service's dubious rationale for denying full step-up which has caused use of the joint trust method to achieve a full step-up on each spouse's death to be advised in some quarters as a "nothing to lose" approach and one which may (it is argued) shield the practitioner from downstream criticism or claims that greater attempts to avoid income tax were not taken. Other more cautious observers criticize the joint trust method as a way of achieving full basis adjustment as being the kind of "form over substance" device which not only invites

scrutiny, but is the kind of scheme which the Service loves to challenge.

The two issues therefore which are central to joint trust tax considerations are:

1. (Whether upon the first death all joint assets including those contributed by the survivor can be used to fully utilize the decedent's credit shelter trust; and
2. Whether upon the first death a full step-up in basis pursuant to Section 1014(a) is afforded for all trust assets, *even the survivor's contribution*, or will Section 2040(b) and the carryover basis provisions of 1014(e) apply leaving the survivor with no basis adjustments over his or her contributions to the trust.

The various IRS rulings contain several fact patterns*, but the common denominator in every case is the providing of a testamentary general power of appointments over the entirety of trust assets* in order to obtain the desired outcome: full inclusion of all trust assets in the first spouse to die as well as a full 100 percent basis adjustment on all trust assets, even those contributed by the surviving spouse. The survivor would then presumably be entitled to another full step-up on death pursuant to section 1014(a). In a nutshell, the joint trust arrangement seeks inclusion all joint trust assets, (typically up to the full exemption amount) under section 2041, in the gross estate of the first dying decedent. Fundamental to the argument is that property acquired from the decedent specifically includes under Section 2038 property which the decedent owned by virtue of a "non-exercise of a power of appointment"—i.e., in this case the non-exercise by the survivor of the power of appointment granted by the decedent. Under this plain reading of the code the taxpayer would argue that a concomitant full step-up in basis should occur under 1014(a) with the survivor being entitled to another full step-up at his or her death. The taxpayer would further argue that 1014(e) should not apply as none of the property included in the decedent's taxable estate was acquired by "gift," which has a specific definition in the Internal Revenue Code and which is specifically not a "power of appointment."

Essential IRS Rulings

Technical Advice Memorandum 9308002

This flawed but highly instructive ruling provides important insight as to how the service approaches the double step-up argument in common law states. This case involved a joint revocable trust that was funded by the couple's joint property. Each settlor could revoke the trust and get his or her property returned. Each settlor had a power of appointment over the entire property to his or her estate until he or she died first. Unlike other rulings this TAM arose after the first settlor died. The survivor's share had been included in the decedent's estate under Section 2041 and the issue was whether a full 100 percent step-up would be allowed.

The service agreed that the survivor's contribution should be allowed full inclusion in the decedent's estate under section 2041 (without explaining how one spouse's property could be taxed in the estate of another without a transfer taking place). The service focused solely on the issue of section 1014 and the sought-after full step-up in basis. The service ruled that the spouse, *since the power to revoke the trust had been retained,* had not relinquished dominion and control over the property in the year prior to death. The service ruled that the property was not therefore acquired from the decedent under 1014(a) and (e) *notwithstanding that it was included in the decedent's estate under Section 2041.* The key criticism of this ruling is that "property acquired by the decedent" as used in Section 1014(a) is a defined term and includes all property includable in the estate under Section 1014(b) (9). In addition, section 1014(e) only is supposed to apply to property "acquired by the decedent by *gift"* within one year of death. The service seems to be arguing that the decedent never acquired the property in the first place, despite it being included in the taxable estate. It therefore seems under the service's rationale it would make no difference when the trust was established for 1014(e).

PLR 200101021

In addition to the full tax basis adjustment objective, the taxpayers here desired to use the unified credit of the first settlor to die as well as the survivor's contribution to trust to fund a credit shelter trust which would be fully included in the first-settlor-to-die's estate under section 2041. The service agreed that 100 percent of the trust would be includable of the estate of the first spouse to die, that the survivor made a gift to the decedent of the 50 percent contribution to trust in turn covered by the unlimited gift tax marital deduction and that none of the property would be deemed to have been transferred by the survivor.

Interestingly, *although the taxpayers did not seek a ruling for full basis step-up under section 1014,* the service ruled on the applicability of Section 1014(e) nonetheless. The service ruled that: "Section 1014(e) will apply to any Trust property includable in the deceased Grantor's gross estate *that is attributable to the surviving Grantor's contribution to Trust, and that is acquired by the surviving Grantor, either directly or indirectly, pursuant to the deceased Grantor's exercise, or failure to exercise, the general power of appointment.*" It seems as though the IRS needed to get to a ruling finding a transfer by gift within one year of death and were prepared to do just about anything do so—including inventing a magical transfer at the moment of death to the donee spouse. The service offers no authority for this position, or for its conclusion that the transfer qualifies for the marital deduction.

