February 2013 Vol. 59, No. 7

ILLINOIS STATE BAR ASSOCIATION

TRUSTS & ESTATES

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

In the February issue...

By Darrell Dies & Jacob Frost

This month's newsletter features an article by Steven Siebers and Emily Schuering Jones which provides lessons learned from *Cain v. Hamer* regarding avoiding Illinois income tax for your clients that spend winters in a warmer climate. Curt Furgeson provides a fluent summary of his experience as a member of the National Network of Estate Planning Attorneys. George L. Schoenbeck provides a timely article regarding whether there is a need for the credit shelter trust given the recent enactment of portability. Susan M. Brazas provides us with her take on *In Re Estate of Weeks* and a discussion of the attorney fee issues presented therein. Jeff Mollett provides us with a practice tip regarding locating VA benefits. Finally, Paul Meints informs us of a recent Massachusetts case regarding the Doctrine of Necessities.

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 Website at <http://www.isba.org/sections/trustsestates/newsletter> and we welcome any comments from our audience. ■

Snowbirds fly free of Illinois tax

By Steven E. Siebers and Emily Schuering Jones

The taxpayers in *Cain v. Hamer*[1] were classic snowbirds. Residents of Illinois since 1964, they built a second home in Florida in 1990. Within several years, they began spending a portion of each year in Florida. Every October through May, they enjoyed Florida's warmer climes. They returned to Illinois once during the holidays, before again fleeing the Midwest winters.

This pattern raises an important question: how can an Illinois resident who maintains contacts with Illinois qualify as a nonresident who is no longer subject to Illinois income tax? In a surprisingly taxpayer-friendly decision, *Cain v. Hamer* provides a judicial road map for an Illinois snowbird.

The background

From 1964 until 1995, the taxpayers lived and worked in Illinois. They were admittedly Illinois residents and filed resident income tax returns for those years. In 1995 they began to take steps to change their domicile to their second home in Florida, while continuing their snowbird pattern of spending more than five months a year in Illinois. In 1996 they discontinued filing Illinois income tax returns, asserting they were nonresidents.

Apparently and not surprisingly, their tax advisors became concerned that failing to file Illinois tax returns for the years 1996 through 2004 resulted in indefinite exposure to a notice of deficiency. To bring certainty to their potential Illinois tax exposure of $1.8 million (tax and penalties) for those years, the taxpayers paid under protest and filed suit for declaratory judgment. The suit sought a judicial determination that they were not residents for purposes of the Illi-

INSIDE

IF YOU'RE GETTING THIS NEWSLETTER BY POSTAL MAIL AND WOULD PREFER ELECTRONIC DELIVERY, JUST SEND AN E-MAIL TO ANN BOUCHER AT ABOUCHER@ISBA.ORG

nois income tax for the years 1996 through 2004. When the trial court granted the taxpayers' motion for summary judgment, the State appealed, presumably anticipating a favorable result under the least deferential de novo standard of review.

Facts favorable to the taxpayers

As a first step to freeing themselves of the Illinois income tax, in November 1995 the taxpayers filed a written declaration of domicile in Florida. They renounced their Illinois residency, asserting they had changed domicile to the Florida home constructed in 1990. This action was taken in accordance with a Florida statute providing for such a declaration.[2]

The taxpayers also took a number of other steps to establish their Florida domicile. They:

- Obtained Florida permanent resident identification cards in 1995 and 1996,
- Held Florida drivers' licenses,
- Voted in Florida,
- Received Florida jury duty summonses during the relevant time period,
- Had newspapers delivered to their Florida residence,
- Purchased burial plots in Florida,
- Developed relationships with several medical professionals in Florida (while continuing relationships with their Illinois doctors),
- Retained legal advisors in both Florida and Illinois,
- Kept some records to prove their physical presence in Florida, Illinois, and other locations during the years in question.

The husband also used a cellular telephone with a Florida area code and maintained a Florida firearm license. The couple's credit card statements for 2001 through 2004 showed that 73% of their expenditures were made outside of Illinois and that they were making those expenditures outside of Illinois 61% of the time.

Facts detrimental to the taxpayers

In August 1995, the year taxpayers claimed their Illinois residency ended, they began construction of an addition to their Illinois house. They continued to own their Illinois home and occupied it for more than five months a year. The opinion provides incomplete facts on their precise physical presence during the nine years at issue, 1996-2004. However, the facts discernible from the opinion are summarized in the following table:

Calendar Year	Florida days	Illinois days	Other location days
1996	159	161	45
2004	170	171	24
1996-2005	1700	1666	284

The table discloses that in calendar years 1996 and 2004 the taxpayers actually spent more days in Illinois (161 and 171) than Florida (159 and 170). During the ten years from 1996 to 2005, the days spent in Florida (1700) only narrowly exceeded the time spent in Illinois (1666).[3] No mention is made in the opinion of their physical presence in Illinois for the other seven tax years in question.

