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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 August issue...

By Darrell Dies

In this month's newsletter Steven Siebers and Emily Schuering Jones provide a timely discussion about the State of Illinois's response to *Cain v. Hamer* with respect to maintaining Illinois residency for tax purposes. Also in this month's issue, Richard A. Sugar provides an opinionated view of the *Windsor* case and its handling of the Defense of Marriage Act. Likewise, Gary Gehlbach provides us with a discussion about the recent *Morehouse* case which determined that CRP payments are includable in a taxpayer's self-employment income. Frank Greenfield provides a practice tip related to dealing with digital assets. Finally, Darrell Dies provides a tribute to Linscott Hanson.

Thank you 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 comments are welcome. ■

Illinois tries to ensnare snowbirds (again)

By Steven E. Siebers and Emily Schuering Jones

This is a follow-up to the article titled "Snowbirds Fly Free of Illinois Tax" that was published in the February 2013 edition of the ISBA Trusts & Estates Newsletter. For many longtime Illinois residents, living part of each year in Florida is an ideal lifestyle. These "snowbirds" typically flee the state during the winter months, trading in snow boots for sandals. But the snowbird lifestyle may offer something more than weather-related benefits. A nonresident does not pay Illinois income tax on income from a non-Illinois source. The question is, then, can Illinois snowbirds, while retaining their Illinois homes, become nonresidents for Illinois income tax purposes? The Illinois Appellate Court ruled that it is possible. The Illinois Department of Revenue ("Department") has now said, "Not so fast."

The Department is smarting from the snowbird taxpayer victory in *Cain v. Hamer.*[1] In *Cain*, the taxpayers claimed Florida residency despite having been Illinois residents for many years and continuing to own a house in Illinois. The taxpayers spent about equal time in Florida and Illinois during the tax years in question. Nevertheless, the taxpayers prevailed in litigation over a $1.8 million Illinois income tax bill. We examined the *Cain* case in detail in a previous article, which was published in the *Trusts & Estates Newsletter,* Volume 59, No. 7, page 1 and the *Agricultural Law Newsletter*, Volume 22, No. 5, page 1.

Not surprisingly, the decision in *Cain* has prompted the Department to respond. Instead of appealing *Cain* to the Illinois Supreme Court, the Department has elected to change its regulations. The obvious purpose is to try to ensnare imprudent Illinois snowbirds.[2]

The Old Regulations – Presumption of Residence

The Department's previous regulations provided that if an individual spends in the aggregate more than nine months of any taxable year

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Illinois tries to ensnare snowbirds (again)

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in Illinois, the individual will be presumed to be an Illinois resident. The old regulations further provided a presumption of *non-residence* if an individual was absent from Illinois for one year or more. These old presumptions have now been washed away like a sand castle on the beach.

The Amended Regulations – Presumption of Residence

Under the amended regulations, effective April 19, 2013, snowbirds are now subject to two separate "rebuttable presumptions:"

1. An individual receiving an owner-occupied homestead exemption (see 35 ILCS 200/15-175) for Illinois property is presumed to be a resident of Illinois.
2. An individual who is an Illinois resident in one year is presumed to be a resident in the following year if (s)he is present in Illinois more days than (s)he is present in any other state.[3]

These presumptions are not conclusive and may be overcome by "clear and convincing evidence" to the contrary.

The first rebuttable presumption is an obvious attempt to trap the unwary snowbird who has been a resident of Illinois and retains an Illinois house. Illinois home owners regularly claim the owner-occupied exemption for real estate tax purposes. The exemption reduces assessed value by $6,000 or $7,000.[4] Typically the exemption is claimed once and automatically renewed each year thereafter. The Department is trying to use this automatic qualification for the owner-occupied exemption as an admission that the Illinois resident is claiming the Illinois house as the taxpayer's principal residence.

The second rebuttable presumption affects owners who spend less time in Illinois than in any other state in the first year of nonresidency. In *Cain* during some of the years at issue, the taxpayers actually spent more days in the State of Illinois than in any other state, including Florida. Still, the taxpayers were found to be nonresidents of Illinois.

The amended regulations also provide that if either one of these two new rebuttable presumptions is applicable, the taxpayer must file an Illinois income tax return that contains full disclosure of all facts.[5] The full disclosure would give the Department the information needed to easily issue a notice of deficiency against the snowbird taxpayer claiming nonresident status.

Further, the amended regulations expand the types of evidence that may be submitted to rebut the presumption of residence or non-residence. The new types of evidence are:

- the location of spouse and dependents,
- the permanency or temporary nature of work assignments in the state,
- the location of professional licenses, and
- the location of medical and other healthcare providers, accountants and attorneys.[6]

The amended regulations include one taxpayer-friendly concession: making financial contributions to an Illinois charity is not a factor in determining whether the donor is an Illinois resident.[7] This "non-factor" is good news for taxpayers and for Illinois based not-for-profits, but it is in stark contrast to the other amendments that heavily favor the Department.

