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ILLINOIS STATE BAR ASSOCIATION

TRUSTS & ESTATES

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

In the April issue...

By Darrell Dies & Jacob Frost

This month's newsletter features an article by Edward R. Sherman regarding the equitable adoption case that the Supreme Court of Illinois filed in its decision of *DeHart v. DeHart*. Matthew L. Brown provides estate planners with a nice discussion regarding the Illinois Estate Tax and life time gifts. Juan C. Antunez has agreed to let us republish an article on pre-death will contests which is certainly an interesting topic to ponder. Jonathan A. Mintz provides a discussion regarding the importance of collaboration with other professionals. Paul Meints provides a short practice tip related to estate tax return audits. Finally, Donald L. Shriver provides some comments on the Florida vs. Illinois residency issue.

We wish to express sincere thanks to each and every person that has helped make this newsletter a success by providing informative, substantive and practical articles. Members of the Trusts & Estates Section may now comment on the articles in the newsletter by way of the online discussion board on the ISBA Web site at <http://www.isba.org/sections/trustsestates/newsletter> and we welcome any comments from our audience. ■

It is 10:00 p.m., do you know *who* are your kids?

By Edward R. Sherman

On March 21, 2013 the Supreme Court of Illinois filed its decision in the case of *DeHart v. DeHart*, No. 114137. While this case involved numerous will contest issues, two issues were addressed that will have a profound effect on estate planning and estate litigation: the Court's recognition of equitable adoption and the establishment of a standard for a limited waiver of the attorney-client privilege after a testator's death by a person claiming to be equitably adopted.

Concept of Equitable Adoption

Equitable adoption where it has been previously recognized is not a legal adoption, but rather an equitable remedy in which a court will find a child who was the subject of an unfulfilled contract to adopt to be considered as if the child was actually adopted so the child can be considered an heir of the putative adoptive parent. *Tracy Bateman Farrell*, Modern Status of Law as to Equitable Adoption or Adoption by Estoppel, 122 A.L.R. 5th 205, § 2(a). The court's recognition does not confer the legal status of adopted child, but rather is merely an equitable remedy. *Id.* In most states that have recognized equitable adoption "the most important prerequisite to application of the doctrine in most states is proof that a contract of adoption was entered into between the foster parent and the child's natural parent or some individual or institution standing in loco parentis." *Id.*

Facts Pertaining To Equitable Adoption in *DeHart*[1]

James DeHart was born out of wedlock as James Thomas Staley, Jr. to Virginia Boswell and James Staley, Sr. in the 1940s. James Staley, Sr.

Continued on page 2

INSIDE

abandoned James when he was an infant and Virginia married Donald DeHart when James was two. Donald and Virginia raised James together and held him out as their son during their lives. Donald also provided James with a birth certificate indicating that Donald was James' father. In 2000 James applied for a passport and needed a certified copy of his birth certificate. When he obtained a copy, the birth certificate identified James Staley, Sr. as James' natural father. James confronted Donald about the birth certificate, to which Donald replied that he believed he had adopted James and hired a lawyer to do so.

Virginia subsequently passed away and Donald remarried. Donald executed a will one year after he remarried naming his second wife and his siblings as heirs and stating that he had no children. Donald subsequently passed away and when his will was admitted to probate James filed a will contest. James subsequently amended his complaint to add claims of contract to adopt and equitable adoption for the purpose of being able to claim as an heir in the event he was successful in setting aside Donald's will.

Illinois' Broadening of Equitable Adoption

In *DeHart* the Court recognized the vast majority of states require a contract in order for a claim of equitable adoption and that in that context equitable adoption is "essentially indiscernible from the Illinois cases involving a failure to follow the statute of adoption that have proceeded on a contract theory." *DeHart v. DeHart*, 2013 IL 114137, ¶ 52 (Mar. 21, 2013).

Nonetheless, the Court chose to allow for equitable adoption without a contract by requiring a plaintiff to prove the "decedent's intent to adopt and form a close and enduring familial relationship". *Id.* at ¶ 62. The Court noted that the decedent's intent "must not be just as readily harmonizable with the mere intention to provide a good home, but must instead *indicate a clear intent to adopt* or *to continuously represent to the plaintiff and the world at large that the plaintiff was the decedent's natural child*." *Id.*, at ¶ 63 (Emphasis added).

The Court did recognize that "[f]irst, and foremost, equitable adoption cases in the inheritance context deal with deceased persons who can no longer testify as to their intent" and did require that proof be made by clear and convincing evidence. *Id.*, at ¶ 64.

Potential Estate Planning and Litigation Impacts

Estate planners going forward will need to not merely ask if a client has any children or adopted any children, but will need to delve deeper into a client's background to determine if there are any potential equitably adopted children.

- Is the client a stepparent, and if so, did the client hold himself/herself out as the natural parent of the child?
- Is the client aware of any persons with whom he/she has had a close relationship that may claim to be equitably adopted after the client has passed away?