The couple continued to own Illinois businesses, although the opinion said the taxpayers had "distanced" themselves from their businesses. What that means is unclear, other than to suggest the taxpayers were no longer working in the businesses. The wife renewed her Illinois interior design license without showing a change of address, despite doing no business in either Illinois or Florida.

The couple used Illinois income tax preparers to help them file their federal tax returns. They made political contributions to Illinois and national candidates and some other state candidates, but no Florida candidates. They continued memberships in various expensive clubs in Illinois, spending $236,000 from 2003 to 2006. (They did, however, spend even more on clubs in Florida during those same years: $422,500.)

The law on Illinois income tax: when does the privilege end?

The Illinois Income Act imposes income tax "on the privilege of earning or receiving income in or as a resident of the state."[4] Since the taxpayers in this case were not earning or receiving income in Illinois, the issue was of residency.

Individuals are considered Illinois residents if they are present in the state for other than a "temporary or transitory purpose" or are "domiciled" in Illinois but leave for a temporary or transitory purpose.[5] If individuals leave the state for other than a temporary or transitory purpose or establish domicile elsewhere, they cease to be Illinois residents.[6] Stated differently, an individual loses his Illinois domicile:

1) by locating elsewhere with the intention of establishing the new location as his domicile, and
2) by abandoning any intention of returning to Illinois.[7]

The taxpayers were admittedly Illinois residents prior to their move to Florida in 1995. The question to be decided was whether their move to Florida constituted a change in domicile or a departure from Illinois for "other than a temporary or transitory purpose" so that they lost their Illinois residency, or, conversely, whether their periodic returns to Illinois were for "other than a temporary or transitory purpose" so that they should be classified as Illinois residents.

The court reviewed the four common law elements required for a change of domicile: (i) physical abandonment of the first domicile; (ii) an intent not to return to the first domicile; (iii) physical presence in the new domicile; and, (iv) an intent to make that one's domicile.[8] The first three tests are easily met in this case: the taxpayers physically left their Illinois home, renounced their Illinois residency, moved to Florida, and declared Florida their domicile. According to the court, the "difficulty comes in determining whether the taxpayers "abandon[ed] any intention of returning" to their Illinois home."

After their move, the taxpayers split their time roughly equally between the two states. The court found the taxpayers maintained an intent to return to both Illinois and Florida for approximately half of their time during 1996 through 2004. The income tax regulations make clear that individuals may have only one domicile, and the Illinois Department of Revenue was not arguing that the taxpayers' domicile alternated between Florida and Illinois. So the court held that a concept of "intent to return" cannot be the basis to decide residency. Instead, the court adopted the concept of domicile as an intended permanent home (and of "return" as a permanent, indefinite, or lengthy return). Here, the taxpayers chose Florida as their domicile. The court found the contacts, memberships and real property holdings maintained in Illinois after their 1995 move were outweighed by "changing their voter registrations to Florida, paying Florida income taxes,[9] obtaining residency cards and drivers' licenses in Florida, and filing a declaration of their Florida residency." Thus, the court concluded the taxpayers' intent was quite clear: they wished to establish Florida as their permanent residence in 1995, even though they planned to keep ties in Illinois and have regular seasonal

visits. The court said the taxpayers intended to live in Florida for half the year and to visit Illinois, not the other way around.

Looking for further support, the court reviewed examples contained in the income tax regulations. The regulations state that whether an individual in Illinois is there temporarily or transitorily will depend on the facts and circumstances.[10] Again, in this case the taxpayers split their time roughly equally between Florida and Illinois. The court recited verbatim and analyzed three examples contained in the income tax regulations. According to the court, the examples make clear that the degree of time splitting does not render individuals' presence in Illinois other than "temporary or transitory." In two of the examples, the hypothetical individuals' three- to four-month-long yearly trips to another state did not affect their residency because other factors regarding their intent are considered controlling. In the third example, the individuals spent over four months in Illinois and actually owned a home in Illinois, but were nonetheless considered Minnesota residents because the connection of the individuals to Minnesota was closer than it was to Illinois. The court found this third example to be applicable to the Cains. Although the taxpayers maintained some Illinois ties, including social club memberships and the continued ownership of their longtime home, the court found the facts showed a much stronger connection to Florida. The court then reviewed those connections: spending more money on Florida social clubs, holding drivers' licenses and residency cards in Florida, voting in Florida, using a Florida telephone number, spending more money in Florida than in Illinois, and purchasing burial plots in Florida. The court said that while the ties between Illinois and their companies continue, the taxpayers have distanced themselves from their companies. Likewise, although the taxpayers' charitable foundation is still involved in Illinois causes, the taxpayers had "begun to shift its focus to Florida." In the court's opinion, these facts established the taxpayers had a much stronger connection to Florida than to Illinois. Based on the examples given in the regulations' definition of "temporary and transitory purpose," the court found the "regularity and duration of the taxpayers' visits to Illinois do not affect their residency status in the face of this disparity in connections."