Practice Tip

To avoid the snares contained in the regulations enacted in response to *Cain*:

1. Make sure your snowbird client does NOT claim the owner-occupied exemption (sometimes called the "homestead exemption") on the client's Illinois real estate tax bill. The exemption normally reduces assessed value by $6,000 or $7,000. The additional real estate tax cost is fairly insignificant. The taxpayer simply needs to go to the supervisor of assessments office in the county where the house is located to withdraw the owner-occupied exemption on his or her Illinois house.
2. Make sure that in the first year of nonresidency your Illinois snowbird client does not spend more time in Illinois than any other state in which the client is present during the year. For example, if Florida is the new state of residency, the snowbird client needs to be able to document spending more time in Florida than the client spends in Illinois, regardless of whether the client spends time in places other than Illinois and Florida.

Through newly adopted "rebuttable presumptions," the Department is more aggressively attempting to catch snowbirds who retain an Illinois house.

Thirteen Lessons to Follow

We now have 13 lessons for establishing nonresident status. Ten are from our previous article and three are new.

1. If the taxpayer works in Illinois or earns income from an Illinois source (such as real estate located in Illinois), that income is subject to Illinois income tax regardless of residency.[8]
2. If the taxpayer has only retirement income, Illinois exempts it by allowing a subtraction of retirement income in computing Illinois taxable income.[9]
3. An Illinois resident has the right to establish a domicile different from Illinois under the four part test:
   a. physical abandonment of the first domicile;
   b. an intent not to return to the first domicile;
   c. physical presence in the new domicile; and
   d. an intent to make that one's domicile.
4. The taxpayer should pick a state like Florida, which has a statute authorizing the individual to designate it as the state of residency. The taxpayer should fully comply with the statute.
5. Individuals may have only one domicile, and domicile does not alternate between two states during a calendar year.
6. The taxpayer should maintain logs of physical presence during the year.
7. The issue of whether a taxpayer's presence in Illinois is other than "temporary or transitory" is a fact and circumstances test, but the following do not make a person an Illinois resident:
   a. being physically present in Illinois for a significant amount of time each year (more than five months but less than six months),
   b. retaining ownership of an Illinois house,
   c. being a member of social clubs in Illinois
8. The taxpayer should take all action in the new state of residence as if the taxpayer resided solely in that new state: register

to vote, obtain all licenses there (driver's, car, firearms, hunting, and any others), use the new mailing address, have newspaper subscriptions delivered, change telephone cell numbers, do banking, change registrations, buy a burial plot, obtain medical care, retain legal advisors, and contribute to political candidates of the new state.

9. Not filing an Illinois tax return results in an indefinite time for Illinois to assert a notice of deficiency.[10] Consider having the client receive some Illinois source of income requiring the filing of an Illinois nonresident return so at least some statute of limitations is running. A taxpayer presumed to be an Illinois resident but claiming nonresident status is required to file a return complying with the regulation.[11]
10. If a dispute with the State of Illinois occurs, argue the taxpayer has closer contacts with the non-Illinois state and hope you draw the same appellate panel that decided *Cain*.
11. Be sure the taxpayer withdraws the owner-occupied homestead exemption for real estate taxes on the Illinois house.
12. For at least the first year of establishing non-residency, the taxpayer should be able to document more time is spent in the resident state than in Illinois.
13. Charitable gifts to Illinois based charities are a non-factor.

Following these lessons can avoid potential pitfalls. The snowbirds can then fly free of Illinois income tax - again. ■

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1. *Cain v. Hamer* 2012 IL App (1st) 112833
2. In addition to *Cain*, the Department has lost other recent cases involving residency. See e.g., *Grede v. Hamer* 2013 Ill. App. 2nd 120731-U, 4/22/13; *Dods v. Hamer*, Ill. App. (1st) 1-09-2548 Rule 23 Order 8/19/10; *Sweeney v. Hamer,* Cook County Circuit Court Order, Case No.10-L-050524, 6/26/13.
3. 86 Ill. Adm. Code § 100.3020
4. 35 ILCS 200/15-175(b)
5. 86 Ill. Adm. Code § 100.3020(g)(3)
6. 86 Ill. Adm. Code § 100.3020(g)(1)
7. 86 Ill. Adm. Code § 100.3020(g)(2)
8. 35 ILCS 5/201(a)(West 2010)
9. 35 ILCS 5/203(a)(2)(F)(2012)
10. 35 ILCS 5/905(c)(2012)
11. 86 Ill. Adm. Code § 100.3020(g)(3)

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What is remarkable for estate planners about the *Windsor* Supreme Court decision?