Estate planners should also review the definition of "child" in their will and trust templates to make sure they account for not only equitable adoption, but also contract to adopt scenarios. One possibility is to identify an adopted child as a child who's adoption has been completed in accordance with the Illinois Adoption Act (750 ILCS 50/1 et seq.). Another possibility is to include language that expressly disclaims any children that may claim to be equitably adopted or the subject of a contract to adopt and make sure the client expressly includes those children who are not naturally born or legally adopted in the will and/or trust. Considerations regarding corrective language should not only be done prospectively, but current clients should have their wills reviewed to make sure that there are no unintended consequences.

Corrective language should prevent an accidental heirship from being created, but will not prevent a person from challenging the validity of a will or trust in court. A person claiming to be equitably adopted could seek to have a will or trust set aside for lack of testamentary capacity, as in *DeHart*, by claiming that the decedent did not have the capacity to know the natural objects of his or her bounty because the person making the claim should have been identified in the decedent's will. If such an allegation were combined with facts similar to *DeHart*, then a claim for lack of testamentary capacity would probably have to be litigated and not disposed of at the initial pleadings stage.

Considering that the testator cannot speak, the most likely and credible source of evidence for trial will be the attorney that drafted the will or trust that is being contested. The attorney who prepared the will or trust expect to be deposed and for his notes to be the subject of a request for production. The attorney's notes should reveal the questions and answers of the testator regarding the subject of equitable adoption, as well as contract to adopt. An attorney's questions should be probing and approach the issue from multiple perspectives because a client may believe that because he/she is filling out a legal document that only legally adopted children should be included.

Standard for Limited Waiver of Attorney-Client Privilege to Persons Claiming to be Equitably Adopted in Estate Contests

The court in *DeHart* also addressed a situation that will be common in future will contests involving equitable adoption: at what point is the attorney-client privilege waived in favor of a person who claims to be equitably adopted?

Prior to *DeHart* there has been a limited waiver of the attorney-client privilege in favor of heirs and legatees of a decedent because it is assumed that the decedent would want his/her intentions known. *Wilkinson v. Service*, 249 Ill. 146, 150-51, 94 N.E. 50, 52 (Ill. 1911). In *DeHart* the Court addressed the issue of when a person claiming to be equitably adopted should be considered an heir for the purpose of seeking privileged information. The Court held that James "need only make an initial evidentiary showing that he is an heir or next of kin . . . ." *DeHart*, 2013 IL 113137, ¶ 73. The court noted that if a prima facie case is shown that the Estate would need to rebut the evidence provided by James. *Id.* Therefore, while a person cannot merely allege that he or she was equitably adopted to seek to have the attorney-client privilege waived, the threshold for waiver to obtain privileged communications is a very low standard.

Conclusion

Equitable adoption is now recognized in Illinois and estate planners and litigators need to be aware of the ramifications of this new theory on their practices. While the impact on successful future litigation on this theory is unknown, the likelihood of attorneys raising this theory as the basis to establish standing and contest wills and trust is likely to increase. Therefore, it is prudent for estate planners to take affirmative steps to make sure that a client's familial situation is clearly understood during the estate planning process so that steps can be taken to make sure that inadvertent heirships can be minimized and the true intent of a client is expressed. ■

1. *DeHart* was decided on a motion to dismiss pursuant to Illinois Code of Civil Procedure section 5/2-615 so the following facts from James DeHart's Second Amended Complaint were taken by the Court as true for the purpose of determining the legal sufficiency of James DeHart's Second Amended Complaint.

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Lifetime gifts and the Illinois Estate Tax

By Matthew L. Brown

Attempting to explain how estate taxes are calculated can be a frustrating exercise. For the last decade, the uncertainty in the federal tax laws required complex illustrations based on the different assumptions for when the client might die due to the increasing exemptions enacted by the Economic Growth and Tax Relief Reconciliation Act of 2001.[1] From 2010 to 2012, the uncertainty was compounded by the repeal of the estate tax, its retroactive reinstatement, and the sunset of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.[2] With the passage of the American Taxpayer Relief Act of 2012 (enacted January 2, 2013),[3] the federal estate tax laws have been made "permanent," subject to the impermanence that characterizes any federal legislation.

In our efforts to describe the complexities of the federal estate tax laws to our clients, a discussion of the Illinois estate tax may have been relegated to a cursory comment or footnote in a letter or memorandum. Many clients no longer face federal estate tax liability with the federal estate and gift tax exemptions being maintained at $5 Million, indexed for inflation since 2011. Nonetheless, since Illinois only recognizes an exclusion amount of $4 million for persons dying on or after January 1, 2013,[4] many Illinois residents will continue to be subjected to Illinois estate tax liability.