Last, the court pointed to the income tax regulations that list the types of evidence that help to determine whether an individual is an Illinois resident. Those include evidence of "voter registration, automobile or driver's license registration, filing an income tax return as a resident of another state, home ownership or rental agreements, club and/or organizational memberships and participation, telephone and/or other utility usage over a duration of time."[11] The court found the evidence the taxpayers introduced of their connections with Florida were consistent with the taxpayers being Florida residents.

Ten planning points for taxpayers with Illinois contacts who seek to avoid Illinois income tax – The lessons of *Cain*

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.[12]
2. If the taxpayer has only retirement income, Illinois exempts it by allowing a subtraction of retirement income in computing Illinois taxable income.[13]
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,

Trusts & Estates

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call 217-525-1760

Office

Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

Editors

Darrell E. Dies
1201 S. Main St., Ste. 3
Eureka, IL 61530-1736

Raymond W. Prather
53 W. Jackson Blvd
Ste. 1025
Chicago, IL 60604-3650

Jacob J. Frost
102 E. Saint Paul Street
Spring Valley, IL 61362

Managing Editor/ Production

Katie Underwood
kunderwood@isba.org

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, 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.[14] Consider having the client receive some Illinois source of income requiring the filing of an Illinois non-resident return so at least some statute of limitations is running.
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*.

Conclusion

Advising Illinois snowbirds seeking to avoid Illinois income tax while maintaining a house in Illinois remains a tricky business. There is inherent uncertainty in a fact and circumstances test. This case provides appellate authority to try to avoid the privilege of being subject to Illinois income tax. Still, not filing tax returns results in an indefinite period to assess a notice of deficiency. Taxpayers need to be advised of this risk. ■

Steven E. Siebers (ssiebers@slpsd.com) is a partner at Scholz, Loos, Palmer, Siebers & Duesterhaus LLP in Quincy, Illinois. He concentrates his practice in estate planning, probate, banking, corporate, real estate, taxation, and civil litigation.

Emily Schuering Jones (ejones@slpsd.com) is an associate at Scholz, Loos, Palmer, Siebers & Duesterhaus LLP in Quincy, Illinois. She her practice areas include civil litigation, insurance defense, probate, banking, and civil appeals.

1. *Cain v Hamer* 2012 IL App (1st) 112833
2. Fla. Stat. § 222.17(2)
3. Opinion includes facts of physical presence for year 2005 even though relevant years were 1996-2004.
4. 35 ILCS 5/201(a) (West 2010)
5. 35 ILCS 5/1501(a)(20)(A)(West 2010)
6. 35 ILCS 5/1501(a)(17) (West 2010)
7. 86 Ill. Adm. Code § 100.3020(d)
8. Viking Dodge Inc. v. Hoffman, 147 Ill. App. 3d 203, 205, 497 N.E.2d 1346, 101 Ill. Dec. 33 (3rd Dist. 1986)
9. Where this finding came from is unclear since Florida has no personal income tax.
10. 86 Ill. Adm. Code § 100.3020(c)
11. 86 Ill. Adm. Code § 100.3020(g)(1)
12. 35 ILCS 5/201(a)(West 2010)
13. 35 ILCS 5/203(a)(2)(F)(2012)
14. 35 ILCS 5/905(c)(2012)

Reflections on national network membership

By Curt Furgeson

About 17 years ago, I made what turned out to be the best business decision of my life. Instead of running my law office around my latest idea, dream or whim, I started running it like a business. We have probably all heard—or said—that law school doesn't teach you how to run a business. In my case I think it also made me forget what had earned me the B.A. in Management Science.

For a few years I had been concentrating mostly in estate planning. I found the proactive side of law more meaningful than litigation. But estate planning was losing its charm, too, because what I offered my clients was simplistic and form-driven.

Then, in 1996, I had the good fortune of encountering the National Network of Estate Planning Attorneys (NN). I attended a NN two-day CLE program that blew me away. I discovered a whole world of personalized planning I was not providing to my clients. As a new father, one powerful illustration for me was "babysitter instructions." The punch line? Most people leave more detailed instructions for the care of their little ones when they go out for the evening than when the go out for eternity. I could never again be satisfied providing boilerplate "minors trust" language in my clients' wills and trusts. I had to get away from "one size fits all" documents and offer them plans truly tailored to their hopes, fears and dreams.