By Richard A. Sugar

Introduction

In a momentous decision issued on June 26, 2013 the United States Supreme Court in *U.S. v. Windsor*[1] issued its first substantive decision on the controversial subject of same-sex marriage. There were several remarkable aspects to the decision, not the least of which is the way the decision alters the landscape for administering thousands of Federal programs, and lays the groundwork for the companion controversy surely to arise about a state's ability to ban same-sex marriage. Moreover, the sweeping change at the Federal level left unanswered many important questions, like the effective date of recognition of same-sex marital status (in those states where same-sex marriage is legal), and how to decide which state's law should apply when couples have contacts with more than one state.

Summary

To summarize the case, first, and fundamentally, the Supreme Court decision affirmed the decisions of both the U.S. District Court and the U. S. Court of Appeals, by deciding that Congress's enactment of the Defense of Marriage Act ("DOMA") was unconstitutional under the 5th Amendment Due Process Clause, because Congress, in a spiteful and biased way, placed unacceptable limitations on marital rights of same-sex couples, when the states, where these couples lived, enabled same-sex couples to enjoy the same marital privileges as opposite-sex couples. Specifically, the court held that Edith Windsor, who obtained a lawful same-sex marriage in Canada, and now lived in New York, a state which recognized same-sex marriages as lawful, was able to claim a marital deduction for the inheritance she received as a surviving same-sex spouse, and avoid $363,000 of Federal estate taxes. In 1996, Congress passed DOMA which defined "marriage" only as a legal union between one man and one woman as husband and wife. Thus, DOMA had forbidden a same-sex surviving spouses from utilizing the Federal estate tax deduction, otherwise available to surviving spouses who could avoid the imposition of Federal estate taxes on inheritances passing to surviving spouses.

Majority rationale

The Supreme Court (by a majority 5-4 decision) held that DOMA seeks to injure a class of citizens that the states, in allowing same-sex marriage, had decided to protect. It said DOMA imposes a disadvantage and stigmatizes those citizens who enter into same-sex marriages made lawful by their state, and it interferes with the equal dignity of same-sex marriages. The Court claimed that such differentiation in marital status, made by Congress, demeans the couple, whose moral and sexual choices the Constitution protects and whose relationships the state have sought to dignify, and "it humiliates tens of thousands of children now being raised by same-sex couples." The majority's decision in *Windsor* found no legitimate purpose for DOMA, but rather its purpose was to disparage and injure that class of citizens which a state-based marriage law sought to protect.

The majority's decision wrapped its rationale in a kind of federalism, pointing out that, historically, the definition of marriage and domestic relations was a subject left to be decided by the states, not the federal government. The majority said "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages."

In defining the discriminatory reach of DOMA, the majority pointed out that there are over 1000 federal laws in which marital or spousal status is addressed as a matter of federal law. Of course, central to the *Windsor* case, DOMA prevents same-sex couples from enjoying the tax exemptions and deductions available to opposite-sex couples under the Federal Estate, Gift, and Generation-Skipping Tax Laws.

Companion case not addressed

While the majority opinion attempted to limit the scope of its holding to federal law which interfered with state rights to determine marital status, the rationale used was unmistakably broad enough to apply to the next case - whether a state's law prohibiting same-sex marriage can be constitutional. In fact, that case, *Hollingsworth v. Perry*, came up coincident with the *Windsor* case on June 26th, 2013, but the Supreme Court declined to rule in *Perry,* on technical, procedural grounds. However, the dissenting justices in *Windsor* made it perfectly clear that they oppose any extension of the majority's decision to a finding that States are constitutionally forbidden from banning same-sex marriage.

Remarkable procedural process

What was remarkable about *Windsor* was that the surviving spouse won in the District Court and also won in the Court of Appeals, both ruling that DOMA was unconstitutional, and the principal party on the other side of the case (the US Government) refused to defend the propriety of DOMA. During the litigation, the US Justice Department refused to defend DOMA in court because the Executive Branch did not think the law was constitutional. Nonetheless, the Executive Branch continued to enforce the law on an administrative level (hence the refusal to refund to Edith Windsor the estate tax paid). When the Attorney General of the United States notified the Speaker of the House that the Department of Justice would not defend the constitutionality of DOMA, the Bipartisan Legal Advisory Group of the US House of Representatives ("BLAG") was appointed to intervene in the litigation in order to defend the constitutionality of DOMA.

Scalia's dissent

What was equally remarkable was the dissent from Justice Scalia. It is hard to take seriously the well-meaning effort of the legal profession to restore civility to court proceedings, when a Supreme Court justice is so intemperate in expressing his opinion.

Scalia begins by claiming that the Supreme Court had no power to decide this case. He characterizes the majority's decision to undertake the case as "bearing no resemblance to our jurisprudence"; that it "effects a breathtaking revolution in our Article III jurisprudence." He says that the jurisdictional

requirement relied on by the majority "is incomprehensible." He claims that the majority's action is "jaw-dropping" by asserting "judicial supremacy over the people's representatives in Congress and the Executive." He calls the process a "contrivance" and accuses the majority of entertaining the contrivance in order to "blurt out its view of the law."

