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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 January issue...

By Darrell Dies

In this month's newsletter attorney Sean Brady provides a case summary of *In re KARAVIDAS*. Attorney Mary Cascino provides a discussion regarding Wills and Supreme Court Rule 138. Attorney Jennifer Bunker provides us with a member spotlight for Section Council Members Sonia D. Coleman, Gary R. Gehlbach and Frank M. Greenfield. Finally, we have included some relevant estate and income tax numbers for 2014.

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. ■

When is misconduct by an attorney not subject to discipline by the ARDC? *In re KARAVIDAS*, 2013 IL 115767

By Sean D. Brady

Answer: When the misconduct does not violate the Rules of Professional Conduct

Although that answer might sound obvious, the application of that principle in *In re Karavidas* might surprise some people.[1] In *Karavadis,* the son became the independent executor of his father's probate estate. The son, who was a personal injury attorney, hired another attorney to represent the son as the executor. The estate was valued at approximately $700,000 and included an interest in a family pizza business.[2]

Under the will, the personal property was given to the mother (the surviving spouse) and the balance of the estate was to go into a previously unfunded trust that the father had created. Once funded, the trust was to be divided into a family trust and a marital trust and the son was to act as the trustee. However, the son never funded any of the trusts in the five years that he acted as the executor.[3]

As executor, the son made a $50,000 withdrawal from one of his father's accounts and a total of $398,104 in withdrawals from another of his father's accounts. He used the withdrawn funds for his own personal use.[4]

As executor, the son also used estate funds to benefit his mother and his sister. His mother received a new Mercedes, had her health insurance premiums and real estate taxes paid. The sister received $20,000, contributions to her IRA, and had her personal income taxes paid. In addition, at the sister's request, the son used $339,247 from the estate to keep the family pizza business operating.[5]

The sister, who operated the family pizza business, learned that her brother had attempted to sell the family business without her knowl-

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edge or her mother's knowledge. The sister then petitioned to terminate independent administration. She alleged that her brother had not circulated an inventory and had not provided any accountings. The sister and mother both asked to have the son removed as executor. The probate court terminated the independent administration and the son resigned as executor. The son repaid all the loans (without interest) to the estate.[6]

Approximately one year later, the ARDC filed a one-count complaint against him which can be summarized as follows:

(1)He converted assets as executor;
(2) He breached his fiduciary obligations to the estate beneficiaries;
(3) His conduct involved dishonesty, fraud, deceit, or misrepresentation;
(4) His conduct was prejudicial to the administration of justice; and
(5) His conduct defeated the administration of justice or brought the courts or the legal profession into disrepute.[7]

At the discipline hearing, the son testified that he thought he was authorized use the funds because he was a beneficiary. He testified that he treated the withdrawals as loans and planned on repaying the estate.[8]

The Hearing Board concluded that he violated Rule of Professional Conduct 8.4(a)(5), breached his fiduciary duties, and converted estate funds.[9] It recommended that he be suspended for 4 months.[10] The ARDC Administrator wanted a one year suspension.[11] However, the Review Board found there was no attorney-client relationship and thus professional discipline was not appropriate for the charges of breach of fiduciary duty and conversion.[12] The Review Board recommended that the charges against the son be dismissed and found that the Administrator did not prove by clear and convincing evidence that the son violated the Rules of Professional Conduct.[13]

The Illinois Supreme Court accepted the recommendations of the Review Board and dismissed the charges against the son.[14] The Illinois Supreme Court looked at two issues: "(1) whether the Administrator met the burden of proving by clear and convincing evidence that respondent's actions with respect to his father's estate constituted a breach of fiduciary duty or conversion; and (2) if so, whether his actions are professional misconduct that may be the basis for the imposition of professional discipline."[15]

Since the son was acting as the executor and not as the attorney for the estate, the Illinois Supreme Court discussed the fiduciary duties of the executor which can be summarized as follows:

1. Act with due care to protect the interests of the beneficiaries;
2. Follow the decedent's wishes;
3. Act in good faith to protect the interests of the beneficiaries;
4. Use the skill and diligence any reasonably prudent person would devote to his/her own personal affairs;
5. Administer the estate assets so debts are paid and the beneficiaries timely receive their portion of the estate; and
6. Full disclosure to the beneficiaries of will.[16]