PLR 200210051

Again, the service ruled that 100 percent of the trust assets would be included in the first-spouse-to-die's estate, but more importantly gave the yet another sua sponte ruling on the applicability of Section 1014(e). While the taxpayers, through cross powers of appointment over 100 percent of the trust assets, achieved full inclusion in the first-spouse-to-die's estate, the service was seemingly compelled to use the same 1014(e) ruling as it had in PLR 200101021 thus denying a fully basis adjustment at the first decedent's death.

In summary, both the TAM and the various PLRs seem to indicate the idea of inclusion in the gross estate of the decedent of the survivor's joint trust contribution via the survivor's granting of a general power of appointment. It seems to have won the

acceptance of the service. The application of Section 1014(a) to such property is, however, another story and the rulings, if nothing else, provide an indication of how determined the service was on getting to the result of carryover basis as mandated by 1014 (e). Flawed as these rulings may be, unfortunately they represent the only written guidance from the service on these issues. In the author's view, the rulings indicate a clear intent on the part of the service to contest the issue of full basis adjustment in the joint trust context. Adding to the uncertainty, the service has issued no regulations on 1014(e) and in News Release 86-167 announced that it was closing any efforts at further clarify Section 1014(e). To my knowledge, there have been no tax court decisions interpreting Section 1014(e).

Further Caveats

Divorce: The use of joint trusts should be considered only for couples with "stable," long-term marriages. Separate property assets transferred to a joint trust arguably would lose their non-marital characteristic. Of course, couples could keep detailed records as to "mine," "yours," and "ours," but this seems unrealistic.

Creditor Protection: Arguably, all of the joint trust assets could become subject to the claims, including environmental claims, of one spouse. Spouses in "lawsuit prone" professions will likely want to segregate assets in separate vehicles. Illinois affords modest creditor protection for those spouses holding real estate in joint trust.

Taking the Plunge: Drafting the Joint Spousal Trust

Should you have clients with low basis, high value assets who wish to establish a joint trust with a view of gaining full inclusion and full basis adjustment at the first death, the draftsman should consider the following:

Have each client contribute equal values of assets such as 50/50 interests in the family business. Any business interest can be allocated between the credit shelter and a marital or QTIP trust, and the survivor can act as trustee and maintain control over the business. It is important that the gifts to the trust be completed;

The trustee should not be required to inquire or consider the surviving spouse's other assets prior to making principal distributions to the survivor. The credit shelter trust should be drafted to provide the surviving settlor with a special power of appointment limited to the settlors' children;

The joint trust should provide that the decedent retains the right to income of the trust property, the right to designate who will be entitled to income, and the power along with the surviving settlor to amend, terminate or revoke the trust.

The trust should provide that only assets that qualify for the marital deduction are allocated to the marital trust. Furthermore, if the marital trust were structured as a QTIP trust the acquisition of the property would arguably better avoid the restrictions of Section 1014 (e) as the trust, not the spouse, would be entitled to any proceeds of sale of trust assets while still maintaining ultimate control without affording a withdrawal right or power of appointment as is typically done in a marital trust;

In order to rebut the presumption that property has been gifted to the marital estate, a separate written property agreement should be signed by the parties to affirm that non-marital property shall remain non-marital without transmutation, and that any marital property acquired during the marriage shall remain marital property;

The trust should make clear that the settlors have a vested interest in the trust and that no contingency must occur before the settlors, as beneficiaries, have the right to receive distributions.

Another potential solution would be to establish a joint community property trust under the laws of Alaska, Tennessee, or South Dakota. These statutes generally permit non-residents to create joint community property trusts to potentially convert separate property into community property so that Section 1014(b)(6) would allow the surviving spouse's one-half share to be eligible for basis adjustment. The statutes demand a resident trustee. There are no test decisions of which the author is aware.