After excoriating the majority on the procedural aspects of the case, Scalia then goes on to castigate them for the inferences that they make on the underlying constitutional question. He accuses the majority of "initially fooling many readers" into thinking that the case hinges on the principles of federalism. Scalia scolds that the underlying question lurking in the litigation is whether, under the equal protection and due process clauses, laws restricting marriage to a man and a woman are something to be reviewed under constitutional scrutiny. Scalia says "the sum of all the court's non-specific hand waving is that this law is invalid (maybe on equal protection grounds, maybe on substantive due process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a bare desire to harm couples in same-sex marriages." He goes on, in great hyperbole, to criticize the majority for inventing the rationale of their decision, which he warns will serve as the future underpinning for a forthcoming controversy about the power of the states to forbid same-sex marriages. Scalia characterizes the majority's rationale as "a disappearing trail of legalistic argle-bargle." Scalia concludes by saying that a hotly contested political issue of societal norms and values involving marriage are best left to the People, and not to the Judiciary to decide by legal reasoning without basis.

Alito's dissent

Justice Alito, in his dissent, stakes a strong position denying that the Constitution guarantees the right to enter into a same-sex marriage. He says "no provisions of the Constitution speak to the issue." Also remarkably, Justice Alito gives us a historical and sociological lecture on the development of the same-sex marriage movement. He, like Scalia, objects to the recognition of a new right, an innovative right that springs not from a legislative body elected by the people, but from unelected judges. Justice Alito clarifies the two competing views of marriage which are in dynamic conflict. He names the "traditional" or "conjugal" view, which, he says, sees marriage as an intrinsically opposite-sex institution, and contrasts it with the emerging view called the "consent-based vision of marriage," which he says is defined by a strong emotional attachment and sexual attraction marked by the solemnization of mutual commitment. He concludes by saying that the Constitution does not codify either of these views of marriage, so Congress and the states are entitled to enact laws recognizing either of the two understandings of marriage.

Justice Alito urges the Court to narrow the impact of its decision, and permit the people of each state to decide the question of marriage for themselves, and that the Court should stay out of the way, much like Justice Roberts' short and measured dissent and Justice Scalia's more extensive and impassioned dissent.

Finally, Justice Alito makes the following closing argument. If Congress has the power to enact laws providing special privileges and special benefits for its citizens, it should also have the power to define the categories of persons to whom the laws apply. I leave the reader to decide whether this simplistic statement begs the entire question presented.

Impact on estate planning

So where does *Windsor* leave the estate planner who deals with a same-sex couple?

First, there is the question of the effective date of this law change. Finding the law unconstitutional generally means it is unconstitutional *ab initio*. So same-sex couples should always have been treated as opposite-sex couples. Should the estate planner recommend that those clients file amended gift, estate, generation-skipping, or income tax returns (within the open years not closed by the statutes of limitation), in order to properly claim the benefits of marital status? Should those couples revisit the question of spousal rollovers of retirement benefits? Can the couple retroactively apply for spousal benefits under Social Security?

Second, since the question of marital status is left to the states, which state's law applies? If a same-sex couple were legally married in a state that recognized same-sex marriage, but then moved to a state that prohibited same-sex marriage, which law applies? Do issues of "full faith and credit" arise to require one state to honor the rules of a sister state?

Third, some states (like Illinois) recognize "civil unions" that in many ways are similar to legal marriage for state law purposes. Are civil union laws to be recognized in the same way as marital laws, so that the Federal government will be bound to recognize civil unions of same-sex couples in the same way they must now recognize legal marriage of same-sex couples?

Lastly, in recognizing the identity of "spouse" and "descendant" for administration purposes in estate planning documents, estate planners should now clarify these definitions, to assure that marital status of same-sex couples, and their progeny, are respected, or rejected, as the grantor (or beneficiaries) wish, independent of state law definitions. These changes are easily made in revocable documents. In irrevocable documents, consideration should be given to making these changes by decanting, virtual representation agreements, changes of situs, or exercise of powers of trust protectors. Of course, the applicability of a particular situs to a trust is limited by "adequate contacts" the trust has with the applicable state, and caution is warranted in invoking this solution. ■

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1. *U.S. v. Windsor*, 570 U.S. _____ (2013), Docket No. 12-307.