In this article, I will explain the computation of the Illinois estate tax and provide some practical guidance for evaluating a client's estate tax exposure. I have included illustrations in the endnotes.[5]

Basic Computation of Illinois Estate Tax

The computation of the Illinois estate tax requires two separate calculations, both of which are interrelated. To simplify the computation, the Illinois Attorney General offers a calculator on its Web site.[6] While this is useful in preparing Illinois estate tax returns, advising clients regarding the Illinois estate tax requires understanding the underlying complexity of the calculation.

The basic calculation is as follows:

Step 1: Calculate the State Death Tax Credit under Section 2011 or 2604 of the Internal Revenue Code as in effect on December 31, 2001[7]

Taxable Estate (Form 706, Line 3c) less $60,000 Adjustment = Amount From Table [8]

The value for the Taxable Estate is net of the deduction for the state death tax, which makes it an interrelated calculation. As the Illinois estate tax increases, the Taxable Estate decreases resulting in a decrease in the Illinois estate tax.

Step 2: Calculate state death tax credit limitation[9]

The calculation above does not provide the final amount for the Illinois estate tax. Under Section 2011(e) of the Internal Revenue Code as in effect on December 31, 2001, the state death tax credit could not exceed that maximum amount of federal estate tax due. The second computation requires a calculation of the federal estate tax that would be payable applying a federal exemption of $4,000,000 (for decedents dying on or after January 1, 2013). For purposes of this calcu-

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lation, the Illinois Attorney General has indicated that the then current estate tax rate should be applied.

The limitation calculation is as follows:

Taxable Estate (Line 3c) plus adjusted lifetime taxable gifts (Line 4)

Less: $4 million

Multiplied by: 40%

Here again, the value for the Taxable Estate is net of the deduction for state death taxes payable, which makes it an interrelated calculation. As the Illinois estate tax increases, the Taxable Estate decreases resulting in a decrease in the Illinois estate tax.

The final tax payable to the State of Illinois is the lesser the state death tax credit and the federal estate tax payable applying a federal exemption of $4 million. This calculation produces several unexpected results that could significantly impact our recommendations to our clients.

True or False – If my client gifts assets so that his or her estate is less than $4 Million, he or she will not owe any Illinois estate tax?

False. Because the State Death Tax Credit limitation calculation includes adjusted lifetime taxable gifts, the lifetime taxable gifts will increase the tax payable under Step 2 of the calculation above. For decedents with a taxable estate plus adjusted lifetime taxable gifts between $4 million and $5,359,167, the State Death Tax Credit limitation will apply to limit the tax payable. Although making gifts may reduce the tax payable so that the State Death Tax Credit calculated under the table is less than the State Death Tax Credit Limitation, any decedent with a taxable estate plus adjusted lifetime taxable gifts in excess of $4 million will owe Illinois Estate Tax unless he or she gifts all of his or her property during life or to tax deductible beneficiaries at death so that his or her taxable estate is $0.[10]

True or False – My client has $5 million. If she gifts $500,000, she will save on Illinois estate tax?

False. The client will owe $285,714 in Illinois estate tax regardless of the lifetime gift. For clients with a taxable estate plus adjusted lifetime taxable gifts between $4 million and $5,359,167, no taxes will be saved until the client reaches a breaking point, which varies based on the value of the client's taxable estate plus adjusted lifetime taxable gifts. For a client with $5 million, the breaking point is $663,187 in taxable gifts. The first $663,187 in lifetime taxable gifts generates no Illinois tax savings. After the breaking point is reached, each dollar gifted generates an initial tax savings of 9.4 cents. The savings generated by each additional dollar gifted declines as the client's taxable estate moves up the Stated Death Credit Tax Table. Additionally, because the calculation is interrelated, the savings will always be slightly less than the tax rate applicable to that client's taxable estate.[11]

True or False – Illinois does not tax lifetime gifts?

True and False. The answer depends on the size of the clients' taxable estate plus adjusted lifetime taxable gifts. For a client with a taxable estate plus adjusted lifetime taxable gifts between $4 million and $5,359,167, he or she cannot avoid Illinois estate tax by making taxable gifts. Client #1 with a $4 million taxable estate who makes no taxable gifts will not pay any Illinois estate tax. Client #2 with a $4 million taxable estate at death who made $1,359,167 in taxable gifts during life will pay $253,986 in Illinois estate tax. Client #2's beneficiaries may claim that this is $253,986 was a tax on the decedent's gifts, however, Client #2's beneficiaries would have paid $388,333 in Illinois estate tax if the gifts had not been made.[12]

For a client with a taxable estate in excess of $5,359,167, the amount of adjusted lifetime taxable gifts becomes irrelevant, and thus these gifts are Illinois estate tax free. When a client's taxable estate equals $5,359,167, the amount of tax payable under the State Death Tax Credit Table is $388,333 (Step 1 above) and the State Death Tax Credit Limitation is $388,333 (Step 2 above). Since the limitation is no longer a factor in the calculation, the adjusted lifetime taxable gifts have no further effect on the tax payable. Nonetheless, clients with estates in excess of $5,359,167 can reduce their Illinois estate tax by further gifting, but as described above, the marginal benefit decreases as additional gifts are made.[13]

True or False – The tax rate for Illinois estates of $4,000,000 increases from 10.4% to 16% according to the State Death Tax Credit Table. The marginal Illinois tax rate will not exceed 16%?