Conclusion

Joint trusts represent an opportunity for common law residents to maximize the unified credit equivalent of the first spouse to die and provide an *argument i*n order to obtain the double step-up in basis afforded by section 1014(b)(9) as is given to residents of community property states. With the advent or portability and the Illinois QTIP election it is thought that the issue of inclusion under 2041 will take a back seat to the issue of possible income tax avoidance through full basis adjustment. While this strategy is not without uncertainty (and in fact depends on the service being proven wrong in its articulated rulings), practitioners and their clients should be aware of the strategy and arguments in favor of obtaining a full basis step-up on the first death. Some commentators see the practitioner's risk in employing the joint trust as somewhat nominal compared to the downstream risk that some family member will ask why these techniques to attempt to avoid the capital gains and associated taxes were not employed. Though the joint trust is admittedly not for everyone, clients with low basis, high value assets in long-term, stable marriages are arguably (other than the cost of establishment and administering) put in no worse position for having established the joint trust than if they had set up separate trusts as has been traditionally done in common law jurisdictions. Finally, while the joint trust may prove to be an efficient and useful mechanism, its use in a taxable estate setting represents aggressive estate planning with its associated risks.

Providing clients with alternative scenarios and covering the doubt surrounding the Service's double step-up position is advisable. This author believes that the IRS, as it has in all of its published rulings, is now, and will contest the double step-up in basis argument. However, if the trusts are drafted and administered in accordance with the strict letter of the code, particularly section 1014, with a view toward the weaknesses of the service's arguments, the client will have the best chance of prevailing should the matter be contested by the Service. ■

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1. Tax Reform Act of 1976, Pub. L. No. 94-455.
2. The Tax Relief and Unemployment Reauthorization and Jobs Creation Act of 2010, and the American Taxpayer Relief Act of 2012 made portability permanent. The election for portability has to be made irrespective of whether the filing of a Federal Estate Tax Return is otherwise warranted. Portability is not available for GST purposes and is generally not available for state estate taxes.
3. Tax Cuts and Jobs Act, Pub. L. No. 115-97.
4. States which apply community property law include Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.
5. *Gallenstein v. United States*, 975 F.2d 286 (1992).
6. See Alan S. Gassman, Christopher J. Denicolo and Kacie Hohndall, *Jest Offers Serious Estate Planning for Spouses, Parts 1 and 2,* Estate Planner (2013).
7. See Virginia F. Coleman, *Joint Revocable Trusts*, ALI-ABA Course Materials, Sep. 7 and 8, 2006.
8. I.R.C. §2038.
9. I.R.C. §1014(a) provides that the basis of property in the hands of a person acquiring the property via a decedent is the date of death fair market value. Section 1014 (e) provides an exception that if appreciated property is acquired by gift during the one year period prior to decedent's death the basis would not be the date of death value, but rather the is the adjusted basis of the decedent immediately prior to his or her death.
10. 765 ILCS 1005/1c.
11. See *Commissioner v. Harmon,* 323 U.S. 44 (1944) (ruling that a statute allowing spouses to elect a community property system under Oklahoma law would not be recognized for federal income tax purposes); but see Rev. Ruling 77-359, 1977-2 C.B. 24 where Washington couple agreed to convert their separate property to community property for federal tax purposes. The IRS agreed to this characterization but noted "to the extent that the agreement affects the income from separate property and not the separate property itself, the Service will not permit the spouses to split that income for tax purposes when they file separate income tax returns."
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Ethics Corner: Ethical issues in Illinois estate planning and trust/estate

BY RICHARD W. KUHN

This is the seventh article in a series analyzing the following model rules of professional conduct and its application in practicing trusts and estates law:

1.1 Competence
1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
1.3 Diligence
1.4 Communication
1.5 Fees
1.6 Confidentiality of Information
1.7 Conflict of Interests: Current Clients
1.8 Conflict of Interests: Current Clients: Specific Rules
1.9 Duties to Former Clients
1.10 Imputation of Conflicts of Interest: General Rule
1.14 Client with Diminished Capacity
1.15 Safekeeping Property
1.18 Duties to Prospective Client
3.3 Candor Toward the Tribunal
5.3 Responsibilities Regarding Non-Lawyer Assistance
5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

1.14 Client with Diminished Capacity

(Additional Rules encountered: 1.6 Confidentiality and 1.7 Conflict of Interest)

ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996):

"When client's ability to communicate, to comprehend, and assess information and to make rational decisions is partially or completely diminished — maintaining the ordinary relationship in all respects may be difficult or impossible."

Rule 1.14 came as a godsend because there was virtually no guidance prior to its inception as to the untenable position of the lawyer representing a client with diminished capacity. The classic example is what to do with a client with obvious diminished capacity who indicates that she wants to remain in her own home and refuses to have a guardianship appointed when the lawyer knows otherwise it is clearly in her best interests to be in a safe controlled environment and to have her finances

handled in a professional manner by a third party.