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CRP payments subject to self-employment tax

By Gary R. Gehlbach

On June 18, 2013, the United States Tax Court issued a decision finding that payments received under the U.S. Department of Agriculture Conservation Reserve Program (CRP) are includable in a taxpayer's self-employment income, ruling that the taxpayer was engaged in a trade or business and that a nexus existed between his trade or business and the CRP payments he received.[1]

CRP Background

The CRP was initially established in 1985 as part of the Food Security Act of that year. Under that program, the USDA was authorized to enter into contracts with owners and operators of land "to conserve and improve the soil, water, and wildlife resources of such land and to address issues raised by State, regional and national conservation initiatives."[2] Under a typical CRP program, the owners and operators implement a conservation plan, while ceasing to use the land for agricultural purposes. One of the other benefits to the land owner is that the USDA pays the owner or operator an "annual rental payment."[3]

Typically, CRP contracts are either with the owner of the land who is also the operator, or the landlord or tenant when the owner is not the operator. In the latter context, typically the landlord retains the CRP payments, while the tenant's lease payments are based on the tillable acres excluding the CRP acres. The tenant in those instances is not involved with the CRP land, that is, that land is not involved in an agricultural endeavor. In other situations, the tenant's rent is based on the tillable acres plus the CRP acres. In those instances, the tenant maintains the CRP according to the CRP contract and receives the CRP payment.

The *Morehouse* Facts

Rollin Morehouse resided in Texas in 1994 when he inherited farmland in South Dakota from his father, who had placed some of the land in a CRP program. Mr. Morehouse later moved to Minnesota, retaining the land in South Dakota. Mr. Morehouse did not personally farm any of the land but leased the land to area farmers. However, not all of the land was tillable. Part of the property was devoted to a gravel pit while approximately 129 acres were placed in the CRP program. In 1999 Mr. Morehouse, then as the owner of the property at issue, entered into a new CRP contract with respect to the 129-acre parcel. He personally managed his various investments, including the property in South Dakota.

Under the CRP contracts that Mr. Morehouse entered with the USDA, he personally assumed all obligations and responsibilities of compliance. Mr. Morehouse agreed to "maintain already established grass and legumes cover for the life of the [CRP] contract, establish perennial vegetative cover on land temporarily removed from agricultural production,…and engage in pest control and pesticide management." He also agreed, in one of the CRP contracts, to "control pests such as weeds, livestock, insects and disease," and to establish native grass vegetation. The CRP contracts listed Mr. Morehouse as the owner of the land and did not identify any operator.

However, in a letter that Mr. Morehouse sent to the county Farm Service Agency (FSA), in addition to indicating that he would "assume all obligations and responsibilities of contractual compliance" under the CRP contracts, he avowed that he would do so through an independent contract with a third party, whom he would hire to monitor and supervise the CRP land.

To partially fulfill his obligations, Mr. Morehouse purchased seeding materials and had them shipped directly to his independent contractor, who performed the initial seed preparation and seeding. The independent contractor also then later plowed some of the land, reseeding it with specified grasses. As the Tax Court pointed out, the independent contractor performed some of Mr. Morehouse's obligations, while Mr. Morehouse provided the annual certifications that the conservation plans were being properly implemented pursuant to the CRP contracts.

Mr. Morehouse had limited involvement, however, with the CRP lands. He visited the properties several times each year and allowed hunting to take place on some of the properties, while he operated a gravel pit on one of the properties.

Mr. Morehouse reported the CRP payments that he received as farm rental income on his personal income tax returns. Unfortunately for him, the IRS issued a notice of deficiency, finding that he should have reported the CRP payments as Schedule F income, Profit or Loss from Farming. The IRS also determined that the CRP payments constituted self-employment income.

Self-Employment Income

Self-employment income is "the net earnings from self-employment derived by an individual."[4] Net earnings from self-employment is "the gross income derived by an individual from any trade or business carried on by such individual…which are attributable to such trade or business."[5] As the taxpayer argued, rentals from real estate are excluded from self-employment income, unless "such rentals are derived in the course of a trade or business as a real estate dealer."[6]

However, the rental exception does "not apply to any income derived by the owner… if (A) such income is derived under an arrangement between the owner or tenant and another individual, which provides that such other individual shall produce agricultural…commodities …on such land, and that there shall be material participation by the owner or tenant (as determined without regard to any activities of an agent of such owner or tenant) in the production or management of the production…, and (B) there is material participation by the owner or tenant (as determined without regard to any activities of an agent of such owner or tenant) with respect to such agricultural … commodity."[7]

Moreover, citing several cases, the court found that "self-employment tax provisions are construed broadly in favor of treating income as earnings from self-employment." (Citation omitted.)

Trade or Business Test

The Service contended that Mr. Morehouse "derived the CRP payments from his trade or business of conducting an environmentally friendly farming operation." Mr. Morehouse, of course, contended otherwise; however, the court found that the burden of proof was on Mr. Morehouse and that he was required to rebut the Service's presumption that the payments constituted self-employ-

ment income.