False. For clients with taxable estates plus adjusted lifetime taxable gifts between $4 Million and $5,359,167, the marginal increase in tax payable is not determined by the State Death Tax Credit Table, but by the State Death Tax Credit Limitation calculation (Step 2 above). As a result, the marginal rate for taxable estates with adjusted lifetime taxable gifts between $4 million and $5,359,167 is 28.57%. Once the taxable estate reaches $5,349,167, the marginal rate is then based on the State Death Tax Credit Table, except that the actual marginal rate for taxable estates in excess of $5,359,167 will always be slightly less than the published rate due to the interrelated calculation.

Planning Considerations.

- **Client Expectations**. Estate tax surprises are a most unwelcome type of surprise. While the intricacies of the calculations above may be difficult to explain to a client, we should manage our clients' expectations by avoiding over generalization of the clients' Illinois estate tax exposure. For clients with a taxable estate between $4 million and $5,359,167, it may be helpful to calculate the tax payable in a variety of scenarios to ensure that the client is fully informed.

- **Cost Basis**. Advising a client to make taxable gifts always requires a careful consideration of cost basis issues. The beneficiary of a taxable gift receives the donor's basis in the gifted property. If the donor had held the property until his or her death, the beneficiary would receive a new basis in the inherited property equal to the value of the property on the decedent's date of death or the alternate valuation date. If gifting is being advised to reduce Illinois estate tax, it is vitally important to determine the Illinois estate tax savings relative to the potential capital gains tax that the beneficiary may face if he or she sells the gifted property. For example, if a client with a $5 million taxable estate gifted a farm with a value of $1 million to a child in an effort to reduce his taxable estate to $4 million, he would save $31,728 in Illinois estate taxes. There would be no federal tax implication because the client's estate was under the federal exemption of $5.25 million (in 2013). If the farm has a basis of $300,000 and the son sells the farm after it is gifted, he would pay capital gains tax of $175,000 assuming that he is in the 20% bracket for federal capital gains tax purposes and the 5% bracket Illinois tax purposes, and assuming no offsetting losses and disregarding the 3.8% and itemized deduction phase out. If instead the client held the property until his death and the son received the farm as testamentary bequest, $31,728 in additional Illinois estate taxes would be payable, but the son would avoid any capital gains tax and Illinois tax upon the sale of the farm. ■

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1. Pub.L. 107–16, 115 Stat. 38, June 7, 2001.

2. Pub.L. 111–312, 124 Stat. 3296, enacted December 17, 2010.

3. Pub.L. 112–240, 126 Stat. 2313, enacted January 2, 2013

4. *See* 35 ILCS 405

5. All illustrations assume that gifts are made more than three years prior to the decedent's death. Gifts made less than 3 years prior to death will be subject to the provisions of IRC Section 2035.

6. http://illinoisattorneygeneral.gov/publications/estatetax.html

7. 35 ILCS 405/2(b)

8.

State Death Tax Credit Table, IRC Section 2011(e)

Adjusted Taxable Estate

At Least	But Less Than	Credit	Per-cent	Of Excess Over
0	40,000	0	0.0%	0
40,000	90,000	0	0.8%	40,000
90,000	140,000	400	1.6%	90,000
140,000	240,000	1,200	2.4%	140,000
240,000	440,000	3,600	3.2%	240,000
440,000	640,000	10,000	4.0%	440,000
640,000	840,000	18,000	4.8%	640,000
840,000	1,040,000	27,600	5.6%	840,000
1,040,000	1,540,000	38,800	6.4%	1,040,000
1,540,000	2,040,000	70,800	7.2%	1,540,000
2,040,000	2,540,000	106,800	8.0%	2,040,000
2,540,000	3,040,000	146,800	8.8%	2,540,000
3,040,000	3,540,000	190,800	9.6%	3,040,000
3,540,000	4,040,000	238,800	10.4%	3,540,000
4,040,000	5,040,000	290,800	11.2%	4,040,000
5,040,000	6,040,000	402,800	12.0%	5,040,000
6,040,000	7,040,000	522,800	12.8%	6,040,000
7,040,000	8,040,000	650,800	13.6%	7,040,000
8,040,000	9,040,000	786,800	14.4%	8,040,000
9,040,000	10,040,000	930,800	15.2%	9,040,000
10,040,000	99,999,999,999	1,082,800	16.0%	10,040,000

9. IRC Section 2011(e). ("The credit provided by this section shall not exceed the amount of the tax imposed by section 2001, reduced by the amount of the unified credit provided by section 2010.")