With my eyes opened to much greater value I could provide clients, I received a powerful Hot Docs based document creation program. After entering names, but before typing one custom word, I have thousands of living trust variations available by selecting from language developed over twenty-some years by NN members. Adding customized provisions is easy, if needed.

Software is only a small part of membership, however. Iron sharpens iron, as I've learned from "hanging around" a couple hundred other very collegial NN attorneys on the listserve and at semi-annual, four-to-five-day conferences known as "collegia." I always leave collegia with new and better skills and confidence. The NN theme of, "Be in business for yourself, but not by yourself," suits me just fine.

Solos are typically self-employed: you own your own job. The greatest NN value for me was the business development. Every useful marketing idea I have came from the NN. But more importantly, to what sort of business do clients come? Following NN advice and training allowed me to turn a job into a business. I learned that with the right tools and systems—office policies, procedures, scheduling, team training—I can spend more of my time actually counseling clients. The support team handles the more mundane tasks.

Honest estate planning attorneys know that clients leave the firm with beautiful binders full of documents, put them on a shelf, fail to fund the trusts, fail to update them, and eventually die with plans that fail to accomplish what was expected. Some readers feel badly about that. Others may accept it as the norm. I felt badly about it. The NN taught me how to build a service system that would keep the client actively involved with their plan. Each year, between 98% and 99% of my clients renew a small annual retainer fee and receive plan maintenance services. I enjoy seeing those clients each year, updating their plans, and getting acquainted with their families. Around 96% hire our firm

to assist with the trust and estate settlement when that time comes.

The NN helped me and my business shift from a low margin transactional approach to a relationship-based, counseling-oriented process that is very rewarding both personally and professionally. The NN has trained over 1,500 attorneys. The training is more comprehensive today than ever before, with two to three years of in-person classes, teleconferences and coaching from experienced mentors. The NN probably delivers the greatest value to you if you are transitioning to, or have only a few years' experience in, estate planning, and if your goals match the Network's mission: "creating plans that work for clients, and in the process, a practice that works for you."■

Curt Furgeson is the founder of the Estate Planning Center located in Salem, Illinois, is a member of the National Network of Estate Planning Attorneys and can be reached at (618) 548-3729 or by e-mail at curt@tlcplanning.com

Does the American Taxpayer Relief Act eliminate the need for credit shelter trusts?

By George L. Schoenbeck

Regardless of their areas of focus, most lawyers find themselves working with lifetime revocable trusts in some fashion. Real estate lawyers regularly transfer clients' property to such trusts. Divorce matters often require family lawyers to account for the assets held by these instruments and to scrutinize their terms. Even if your practice is not focused on estate planning, clients whose trusts inevitably become part of your representation rely on you to have at least a basic understanding of their functions and purposes.

Often, married couples whose estates could become subject to estate taxes upon their deaths utilize a particular type of lifetime revocable trust commonly known as the "credit shelter" trust or "A-B" trust to reduce their estate tax liabilities. 26 USC § 2010 grants every decedent a unified estate tax credit of an amount calculated to render the "exclusion amount" ($5.25 million in 2013) exempt from tax. In other words, everyone receives a tax credit sufficient to permit the first $5.25 million of assets they own at death to pass tax free. The exclusion amount is indexed for inflation and is subject to a change on an annual basis on account thereof. Credit shelter trusts reduce taxes by enabling their grantors to use part or all of the unified credits of both spouses while simultaneously rendering some of those assets not includable in the gross estate of the surviving spouse upon his or her death. The American Taxpayer Relief Act, Pub. L. 112-240 (2012) (the "ATRA"), made permanent the concept of "portability," which allows a surviving spouse to use the unused unified credit of his or her deceased spouse without the use of a credit shelter trust. From a federal estate tax perspective, portability arguably alleviates the need for credit shelter trusts entirely. However, despite the availability of portability, state estate tax considerations, administration issues, possible changes in tax laws and general estate planning considerations render credit shelter trusts very much a necessity for married clients with potentially taxable estates.

The mechanics of credit shelter trusts

To illustrate how a credit shelter trust works, consider a married couple, Dick and Jane, who each own, individually, assets worth $3.5 million. For purposes of this example, presume portability does not exist. Dick dies in February, 2013 while Jane dies in October, 2013. If they each have only simple wills or trusts that leave all of their property to each other, Jane will inherit all of Dick's property and will pay no estate tax. 26 USC § 2056 permits an unlimited deduction against a decedent's gross estate for all property passing to a surviving spouse (the "marital deduction"). Dick's entire unified credit will go unused because all of his bequest to Jane would qualify for the marital deduction. Jane will now have a gross estate of $7 million by herself and, upon her death later that year, will incur federal estate taxes on $1.75 million of her assets. The federal estate tax would total $645,800. Even if Dick's executor did not claim the marital deduction on his estate tax return and, instead, used Dick's unified credit, all of their collective property will still be includable in Jane's gross estate and the federal estate tax due would remain the same.