The court's analysis revolved around whether there was a nexus between the CRP payments and a trade or business actually carried on by Mr. Morehouse. The court therefore analyzed whether Mr. Morehouse "carried on a trade or business…, whether personally or through an agent; and…if so whether there was a nexus between the trade or business conducted and the income [Mr. Morehouse] received."

To be deemed to constitute a trade or business in which the taxpayer is involved, the trade or business must be one in which deductions are allowable under IRC Sec. 162. As noted by the court, "the taxpayer must be involved in the activity with continuity and regularity, and the taxpayer's primary purpose for engaging in the activity must be for income or profit." (Citation omitted.)

In this case, the Tax Court noted, Mr. Morehouse obligated himself to comply with the CRP requirements. While he did not actually perform the planting and maintenance work required, he hired an agent to do so. Mr. Morehouse purchased materials for the agent and periodically inspected the properties to ascertain whether the property was being maintained in accordance with the CRP requirements. The Tax Court thus found that "[o]n these facts…[Mr. Morehouse] engaged in the business of participating in the CRP and managing his CRP properties with the primary intent of making a profit."

Mr. Morehouse, however, argued, unconvincingly, that the physical labor involved to maintain the properties was performed by a contractor and should not be attributable to him. The court, however, found this distinction to be irrelevant, noting that "for purposes of section 1402 a taxpayer may conduct his trade or business personally or through an agent," citing Treas. Reg. sec. 1402(a)-2(b) and Rev. Rul. 60-32, 1960-1 C.B. 23. Citing a previous Tax Court Memorandum decision, the court found that a "taxpayer who hires another 'to render the services necessary to fulfill' the taxpayer's obligations under a contract is nonetheless liable for self-employment tax with respect to the income the taxpayer receives pursuant to that contract." (Citation omitted.)

Mr. Morehouse's argument that the person he hired to perform the activities to comply with the CRP requirements was an independent contractor was of no avail. Conceding that Mr. Morehouse did not perform the physical work involved, the Tax Court found that he directed the contractor, Mr. Redlin, to perform the maintenance activities required under the CRP contracts, retaining the ability to direct and control Mr. Redlin, although he did so from afar. (Interestingly, the court does not address whether Mr. Morehouse treated Mr. Redlin as an independent contractor in terms of Redlin's compensation, or whether Mr. Morehouse should have treated Mr. Redlin as an employee for purposes of FICA and income tax withholding.)

The court found that it was sufficient that Mr. Morehouse actively participated in the CRP program, maintained his status as a participant, and made decisions about how to satisfy his legal obligations under the CRP contracts.

Rental Payments & Self-Employment Income

The Tax Court also cited favorably Treasury Notice 2006-102 (noted above), which found that CRP rental payments are includable in net income from self-employment if made to "an individual not otherwise actively engaged in the trade or business of farming who enrolls land in CRP and fulfills the CRP contractual obligations by arranging for a third party to perform the required activities." In other words, the Tax Court found, "[p]articipation in a CRP contract meets the criteria to be a trade or business irrespective of whether the participant performs the required activities personally or arranges for his obligations to be satisfied by a third party."

Mr. Morehouse's alternative argument was that the CRP payments were "rentals from real estate," excluded from the calculation of earnings from self-employment under IRC Sec. 1402(a)(1). Citing a Sixth Circuit Court of Appeals decision,[8] the court noted that "rental payments constitute consideration paid for either the use or occupancy of property." However, the court found, "the USDA did not make the CRP payments in exchange for the use of [Mr. Morehouse's] property." Interestingly, the CRP statute and applicable regulations, as well as the CRP contracts, characterize the USDA payments as "rental payments." Nonetheless, the Sixth Circuit found, this does not dictate that CRP payments constitute "rentals from real estate" under the IRC Sec. 1402(a)(1) exclusion.

Conclusion

Based on the thorough analysis of the Tax Court in this case, it may be difficult if not impossible for a recipient of CRP payments to exclude such payments from self-employment income. ■

Gary R. Gehlbach is a member of the ISBA Trusts & Estates Section Council, practices with the firm of Ehrmann Gehlbach Badger Lee & Considine, LLC and can be reached at gehlbach@egblc.com or at (815) 288-4949.

1. *Morehouse v. Commissioner, 140 TC No. 16.*
2. 16 U.S.C. sec.3831(a).
3. One of the taxpayer's arguments in this case was that the CRP payments constituted "rent." As cited in footnote 5 of the opinion, under 16 U.S.C. sec. 3833(2), the annual "rental" payment is designed "to pay owners and operators for "(A) the conversion of highly erodible cropland normally diverted to the production of an agricultural commodity on a farm or ranch to a less intensive use; and (B) the retirement of any cropland base and allotment history that the owner or operator agrees to retire permanently."
4. IRC sec. 1402(b).
5. IRC sec. 1402(a) and Treas. Reg. sec. 1.1402(a)-1.
6. IRC sec. 1402(a)(1).
7. IRC sec. 1402(a)(1).
8. *Wuebker v. Commissioner,* 205 F3d at 903-905.