10.

Taxable Estate	Adjusted Taxable Gifts	State Death Tax Credit	Max Credit Amount (2001 Law w/ $4 Million exemption)	State Death Tax Payable
$5,359,167	$0	$388,333	$388,333	$388,333
$4,000,000	$1,359,167	$253,986	$388,333	$253,986
$0	$5,359,167	$0	$388,333	$0

11

Taxable Estate	Adjusted Taxable Gifts	State Death Tax Credit	Max Credit Amount (2001 Law w/ $4 Million exemption)	State Death Tax Payable
$5,000,000	$0	$352,158	$285,714	$285,714
$4,500,000	$500,000	$301,799	$285,714	$285,714
$4,336,813	$663,187	$285,714	$285,714	$285,714
$4,336,713	$663,287	$285,705	$285,714	$285,705 (9.4% Marginal Savings)

12.

Taxable Estate	Adjusted Taxable Gifts	State Death Tax Credit	Max Credit Amount (2001 Law w/ $4 Million exemption)	State Death Tax Payable
$4,000,000	$0	$253,986	$0	$0
$4,000,000	$1,359,167	$253,986	$388,333	$253,986
$5,359,167	$0	$388,333	$388,333	$388,333

13.

Taxable Estate	Adjusted Taxable Gifts	State Death Tax Credit	Max Credit Amount (2001 Law w/ $4 Million exemption)	State Death Tax Payable
$5,359,167	$0	$388,333	$388,333	$388,333
$5,359,167	$2,000,000	$388,333	$959,762	$388,333
$5,000,000	$2,359,167	$352,158	$959,762	$352,158

Before the party's over: Arguments for and against pre-death will contests

By Juan C. Antunez

Certainty. It's the Holy Grail of estate planning and non-existent in any will contest. Here's how one judge put it over a century ago:

> [P]ost mortem squabblings and contests on mental condition . . . have made a will the least secure of all human dealings, and made it doubtful whether in some regions insanity is not accepted as the normal condition of testators.

Lloyd v. Wayne Circuit Judge, 23 N.W. 28 (Mich. 1885).

Worst Evidence Rule = NO Certainty.

All litigation is uncertain, but why are will contests especially so? Think "worst evidence rule," a term coined by famed Yale Law professor John H. Langbein, in *Will Contests*, 103 Yale L.J. 2039 (1994). In most states (including Florida, see F.S. 732.518) you're barred as a matter of law from litigating the validity of a will until *after* the single most important witness -- the testator -- is dead. Which means we're forced to litigate these cases based in large part on the worst evidence available: the self-interested hearsay testimony of those claiming a right to the testator's estate.

So what's to be done? One possible solution is obtaining a final order validating a will in a guardianship proceeding while the testator is still alive; it worked in a California case I wrote about here. A better idea is adopting legislation expressly authorizing pre-death will contests.

Pre-Death Will Contest = Certainty.

State legislators have experimented with pre-death will contests for generations. According to Prof. Beyer in Will Contests - Prediction and Prevention, the first such statute was passed in 1883 in Michigan, and the National Conference of Commissioners on Uniform State Laws seriously considered the idea in the early 1980s. **As explained by Prof. Beyer, if your goal is greater certainty, a pre-death will contest or "ante-mortem probate" is your best solution.**

> Ante-mortem probate has the potential of greatly improving the legal system's effective transmittal of an individual's wealth by providing the testator with **greater certainty** that the testator's desires for the distribution of property will be fulfilled and designation of fiduciaries followed according to the testator's written declaration. Because the validity of the will would be determined prior to the testator's death, at a time when all relevant evidence is before the court, will contests would be greatly reduced. In addition, ante-mortem probate would lead to more efficient use of scarce and valuable resources as less court time is expended dealing with spurious will contests and fewer estate funds are dissipated defending those contests.
>
> Admittedly, ante-mortem probate is not a panacea. The ante-mortem process . . . may be extremely disruptive to the testator and the testator's family. The testator may not wish to disclose the contents of the will or to face the potential embarrassment that may occur if testamentary capacity is litigated. Additionally, the process involves additional costs and may raise due process and conflict of laws problems. The benefits of ante-mortem probate, however, should not be withheld from the public merely because the technique contains flaws or because it may be difficult to determine the proper model to use.

Today there are four states expressly authorizing pre-death will contests by statute: Arkansas, North Dakota, Ohio and Alaska. The pros and cons of these statutes is the subject of a recent article in the ABA's Probate & Property Magazine entitled Before the Party's Over: The Arguments For and Against Pre-Death Will Contests. In my opinion, the best part of this article is the very funny cover illustration by Max Licht. On a more serious note, anything we can do to keep up the drumbeat in favor of this much-needed legislation is a good thing, and hopefully this article gets more people thinking about it.