A credit shelter trust seeks to avoid this circumstance by utilizing some or all of the unified credit of the first spouse to die by funding a sub-trust that will not be included in the surviving spouse's gross estate. Like the vast majority of revocable trusts, credit shelter trusts are typically administered for the benefit of the grantor during the grantor's life and the grantor serves as trustee during that time period. The spouse of the grantor would execute a similar trust. Upon the death of the first spouse to die, the successor trustee divides the decedent's trust into two trusts—a marital trust and an exempt trust. Funding formulas vary depending on the size and complexity of the estate and the family's objectives. A formula designed to minimize federal estate taxes to the greatest extent possible would fund the exempt trust up to the exclusion amount and fund the marital trust with the balance. The marital trust could be distributed outright to the surviving spouse or held in trust for his or her benefit. The estate of the deceased spouse incurs no tax on funds passing to the marital trust because the trust qualifies for the marital deduction. The martial trust will be includable in the gross estate of the surviving spouse.

The exempt trust, however, will *not* be included in the surviving spouse's gross estate. Even so, the trust can still be administered for the benefit of the surviving spouse to a limited extent during his or her life, even if the surviving spouse serves as the successor trustee of that trust. The trust may pay all of its income to the surviving spouse and may distribute principal to the surviving spouse for his or her health, education or maintenance in reasonable comfort. 26 USC § 2041. The remainder would go to the grantor's children or whomever else the grantor selects. Exempt trusts typically grant the surviving spouse a limited testamentary power of appointment over the exempt trust in favor of the descendants of the grantor. These income, principal invasion and power of appointment provisions in favor of the

surviving spouse could also be narrower or removed completely. In lieu of providing for the surviving spouse during his or her life, the exempt trust could distribute funds outright to the grantor's children or any other third party.

Returning to Dick and Jane, assume that they have implemented credit shelter trusts and have structured them to minimize federal estate taxes to the greatest extent possible by including a funding formula designed to fund their exempt trusts up to the exclusion amount in the year of the grantor's death. All of Dick's $3.5 million in assets will fund his exempt trust. His marital trust will receive nothing. Upon Jane's death, she will leave a gross estate of only $3.5 million. Neither of them will incur any estate taxes. Compare this to the previous scenario where their simpler estate plan cost them $645,800 in federal estate taxes.

The mechanics of portability

Referred to by 26 USC § 2010(c)(4) as the "deceased spousal unused exclusion amount," portability allows Jane, from the first example where she and Dick had only simple wills, to claim Dick's unused unified credit. In order for Jane to do so, Dick's executor must file a properly completed federal estate tax return electing to transfer Dick's unused exclusion amount within nine (9) months of his death. 26 USC § 2010(c)(5). The executor must file the return even if no estate tax return is otherwise due. *Id.* The IRS will grant an automatic six-month extension of that time period. However, the request for an extension must be filed within that initial nine-month time period. If the executor fails to timely file the estate tax return, the surviving spouse will lose the ability to utilize the first spouse's unused unified credit. *Id*. Provided Dick's executor timely files a properly completed estate tax return electing to transfer Dick's unused unified credit to Jane, Jane's estate will incur no estate taxes upon her death in the first example where she and Dick had only simple wills.

Portability will not supplant credit shelter trusts as the primary testamentary estate tax minimization strategy for married couples

Unfortunately, the federal government is not the only entity that levies estate taxes. Under the Illinois Estate and Generation-Skipping Transfer Tax Act, 35 ILCS 405/1 et seq., the State of Illinois assesses an estate tax and that Act does *not* authorize portability for Illinois estate tax purposes. A couple relying on federal portability as a means of dodging estate taxes may find that the surviving spouse will owe Illinois estate taxes, but no federal taxes, due to this inconsistency between the two taxing schemes. This discrepancy alone requires married couples with potentially taxable estates to continue to use credit shelter trusts instead of portability as their primary testamentary estate tax reduction strategy.