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Practice tip—How to plan for digital assets

By Frank M. Greenfield

Financial and personal data stored online has value and should be included as a component of the estate planning process. Whether measured in terms of dollars or in terms of sentimental value, the fact remains that the significance of digitally stored data may not be fully realized until after death.

The ability of an executor, trustee or family member to gain access to a decedent's digital data stored online is dependent on the privacy policies of companies such as Google, Yahoo, and Microsoft, just to name a few. Without log-in information, access to a decedent's digital account may require a court order. Consider implementing the language similar to the following which will grant the executor or trustee the specific power to gain access to online accounts:

> *I give to the [executor or trustee] the unlimited power to obtain full and complete access and control over the content of all digital assets, data, domain names, on-line storage accounts, web pages, email accounts and software programs which I own or in which I have an interest as licensee at the time of my death ("Digital Property"). Without limiting the generality of the foregoing, the executor/trustee shall have full and unrestricted rights and access to all Digital Property notwithstanding the possible lack of log-in information, i.e. user names and passwords. No person or entity need inquire beyond the terms of this instrument in transferring Digital Property to the [executor or trustee].*

Sharing digital access information with a trusted family member or just placing a schedule of the information in a safe place are options, as long as the information is kept current. There are companies that will digitally store passwords, user names and other private information to be released upon death to one or more individuals previously identified by their customer. Illinois statutes do not, at this time, provide for access and recovery to digital assets, but that should not preclude our clients from addressing the question so that ultimately all digital assets are available to the beneficiaries in an efficient manner and in accordance with the decedent's wishes. ■

Frank M. Greenfield is a member of the ISBA Trusts & Estates Section Council and can be reached at fgreenfield@fmg-law.com or at 312.372.6543.

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A tribute to Linscott R. Hanson, 1937-2013

By Darrell E. Dies

Respected Attorney, Linscott R. Hanson, 75, passed away unexpectedly on Wednesday, July 24, 2013 at St. Anthony's Hospital in Michigan City, IN. He was born Oct. 4, 1937 in Evanston, IL, was a former resident of Glenview, Mundelein and Barrington, living in Green Oaks for the past 16 years.

Lin was a graduate of the University of Michigan, both undergraduate and law school (l96l). He was a senior partner with the firm DiMonte & Lizak, LLC in Park Ridge and practiced in the areas of corporate law and estate planning for over 50 years. Lin was one of the drafters of both the Business Corporation Act and Limited Liability Act. He was a 20-year member and past chairman of the Secretary of State's Business Laws Advisory Committee. He chaired the Committee on Shareholders Alternative Remedies and the Illinois State Bar Association Section on Business Advice and Financial Planning.

Lin had published books on corporation law and limited liability companies, and was a frequent lecturer and author on family owned businesses, estate planning and related topics. He co-authored the IL Corporation System, the IL Limited Liability System, the IL Forms System and penned the law, Pet Trusts in IL. He was a member of the Glenview New Church, and was a proud brother and member of Delta Kappa Epsilon Fraternity "DKE" and past president and board member of the International Rampant Lion Foundation.

Surviving are his wife Mary Cate Hanson and their son Linscott II, "Scott" Hanson.

Having personally worked with Lin on several occasions and having considered Lin a valuable mentor, I can tell you that he was one of the finest gentlemen with class, respect, humility and dignity that our profession has known. Lin set the bar high and will truly be missed by me and the ISBA. My heartfelt prayers and wishes go out to Lin's family and friends. ■

Darrell E. Dies is a member of the ISBA Trusts & Estates Section Council, practices in Eureka, Illinois and can be reached at dies@darrelldies.com.

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September

Thursday, 9/5/13- Teleseminar—Generation Skipping Transfer Tax Planning. Presented by the Illinois State Bar Association. 12-1.

Monday, 9/9/13- Chicago, ISBA Chicago Regional Office—ISBA Basic Skills Live for Newly Admitted Attorneys. Complimentary program presented by the Illinois State Bar Association. 8:55-5:00.

Tuesday, 9/10/13- Teleseminar—Choice of Entity for Real Estate. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 9/10/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Wednesday, 9/11/13- Chicago, ISBA Chicago Regional Office—2013 Cyberlaw Symposium. Presented by the ISBA Intellectual Property Section. 8:45-5.

Wednesday, 9/11/13- Live Webcast—2013 Cyberlaw Symposium. Presented by the ISBA Intellectual Property Section. 8:45-5.

Thursday, 9/12/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Thursday, 9/12/13- Teleseminar—UCC 9: Fixtures, Liens, Foreclosures and Remedies. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/12/13- Chicago, ISBA Regional Office—Trial Practice Series: The Trial of a Retaliation Case. Presented by the ISBA Labor and Employment Section. 8:55-4:15.