Lesson learned?

If you're a working lawyer, it's easy to dismiss talk of pre-death will contests as theoretical mumbo jumbo only academics have the luxury of fooling around with. That would be a mistake. Wrapping our heads around the "worst evidence" problem makes us better practitioners, especially when we have our estate planning hats on. If the risk of a future challenge is present, we can't naively rely on the fact that there is no doubt the client has capacity and is acting of his own free will, we need to anticipate how the worst-evidence rule can undermine the best laid plans, and proactively stack the deck in the client's favor through smart defensive planning. ■

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Collaboration: Why is it so elusive?

By Jonathan A. Mintz

Several years ago the Integro Leadership Institute published a paper titled The Elements of Trust (ILI Report). Although written in the context of workplace leadership, this paper is very instructive as to our relationships with allied professionals, and more specifically, why true collaboration with allied professionals is often so elusive. According to the ILI Report, there are four elements to trust:

(1) Reliability – Doing what you say you're going to do

It goes without saying that reliability is an important element in trust. Reliability is also a critical element in collaboration because oftentimes professionals come into the relationship with certain preconceived notions as to other professional. Thus, the parties frequently look to reliability to determine whether this particular allied professional is someone who they wish to collaborate with, and if the other party is perceived to be unreliable the collaboration quickly fails.

For example, as lawyers we are sometimes considered "deal killers" by allied professionals because our actions appear to reflect a desire that a particular transaction not take place, irrespective of our words (our words can also be an issue, as is discussed below). If our role is to draft an estate plan with an irrevocable life insurance trust to own life insurance (perhaps for income tax planning purposes given the permanent income tax rates for high income earners), we should be cognizant of the fact that if we drag our feet in the drafting of the trust the life insurance professional will not get paid.

With automated drafting systems like WealthCounsel's WealthDocx® there is no reason why even a complex life insurance trust can't be drafted, finalized and signed by the client in less than two weeks. Therefore, giving the client a reasonable estimate to complete the work, and completing it in that time frame or less time if possible, is a critical step towards establishing reliability. By doing so you show the allied professional you are reliable – and not a deal killer.

Conversely, lawyers sometimes view financial professionals as "product peddlers" not concerned with the client's best interest, even when the financial professional tells us she is a holistic planner concerned only with the client's best interest. In my experience the product peddlers quickly identify themselves by acting in their best interest. Thus we quickly realize that those who do not do as they say are not ones we wish to work with.

(2) Congruence – The knowledge that what you say and do is on track with what you believe or know to be true

Congruence is also a critical element to effective collaboration for two reasons. First, if you don't believe in what you do you will not come across as genuine, and in my experience people prefer to work with others who appear genuine.

Perhaps more importantly, congruence is critical because it also means "saying what is true even if it is unpleasant and not exactly what you think the other person wants to hear." In my experience this is where the rubber hits the road in professional collaboration, but it generally surfaces at inopportune times—resulting in the "deal killer" label.

What do I mean? If you disagree with another professional's recommendation, good etiquette dictates that the time to raise the disagreement is not in the presence of the client but beforehand, where everyone can either get on the same page as to the strategy or agree to provide multiple recommendations. This is why many estate and business planning attorneys we work with have multiple meetings for higher net worth clients: (1) an advisor strategy meeting to try to reach agreement as to what *the team* should recommend to the client; and (2) a separate meeting with the client where the agreed upon strategies are recommended jointly by the advisor team.

This dual meeting is also far more effective in my experience because it gives the professionals an opportunity to get on the same page as to the recommendations, producing a unified front to the client. Clients are far more likely to move forward (to the advantage of all team members) if the team presents a single, holistic recommendation to the client.

(3) Acceptance – Accepting people for who and what they are in a non-judgmental way

If we are being totally honest, this is an area where many lawyers struggle. We all have come across financial advisors who don't have the experience or expertise that we demand for our clients. And the reality is, that's ok—our clients don't have to work with these advisors.

But the other reality is that not all financial advisors are made equally. Some know far more about sophisticated planning than most lawyers will ever know, even though they don't have a J.D. after their name. So it's not fair to the individuals who make up the profession to assume that all are more like the former than the latter. My experience is if you take the time to get to know financial professionals, most have the same goals as we do—serving clients—and many have more knowledge and experience in sophisticated financial products and their application than most lawyers.

Some professional designation like a CFP, CLU, ChFc, etc. can help you distinguish financial professionals from others, but even this is not determinative. Learn about the particular advisor's practice and processes in a non-judgmental way. Take the time to learn strategies that incorporate life insurance, annuities, or other financial products, many of which are also relevant to lawyers (like those strategies taught by The Advisors Forum). If you use that knowledge to help the financial professional grow her practice you will likely have a loyal collaborative referral source for life.