I was personally so pleased to see the official permission given to the lawyer to take necessary protective action for the client with diminished capacity.[1] However, there remains in the diminished capacity scenario significant ethical concerns for which the rules must continue to evolve and guide us.

The lawyer must first, as far as reasonably possible, maintain a normal client/lawyer relationship with the client who has diminished capacity.

The lawyer then owes a duty to alter the relationship accordingly. Options for the lawyer include:

1. Seek help from family members. Nevertheless, the lawyer must keep the client's interests foremost and, to the extent possible, look to client, not family members to make decisions on client's behalf.[2]
2. The lawyer may consult a diagnostician.[3]
3. Substitute judgment. The lawyer can take reasonable protective action with a client with diminished capacity if client "is at risk of substantial physical, financial, or other harm unless action is taken and [the client] cannot adequately act in client's own interest."[4]
4. Appoint a GAL.[5] However, comment [7] adds the following caveat: "appointment of legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of the circumstances is entrusted to professional judgement of the lawyer". Therefore, when dealing with a client with diminished capacity, the lawyer should take and retain copious notes. Consider having a witness present during the client interview and/or consider taking a video of the consultation."
5. No matter which option is taken, the lawyer must avoid inappropriate disclosure.[6]
6. If the lawyer is taking protective action, then the lawyer may disclose client confidences, but only to the extent reasonably necessary to protect client's interest.[7]
7. The lawyer should not disclose the client's condition of diminished capacity unless authorized to do so. Thus, not only the client's confidential matters but the client's capacity as well.[8]
8. Comment [8] also allows protective disclosures even if client directs the lawyer not to disclose.

What if the client directs the lawyer to draft an estate plan in which client leaves all assets to her church and to an animal rights agency because of a recent spat she had with her daughter? Per ABA Op. 96-404*,* supra:

> The fact client makes a decision that is "ill considered" does not result in conclusion that protective action is required. It is not the lawyer's role to substitute his/her judgment for client's. But if lawyer believes client's mental capacity is so diminished that it lacks the ability to make informed decisions, lawyer can have family member participate or appoint a GAL.

The lawyer cannot substitute their own judgment for perceived errors in the client's judgment. The lawyer may offer a candid assessment of the client's conduct and possible consequences, but must always defer to the client's decision. Even though Rule 1.14 gives us some direction, this area of potential ethical violation is laden with landmines. If the lawyer questions the client's capacity, then consider requiring a doctor's opinion of competency. When questioning the client's judgment, try to persuade the client and if unsuccessful, and if appropriate, then withdraw from representation. In the above example, where the mother had a spat with her daughter, the lawyer might suggest that the client go home and take her daughter to lunch and come back in a month to complete her estate plan. Time can solve many problems.

Remember that competency requirements for wills and TODs are different than that for executing deeds. The capacity requirement to execute a will is set forth at § 4-1 of the Probate Act 755 ILCS § 5 (2015). The testator must be 18 years of age and be of sound mind and memory.[9] The Testator must know what he is doing, what property he has, who are the natural objects of his bounty, and what disposition he wants to make of his property. A testator is not required to understand the consequences or the probable result, which would follow the making of the will he executed.[10] Illinois courts generally hold that the same capacity is necessary to execute a testamentary trust as a will.[11]

However, a higher degree of mental capacity is required to make a valid deed than to execute a will. Here, a person must be capable of understanding, in a reasonable manner, the nature and character of the transaction in which he is engaged, and of transacting ordinary business affairs in which his interests are involved.[12] Only then will he be deemed competent to dispose of his real property by deed.[13] One would think that the same degree of competency for a deed would apply to the relatively new TODI (transfer on death instrument for real property). However, see 755 ILCS 27/35, "the capacity required to make or revoke a transfer on death instrument is the same as the capacity required to make a will." (2015).

According to the Commentaries, elder abuse has been labeled the "crime of the 21st century."[14] The exception to the duty of confidentiality Rule 1.6 (b)(6) allows disclosure to comply with other laws but the disclosure must be limited to what the lawyer reasonably believes necessary to comply. In order to rely on Rule 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity.[15] If the lawyer consults with professionals on that issue, then the lawyer must be made aware of potential mandatory reporting duties.[16] In doing this, the lawyer must determine whether the consultation will result in reporting that the client actually opposes or that would create undesirable disruptions in the client's living situation – thus another *catch 22* for the lawyer.[17]

Yet another situation in which ethical concerns arise is when the lawyer is retained by the fiduciary to represent the person with diminished capacity. If the lawyer did not previously represent the person with diminished capacity, then the lawyer actually represents only the fiduciary, but has some duties toward the person with diminished capacity including to report the fiduciary's misconduct.[18] If the lawyer previously represented the person with diminished capacity and attempts to represent the fiduciary or guardian, in my opinion, the lawyer will run into conflict of interest issues and confidentiality issues. As provided for

above, that the lawyer will continue to owe some duties to the diminished client as a former client.