Thursday, 9/12/13- Live Webcast—Trial Practice Series: The Trial of a Retaliation Case. Presented by the ISBA Labor and Employment Section. 8:55-4:15.

Monday, 9/16-Friday, 9/20/13 - Chicago, ISBA Regional Office—40 Hour Mediation/Arbitration Training. Presented by the Illinois State Bar Association. 8:30-5:45 daily.

Tuesday, 9/17/13- Springfield, INB Conference Center—Fracking in Illinois- Facts and Myths Explained. Presented by the ISBA Environmental Law Section; co-sponsored by the ISBA Real Estate Law Section, the ISBA General Practice, Solo & Small Firm Section, and the ISBA Agricultural Law Section. 8:30-5:00.

Tuesday, 9/17/13- Teleseminar—Transactions Among Partners/ LLC Members and Partnerships/LLCs- Major Tax Traps for the Unwary. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/19/13- Teleseminar—Estate Planning to Reflect Religious and Philosophical Beliefs. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/19/13- Chicago, ISBA Regional Office—Responding to Government Investigations in Health Care. Presented by the ISBA Health Care Section. 12:30-4:30pm.

Thursday, 9/19/13- Live Webcast—Responding to Government Investigations in Health Care. Presented by the ISBA Health Care Section. 12:30-4:30pm.

Friday, 9/20/13 – Peoria, Par.A.Dice Hotel—DUI & Traffic Updates – Fall 2013. Presented by the ISBA Traffic Law Section. 8:30 am – 5:00 pm.

Tuesday, 9/24/13- Teleseminar—Update on Advising Physician and Dental Practice, Part 1. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 9/24/13- Live Webcast—The Role and Reach of Government's Independent Inspectors General. Presented by the Standing Committee on Government Lawyers. 9:30-11:30.

Tuesday, 9/24/13- Chicago, ISBA Regional Office—Staying out of Trouble: Avoiding Sexual Misconduct and Mismanagement of Client Money. Presented by the Attorney Registration and Disciplinary Commission. 12:30-3:20.

Tuesday, 9/24/13- Live Webcast—Staying out of Trouble: Avoiding Sexual Misconduct and Mismanagement of Client Money. Presented by the Attorney Registration and Disciplinary Commission. 12:30-3:20.

Wednesday, 9/25/13- Teleseminar—Update on Advising Physician and Dental Practice, Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 9/25/13 – Webinar—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Wednesday, 9/25/13- Friday, 9/27/13- Chicago, ISBA Regional Office—Advanced Mediation/Arbitration Training. Presented by the Illinois State Bar Association.

Friday, 9/27/13- Collinsville, Gateway Center—Social Security and SSI Disability Law. Presented by the ISBA Standing Committee on Disability Law. All Day.

October

Thursday, 10/3/13/ -Saturday, 10/5/13 - Itasca, Westin Hotel—9th Annual Solo and Small Firm Conference. Presented by the Illinois State Bar Association. Thur 9-8:30; Fri 8:30-8:00; Sat 8:30-12:05.

Tuesday, 10/8/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m. CST.

Tuesday, 10/8/13- Teleseminar—Ground Leases: Structuring and Drafting Issues. Presented by the Illinois State Bar Association. 12-1.

Thursday, 10/10/13-Friday, 10/11/13- Galena, Eagle Ridge Resort and Spa—A Child Custody Trial. Presented by the ISBA Family Law Section. 8-5 both days. ■

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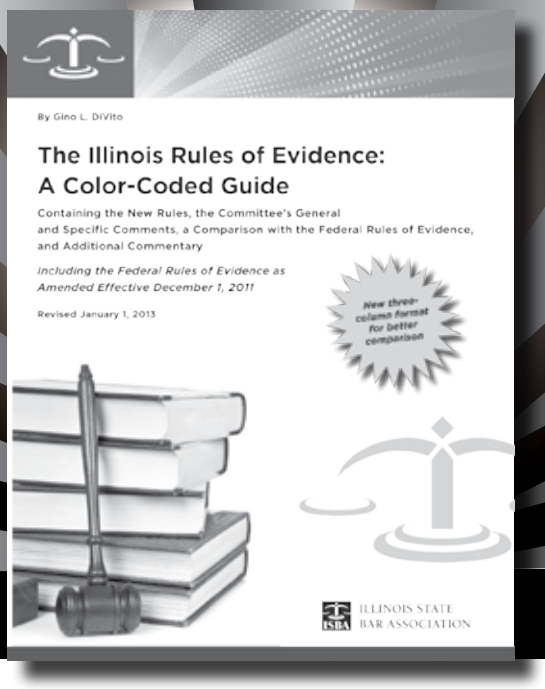

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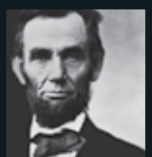

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