(4) Openness – Not holding anything back

In my experience we all have expectations of what others should and shouldn't do (this applies to all relationships, not just our collaborative relationships). But for whatever reason, we rarely express those expectations. And what happens when unexpressed expectations go unmet? Generally we act with disappointment, resentment, or perhaps even anger.

Our collaborative relationships require open and flowing communication as to all expectations. For example,

- Will the other professional take your call if it's an emergency?
- How quickly will she return your messages when it's not an emergency?
- How will the other professional get paid?
- How frequently will the other professional

provide updates as to referred clients?

- Will the lawyer be in position to refer clients to the other professional?

This list of questions is in no way exhaustive, but it gives us a flavor as to the types of expectations many of us have going into professional relationships, and yet we often don't come to a meeting of the minds as to these expectations. And when the other professional consistently doesn't meet our unexpressed expectations, in my experience the relationship is destined to fail.

Openness is not limited to expectations. In speaking to financial professionals over the years I've been told countless times that after the financial professional referred a client to a lawyer the financial professional didn't hear a single word from the lawyer—no thank you, nothing—regarding the status of the referred client. Again, good etiquette suggests at least a thank you, but my retort is always, "what did you do about it?" Typically, the response is "I found another attorney to refer to," but the answer should be, "I invited the attorney to lunch so we could talk about it;" not a confrontation, but an open conversation about the fact that the financial professional felt in the dark and that the referrals were unappreciated.

Conclusion

No relationship can succeed without trust, and the more trust there is the more likely the relationship will succeed. The four elements of trust—reliability, congruence, acceptance and openness—are critical to establishing a successful relationship on any level. In the context of allied professionals, they help explain why so many collaborative relationships fail—often one or more elements do not exist and with both parties frequently entering the relationship with preconceived biases about the other, the relationship is doomed to fail. ■

Jonathan A. Mintz, J.D. is COO of WealthCounsel, LLC and The Advisors Forum, LLC, and oversees all operations of several thousand member organizations for accountants, attorneys, financial planners, insurance advisors and trust officers. The Advisors Forum's "collaborative estate planning system" of marketing tools and training has proven effective for hundreds of practitioners in generating consistent new business from other professionals and clients. Jonathan is also a frequent author and speaker on effective collaboration among estate and financial planning professionals and how to generate consistent business from other wealth planning professionals.

Practice tip—Estate tax return audits

By Paul Meints

According to the "2012 Internal Revenue Service Data Book" issued March 25, 2013 which summarizes IRS activities for its fiscal year which ran from October 1, 2011, to September 30, 2012, the IRS scrutinized estate tax returns more than any category of individual tax returns in tax year 2011 at close to a 30 percent rate of examination, while individual income tax returns with $1 million or more in income saw a slight decline in audit coverage.

The 12,582 estate tax returns filed in tax year 2011 had a 29.9 percent rate of audit by the IRS, compared to 18.2 percent last year, while estates with assets of $5 million up to $10 million had a 58.6 percent audit rate. Estate tax returns with assets of $10 million or more had an effective 116 percent rate of audit, as the IRS also examined returns in that category filed in prior tax years, in addition to those filed in 2011, and included them in the total fiscal year 2012 activity. The IRS' focus on estate tax returns resulted in the collection of $1.1 million more in additional tax revenue for the 2011 tax year. ■

Paul Meints is a self-acknowledged "country lawyer" that practices in the Bloomington/Normal area, is a member of the ISBA Trusts & Estates Section Council and can be reached at meintstaxlaw@fronter.com or at (309) 829-1040.

A comment on the "Snowbirds Fly Free of Illinois Tax" article

By Donald L. Shriver

I read with great interest the Siebers/Jones article "Snowbirds Fly Free of Illinois Tax" in the February 2013 newsletter. The points made were well taken and with many states screaming for tax revenue (Illinois the loudest) when advising clients (usually long-time Illinois residents) who flee to Florida, an attorney or tax adviser should be cautious and careful to warn of these issues.

I would also suggest as estate planners and advisers for clients who are former Illinois "residents," we need to be careful of other matters related to our estate planning documents. Often we are asked to review and update documents previously prepared by ourselves or other attorneys. When doing so we need to change domicile/resident references to the new Florida address. Even if not asked to review we need to remind our clients that at the very least a codicil and/or amendment to the trust should be executed to reflect the change. Since Florida currently has no "estate" tax, you may find other updates being recommended, so executing new wills or restated trusts may be the better way to proceed.