If the lawyer does agree to represent the fiduciary, it is foreseeable that the fiduciary may take action, which the lawyer knows is against the intention or best interests of the diminished former client. Although the rules allow such representation so long as there is no significant risk that representation of one will be materially limited by the lawyer's representation of the other, it is not recommended.

When there is any doubt of a client's capacity, the lawyer should obtain a letter from client's attending physician before the lawyer acts or decides not to represent the client. ■

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1. See Ill. R. Prof'l Conduct (2010) R. 1.4(b).
2. See Ill. R. Prof'l Conduct (2010) R. 1.4(b), Committee Comment 3.
3. *Id.*, Committee Comment 6.
4. Ill. R. Prof'l Conduct (2010) R. 1.14(b).
5. *Id.*
6. Ill. R. Prof'l Conduct (2010) R. 1.14(c).
7. See Ill. R. Prof'l Conduct (2010) R. 1.6(a).
8. Ill. R. Prof'l Conduct (2010) R. 1.14, Committee Comment 8.
9. *Id.* at § 4-1(a).
10. *Anlicker v. Brethorst*, 329 Ill. 11 (Ill. 1928).
11. See *Citizens National Bank of Paris v. Pearson*, 67 Ill.App.3d 457, 384 N.E.2d 548 (4th Dist. 1978).
12. See *Id.*
13. See generally *Lucas v. Westray*, 408 Ill. 243, 96 N.E.2d 623 (1951) (Testator suffered a stroke but evidence that he knew right from wrong and was able to speak clearly and know his own actions was enough for the Court to find he was reasonably capable of understanding the nature of the transaction).
14. John R. Price, J. Michael Farley & Bruce Ross, "Reporter's Note," *ACTEC Commentaries* 57, 161 (5th ed. 2016) (discussing selection of fiduciaries under Rule 1.7).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 162.

Flinn Report summary – March 2, 2018 through April 27, 2018

BY JOSEPH P. O'KEEFE

The following is a summary of regulatory decisions of Illinois agencies reported in the Flinn Report that are related to trust and estate practices.

1. The Department on Aging proposed amendments to implement two public acts to establish an Adult Protective Services registry recording the names of caregivers against whom findings of abuse have been made. (See 42 Ill Reg 3774.)
2. The State Employees' Retirement System proposed amendments to remove an obsolete provision allowing certain lump sum salary payments for unused benefit time to count toward a member's pension. (See 42 Ill Reg 3903.)
3. The Department of Revenue adopted amendments to grant income tax credits for 2017 through 2022 for taxpayers who make qualified contributions to approved scholarship granting organizations providing scholarships to students attending certain non-public schools. (See 41 Ill Reg 14166.)
4. The Department of Commerce and Economic Opportunity adopted amendments to implement recent changes to the Small Business Development Act, adding veteran owned businesses, along with minority female and disabled owned businesses, to those eligible for certain participation loans. (See 41 Ill Reg 12956.)
5. The Department of Revenue Adopted an amendment to replace an emergency rule, and requiring that all employers and payroll providers withholding Illinois income tax to file their W-2 Forms and related returns either electronically or using the same media as on their Federal income tax filings. (See 41 Ill Reg 15041.)
6. The Department on Aging adopted amendments to establish a Statewide Fatality Review Team Advisory Council to oversee teams reviewing deaths of all persons age 60 or older, and disabled persons between ages 18 and 59, living independently or at home, to determine whether the deaths were linked to abuse or neglect and plan for prevention. (See 41 Ill Reg 12932.)
7. The Department of Revenue proposed a new rulemaking to grant income tax credits for 2017 through 2022 to allow taxpayers who make qualified contributions to scholarship granting organizations to students attending non-public schools recognized as by the State Board of Education. (See 42 Ill Reg 7448.)
8. The Department of Human Services adopted amendments to clarify that public assistance claims for funerals and burials are subject to appropriations and may be denied if not submitted within 180 days after the deceased person's death. (See 41 Ill Reg 15167.) ■

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