Credit shelter trusts generally permit taxpayers greater flexibility in dealing with other inconsistencies between the federal and state estate tax regimes as well. Illinois' exclusion amount is only $4 million. 35 ILCS 405/2(b). Most credit shelter trusts contain provisions permitting their trustees to take advantage of the Illinois-only qualified terminable interest property ("QTIP") election permitted by 35 ILCS 405/2(b-1). In essence, this election allows taxpayers to have their cake and eat it too. A trustee could fund the exempt trust up to the federal exclusion amount and then make an Illinois-only QTIP election over the difference between the federal exclusion amount and the state exclusion amount, $1.25 million in 2013. For federal tax purposes, the full $5.25 million in the exempt trust will be excluded from the gross estates of both the husband and wife. $4 million will be excluded from the gross estates of both spouses for state tax purposes. The trustee will create a sub-trust of the exempt trust to hold the $1.25 million to which the Illinois-only QTIP election pertains. That property will be included in the surviving spouse's Illinois gross estate (provided he or she remains an Illinois resident) and must be administered solely for the benefit of the surviving spouse for the remainder of his or her life in accordance with 26 USC § 2056(b)(7). These capabilities inherent in most credit shelter trusts enable trustees to dodge estate taxes completely upon the death of the first spouse while using the maximum available exclusion amounts of that deceased spouse for both federal and state purposes. Such post-mortem planning opportunities are not available to an executor or trustee administering a simpler, portability-reliant estate plan.

Relying on portability carries a certain amount of risk. As discussed above, the executor of the first spouse to die must timely file a properly completed estate tax return and elect to claim the unused unified credit thereon. 26 USC § 2010(c)(5). A surviving spouse who lacks sufficient advisors could fail to meet this requirement and would forever lose the ability to claim the deceased spouse's unused unified credit.

Relying wholly on portability is also relying on the permanence of the gift and estate tax laws as they now exist. Suffice to say that many estate planners chuckle a bit when the words "permanent" and "tax law" are used in the same sentence. Portability is an abstract and complex concept. If it is repealed, couples who previously completed their estate plans relying on it may not realize that they must revise those plans.

A client's estate planning desires and circumstances may also render portability-based estate plans using only simple wills or trusts inadequate as a substitute for credit shelter trusts. Consider a husband and wife in second marriages. Each spouse has adult children from a prior marriage and they each want their estates to ultimately pass to their children. However, they would like part of the estate of the first to die to remain available to support the survivor for the rest of his or her life. These individuals would need to rely on credit shelter trusts in order to carry out these plans in the most tax-advantageous manner. In many circumstances, relying on portability with a simple estate plan will not adequately address a client's estate planning needs.

None of this is intended to construe portability as worthless. The mechanism could save couples who fail to plan for estate taxes while they are both alive significant federal estate taxes. In other cases, it serves as a backup plan where decedents fail to adequately fund their credit shelter trusts and instead have significant assets passing through joint tenancy or other means outside of their trusts.

Although it serves as a welcome addition to the Internal Revenue Code that will be of some use to estate planners, portability fails to address many of the issues handled by revocable credit shelter trusts. Illinois' divergent estate tax scheme, portability's administrative pitfalls, the potential for changes in federal estate tax laws and, in many cases, general estate planning considerations require the continued use of credit shelter trusts as a means of maximizing a couple's use of its unified credits. ■

George L. Schoenbeck practices with the firm of Sosin & Arnold, Ltd. in Orland Park and can be reached at (708) 448-8141 or at www.sosinarnold.com

This article was originally published in the February 2013 issue of the ISBA's Young Lawyers Division newsletter.

Fee awards: Not a sure thing

By Susan M. Brazas

It's 4:59 p.m., and a fax comes across your desk. It's a Fee Petition from your arch-rival opponent, nonchalantly tacked onto a routine hearing already set for 9:00 the next morning. What should you do? Shred it? Fire back with an angry retort? Turn off your fax machine? You might start with a quick review of recent case law. Several recent cases have shown that you can't assume that a fee petition will turn out as you expect, even if "they've always done it that way!"

Reasonable fees for large estate

A case from the Fourth District gave many readers a surprise, both in terms of one common practice for assessing fees for decedent's estates and also in the appellate court's drastic reduction of fees. In the case of *In Re the Estate of Weeks*, No. 4-10-0338 (4th Dist. May 20, 2011), a local attorney was hired by an independent executor of a decedent's estate to assist with estate administration. The Fourth District agreed with the trial court's decision barring the attorneys and the executor from charging a fee based on a percentage of the estate's gross value of $4.024 million. The attorney, who had served as auctioneer for the sale of farmland of the estate, had received 2 percent of the sale price as his fee for the auction, and the attorney and the executor each received fees of 3 percent of the gross estate value, even though that value included nonprobate assets. Despite the expert testimony of another local attorney that a percentage fee was customary of an estate of this size, even per the local bar association's fee schedule, the Fourth District disagreed, noting that the fees should instead be based on the time spent, complexity of work, and the ability of the attorney and the executor.