The court determined that the son breached his fiduciary duty to carry out the express provisions of the will by failing to transfer estate assets to the trust and by lending estate assets to himself when it was not authorized under the terms of the will nor under independent administration.[17] Furthermore, even if the loans were authorized, the son failed to document the loans which put the estate assets at risk if he died or became incompetent while the loans were still outstanding.[18] In addition, he breached his fiduciary duty of full disclosure in that he did not fully disclose the transactions to his mother or sister.[19] The court also noted that the payments to his mother and sister were also breaches of his fiduciary duty since they were not authorized under the will.[20]

The son argued that he was entitled to distribute trust assets to himself under the terms of the trust.[21] Under the terms of the trust, the marital and family trust were primarily for the benefit of his mother but he, as trustee, also had the authority to distribute family trust assets to himself and his sister for their health, support, or education.[22] Under the terms of the trust, upon his mother's death, the assets of the family trust were to be distributed in equally between his sister and himself. However, the trust also gave his mother a testamentary power of appointment to any of his father's descendants and their spouses.[23]

The court rejected his argument that funding the trust was just a formality that he could basically ignore.[24] Although the trust allowed the son to make distributions to himself, that power was not unlimited as the primary purpose of the trust was for the care of his mother and any distributions to the children were only for their "health, support and education."[25] The court noted that it was possible that the entire principal of the trust could have been used up for the care and support of his mother.[26]

The court commented that if he had followed the terms of the will, the probate estate could have been closed much sooner. But instead, the son kept the assets in the probate estate for over five years and made several undocumented transactions which benefitted either his mother, his sister, or himself. Several of his transactions were not disclosed to the beneficiaries and did not have their consent. The court determined that he breached his fiduciary duty as executor. Since the court found that he breached his fiduciary duty, the court did not feel it necessary to also determine if his conduct constituted conversion.[27]

The court went on to look at whether the breach of fiduciary duty was a proper basis for professional discipline against the son as an attorney. The court stated that "professional discipline may be imposed only upon a showing by clear and convincing evidence that the respondent attorney has violated one or more of the Rules of Professional Conduct. Mere bad behavior that does not violate one of the Rules is insufficient."[28]

The court stated that an attorney's conduct that does not violate a Rule of Professional Conduct cannot be the basis for discipline of that attorney.[29] While a violation of any of the Rules of Professional Conduct subjects an attorney to discipline under Illinois Supreme Court Rule 770, Rule 770 cannot be used to charge an attorney for conduct that does not otherwise violate some other Rule of Professional Conduct since Rule 770 is a procedural rule of the court.[30]

Although the Hearing Board found that the son's conduct was prejudicial to the administration of justice, the Illinois Supreme Court determined that his conduct, because

he was not acting as an attorney and he was not involved in the judicial process at the time of the breach, did not undermine the administration of justice.[31]

The court noted that the evidence supported that the son did not fully understand his obligations as executor and trustee, that he did not practice in that area, and that he may have been confused by the legal advice he received about what an independent executor could do. The court also commented that there was no indication that the son intended to deceive or defraud the beneficiaries.[32]

The court stated that before discipline can be imposed on an attorney under Rule 770, the attorney must have violated the Rules of Professional Conduct and any prior cases to suggest otherwise are rejected.[33] It also stated that misconduct by an attorney that is outside the scope of the Rules of Professional Conduct but will not result in discipline.[34] Therefore, improper conduct by an attorney might not subject the attorney to discipline if the improper conduct is not a violation of any of the Rules of Professional Conduct. ■

Sean D. Brady is a member of the ISBA Trusts & Estates Section Council, practices in Joliet, Illinois with Mahoney, Silverman & Cross, LLC and can be reached at sbrady@msclawfirm.com or at 815.730.9500.

1. *In re Karavidas*, 2013 IL 115767.
2. *Id.* at ¶¶ 3-5.
3. *Id.* at ¶7.
4. *Id.*
5. *Id.* at ¶8.
6. *Id.* at ¶9.
7. *Id.* at ¶10.
8. *Id.* at ¶19.
9. *Id.* at ¶23.
10. *Id.* at ¶25.
11. *Id.* at ¶116.
12. *Id.* at ¶27.
13. *Id.* at ¶32.
14. *Id.* at ¶103.
15. *Id.* at ¶34.
16. *Id.* at ¶42.
17. *Id.* at ¶¶ 44-45.
18. *Id.* at ¶46.
19. *Id.* at ¶47.
20. *Id.* at ¶53.
21. *Id.* at ¶51.
22. *Id.*
23. *Id.* at ¶52.
24. *Id.* at ¶51.
25. *Id.*
26. *Id.* at ¶52.
27. *Id.* at ¶54.
28. *Id.* at ¶79.
29. *Id.* at ¶84.
30. *Id.* at ¶86.
31. *Id.* at ¶97.
32. *Id.* at ¶101.
33. *Id.* at ¶103.
34. *Id.*