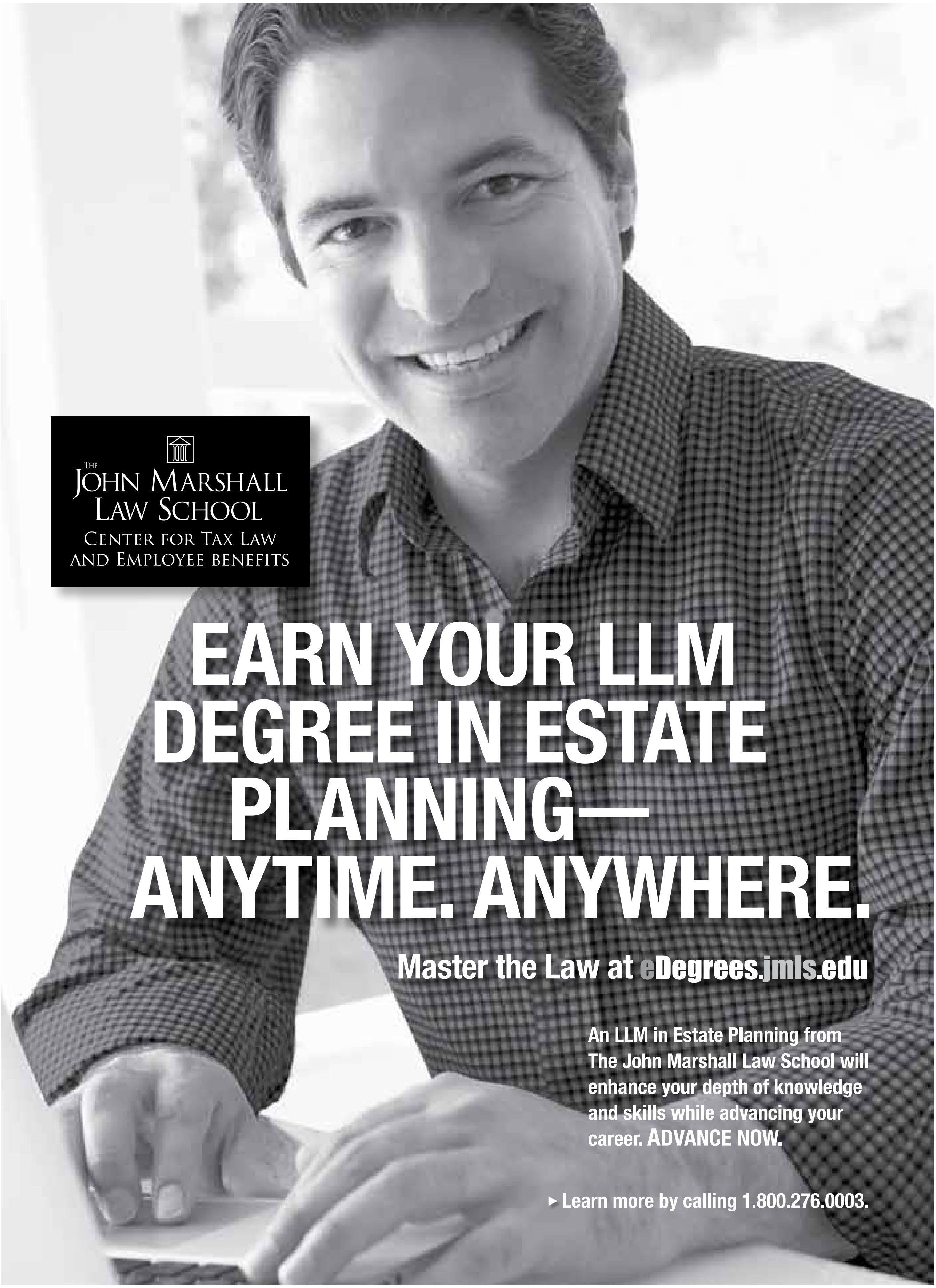
A more difficult concern might be Power of Attorneys previously executed by clients as Illinois residents. Florida refers to a Health Care Surrogate rather than agent and Florida attorneys customarily freelance these POAs for their clients. Other states, for example Wisconsin, have standard statutory forms. Recognition and acceptance in other states by banks, brokerage houses, hospitals, doctors, etc. of Illinois. Standard forms may require plenty of explanation, so careful drafting of a POA needs to expressly state and recognize the Florida residence, and I suggest it should contain a provision similar to the following:

> It is my intention that this document shall be effective and interpreted not only in my state of residence, Florida, but also in the states of Illinois and Wisconsin where I have vacation homes as well as in all other states or countries where I may be when medical treatment and services are sought or may become necessary. To the extent that any provision may be declared invalid or is unenforceable in any such jurisdiction, it shall not void the effectiveness or validity of all the remaining provisions.

Because those new Florida residents I would also suggest to remind client to have brokerage and bank accounts reflect the new Florida address even though physically maintained in Illinois.

Obviously, working with a Florida attorney on any estate planning documents will assure acceptance in Florida and provide comfort to all involved. ■

Donald L. Shriver is a member of the ISBA Trusts & Estates Section Council and practices in Rockford, Illinois and can be reached at (815) 963-4895.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