Timing of claim for executor's fees

In another case involving a decedent's estate, the First District found time-barred an executor's claim for compensation rendered to the decedent during the lifetime of the decedent. In *In Re Estate of Parker,* 2011 IL App (1st 102871) (1st Dist. Aug. 4, 2011), a dispute over the supervised administration of an estate led to the executor and heirs filing petitions for citations to discover assets directed to each other. Ultimately, the executor filed a counterclaim for compensation for the value of the services she had provided to the decedent during her lifetime. However, the court found that Section 18-12(b) of the Probate Act, which requires that claims against the estate are to be filed within two years of the decedent's death, is a grant of jurisdiction and not a statute of limitations. The court noted that the executor was well aware of the statutory deadline to file claims against the estate, as the executor had published the required notice to creditors, yet her claim was untimely filed more than two years after the decedent's death.

"Stipulated" hourly rate for attorney fees

The Second District recently addressed the proper determination of an hourly fee for an attorney who, after having withdrawn from representation of clients in a suit against a construction company, produced no written fee agreement. In *Thompson v. Buncik,* 2011 IL App (2d) 100589 (2d Dist. July 26, 2011), the attorney's former clients denied that they had retained him at a rate of $250 per hour. The trial court found that a reasonable rate for the attorney's services was $175 per hour. The court found that the clients' stipulation as to what an unavailable witness would have said, i.e. that $250 per hour was "a reasonable rate" for an attorney, did not mean that the clients were conceding that $250 per hour was "the rate" agreed upon between the clients and their attorney.

Attorney fees forfeited when conflict is known

The First District recently affirmed the trial court's denial of $250,000 in attorney fees to counsel who represented a wife in a divorce proceeding beginning with "the first moment" they undertook representation of the wife based on a disqualification due to a known conflict of interest. *In Re Marriage of Newton*, Nos. 1-09-0683-0685 cons. (1st Dist. June 30, 2011). The same law firm had earlier represented the husband in the same proceeding, by meeting with the husband privately for 1½ to 2 hours and discussing issues in the marriage and impending divorce. The court found that the law firm's retainer agreement with the wife was void ab initio as against public policy due to the clear violation of Rule 1.9 of the Rules of Professional Conduct.

Attorney fees denied when not incurred for benefit of trust

The First District addressed a dispute over a trust in *Fifth Third Bank, N.A. v. Rosen*, 2011 IL App (1st 093533) (1st Dist. Sept. 23, 2011). The court found that the trustee, who was an attorney and the decedent's daughter, was not entitled to $154,792 in attorney fees because the fees were not incurred for the management or protection of the trust. Instead, the court found, the trustee improperly divided the assets of the trust in a manner contrary to the language of the trust, and these actions did not confer any benefit on the trust but were incurred in defense of her own conduct in wrongly distributing the trust assets.

Conclusion

Courts have demonstrated an unwillingness to award fees which are inequitable, unreasonable, or contrary to ethical rules or policy concerns. Attorneys should be cautious to file fee petitions or claims within the time prescribed by statute or court order, and should be prepared to address not just the statutory basis for fee awards but also any pertinent ethical or policy concerns. ■

Susan M. Brazas is a general practice attorney in Rockford and is admitted to practice in state and federal courts in Illinois and Wisconsin. Susan is the Chair of the General Practice Section Council, and is a member of the Character & Fitness Committee (Second District) for the Board of Admissions to the Illinois Bar. She is the author of the Illinois Supreme Court and Illinois Appellate Court case summaries which appear in the ISBA E-Clips

This article was originally published in the January 2013 issue of the ISBA's General Practice, Solo & Small Firm newsletter.

Practice tip for locating possible VA insurance benefits

By Jeffrey A. Mollet

If you have a decedent's name and social security number, you can see if that individual had VA insurance. There are two separate forms of VA insurance, so naturally the government has two different numbers to call. You can also request claim forms by calling these numbers.

1-800-669-8477 - VA Insurance Center
1-800-419-1473 - Office of Service Members Group Life Insurance

A quick call may locate additional funds for the decedent's family or estate. ■

Jeff Mollett practices in Highland and can be reached at 618-654-8341 or via email at jeff@silverlakelaw.com.

The Doctrine of Necessaries—Coming to a state near you?

By Paul Meints

A Massachusetts trial court recently ruled that a wife is legally responsible for the cost of her husband's nursing home care under the doctrine of necessaries. *Emerson Village, LLC. v. Jode* (Mass. Sup. Ct., Middlesex, No. 12-CV-1736-F, December 15, 2012).

Milfranciu Jode entered a nursing home. His wife applied for Medicaid on his behalf, but he was rejected three times due to the failure to provide backup documentation. He died leaving the nursing home unpaid. After his death, the nursing home sued his wife, arguing that she was legally responsible for the cost of her husband›s care under the doctrine of necessaries. Under Massachusetts state law, a spouse is responsible for debts incurred by the other spouse for "necessaries."

The Massachusetts Superior Court ruled for the nursing home, finding that the definition of necessaries includes the care provided by the nursing home. The court reserved the question of «exactly what services constituted necessaries and the valuation of those services» to be determined by a jury after trial.

It's always interesting to see how cases from other States develop and whether they will have any bearing on how our local Courts rule in time. ■

Paul Meints is a solo practitioner in Bloomington, Illinois with an emphasis in estate and tax planning and can be reached at 309-829-1040 (i.e., not the IRS!) or at meintstaxlaw@frontier.com

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

March

Tuesday, 3/5/13 – 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.

Tuesday, 3/5/13 – Teleseminar—Estate Planning Issues in Pre- and Post-Nuptial Agreements. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/7/13 - 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, 3/7 — Friday, 3/8/13 - Chicago, Kent College of Law—ISBA 12th Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. Thurs: 9-4:45 with reception from 4:45-6; Friday, 8:45-1:15.

Friday, 3/8/13 - Quincy, Quincy Country Club—General Practice Update 2013: Quincy Regional Event. Presented by the ISBA General Practice Section. 8:15-5:00.

Tuesday, 3/12/13 – Teleseminar—2013 Age Discrimination in Employment Law and Hiring Update. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/14/13 - Chicago, ISBA Regional Office—Litigating, Defending, and Preventing Employment Discrimination Cases: Practice Updates and Tips for the Illinois Human Rights Act. Presented by the ISBA Human Rights Section. 9-4.

Thursday, 3/14/13 – Live WEBCAST—Litigating, Defending, and Preventing Employment Discrimination Cases: Practice Updates and Tips for the Illinois Human Rights Act. Presented by the ISBA Human Rights Section. 9-4.

Thursday, 3/14/13 – Teleseminar—Drafting Confidentiality and Non-disclosure Agreements. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 3/19/13 – Teleseminar—Understanding the Role of Insurance and Indemnity in Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 3/20/13 - Chicago, ISBA Chicago Regional Office—America Invents Act- Part 2: Protecting Innovation in a First to File System. Presented by the ISBA Intellectual Property Section. AM Program.

Wednesday, 3/20/13 - Live WEBCAST—America Invents Act- Part 2: Protecting Innovation in a First to File System. Presented by the ISBA Intellectual Property Section.

Wednesday, 3/20/13 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.

Thursday, 3/21/13 – Teleseminar—Ethics and Tribunals: Attorney Duties When Communicating With the Courts and Governmental Agencies. Presented by the Illinois State Bar Association. 12-1.

Friday, 3/22/13 – Teleseminar—LIVE REPLAY: Post-Mortem Estate Planning. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 3/26/13 – Teleseminar—Formula and Defined Value Clauses in Estate Planning: An Update. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/28/13 - Teleseminar—Techniques and Traps for Merging Unincorporated Entities. Presented by the Illinois State Bar Association. 12-1.

April

Tuesday, 4/2/13 – 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, 4/2/13 – Teleseminar—Overtime, Exempt and Non-Exempt: 2013 Wage and Hour Update, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 4/3/13 – Teleseminar—Overtime, Exempt and Non-Exempt: 2013 Wage and Hour Update, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 4/4/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m. CST.

Thursday, 4/4/13 — Friday, 4/5/13 - New Orleans, Hyatt French Quarter—Family Law Update 2013: A French Quarter Festival. Presented by the ISBA Family Law Section. 12:50-6:30; 9:30-5.

Friday, 4/5/13 - Chicago, ISBA Regional Office—Privacy & Security: Online Marketing and Other Hot Topics. Presented by the ISBA Antitrust & Unfair Competition Section. Half day AM.

Tuesday, 4/9/13 – Teleseminar—Estate Planning for Farmers and Ranchers. Presented by the Illinois State Bar Association. 12-1.

Friday, 4/12/13 - Chicago, ISBA Regional Office—Corporate Legal Ethics. Presented by the ISBA Corporate Law Section. 8:30 am – 12:45 pm.

Friday, 4/12/13 – Rockford, NIU—Practicing in Juvenile Court: What to Expect, What to Do, and How to Help Your Clients. Presented by the Child Law Section. 8:45 – 5:00.

Monday, 4/15/13 – Live Studio Webcast (Tape in CLASSROOM C)—Managing E-Discovery When Resources Are Limited. Presented by the Federal Civil Practice Section and Co-sponsored by the 7th Circuit E-Discovery Pilot Program. 11:00 am – 12:30 pm. (Rehearsal prior at 9:00 – requesting classroom for studio set-up with regular studio cameras due to big panels – not just studio space).

Tuesday, 4/16/13 – Teleseminar—Structuring Preferred Stock and Preferred Returns in Business and Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1. ■

TRUSTS & ESTATES

ILLINOIS BAR CENTER
SPRINGFIELD, ILLINOIS 62701-1779

FEBRUARY 2013

VOL. 59 NO. 7

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820