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Wake-up call: Wills and Supreme Court Rule 138

By Mary D. Cascino

The Trusts and Estates Discussion Group recently brought up a very interesting discussion about Illinois Supreme Court Rule 138, parts of which are to take effect January 1, 2015. The Rule requires that paper and electronic filings in civil cases omit personal identity information. For purposes of the Rule, personal identify information includes: (1) social security and individual taxpayer-identification numbers; (2) birth dates; (3) names of individuals known to be minors; and (4) driver's license numbers. The additions to the Rule are underlined.

A redacted filing of personal identity information for the public record is permissible and shall only include: (1) the last four digits of the Social Security or individual taxpayer-identification number; (2) the year of the individual's date of birth; (3) the minor's initials; (4) the last four digits of the driver's license number; (5) the last four digits of the financial account number; and (6) the last four digits of the debit and credit card number.

If the court finds the inclusion of personal identity information in violation of the rule was willful, the court may award the prevailing party reasonable expenses, including attorney fees and court costs.

Although these requirements seem reasonable, what do we do with Wills, which cannot be altered by law? Most Wills identify the testator's children, whether minors or not. Many contain birthdates for purposes of identification, and some even older Wills contain social security numbers. What if a certified copy of the Will is needed? What can or cannot be included in an Affidavit of Heirship?

Julie Kolodzieg of Matlin & Associates, P.C. in Northbrook more specifically identified the conundrum for estate planners and probate attorneys. She noted that 755 ILCS 5/6-1 "says an original Will cannot be altered (alteration is a felony) and also requires the original Will to be filed with the Circuit Court clerk (failure to do so is also a felony)….Therefore we have a statute which requires a Will … to be filed with the court in unredacted form while at the same time having a duty under the Rule to NOT file it unless under impoundment."

The Rule says that "[W]hen the filing of personal identity information is required by law, ordered by the court, or otherwise necessary to effect disposition of a matter, the party shall file a form in substantial compliance with the appended 'Notice Of Confidential Information Within Court Filing.'" A sample form is included in part (d) of the Rule.

This Notice is to provide the personal identity information that has been omitted or redacted and will be impounded by the clerk immediately upon filing and be maintained as confidential. "After the initial impounded filing of the personal identity information, subsequent documents filed in the case shall include only redacted personal identity information with appropriate reference to the impounded document containing the personal identity information."

The information provided with the "Notice of Personal Identity Information Within Court Filing" will be available to the parties, the court, and the clerk, and the information may be transferred to appropriate justice partners. In addition, the clerk, the parties, and the parties' attorneys may prepare and provide copies of documents without redaction to financial institutions and other entities or persons which require such documents.

Presumably, the Clerk of the Court in each county will need to find solutions for individuals and attorneys to file a decedent's original Will. Most likely the original will be filed under seal or immediately impounded, along with a Notice of Personal Identity Information Within Court Filing. A redacted copy of the original Will would be filed at the same time and made part of the court record. The Clerk will also need to find a way to certify a redacted copy of the Will, in addition to a copy of the original Will if needed by financial institutions and other entities or persons that require a copy of the original.

If it is necessary to open a probate estate, similar measures would be required for documents such as the Exhibit A to the Petition for Probate of Will and Letters Testamentary, the initial document filed with the court to open the estate, (and the Copy of Will in Cook County). The Affidavit of Heirship may also require a Notice. If addresses are to be redacted, typical notices will need to impounded as well. Separate or amended Notices would need to be filed with the Court if any personal identity information is added.

A problem could arise because the Notice is to be stored separate from the case file. How is the judge going to be able to identify the minors named in the Will or the heirs at law to make sure they are properly identified and their needs are properly addressed? We await instruction from the Clerk of Court.

The procedures should not be that difficult. The Rule has been in place for two years and courts have established procedures for personal identity information. It is only the addition of birthdates and names of minors to the list in January 2015 that brings many of our Wills under the purview of the Rule, unless the Court adds other identification information to the list. This is more like a wake-up call for estate planning and probate attorneys about Rule 138. ■

Mary D. Cascino is Senior Counsel at Handler Thayer, LLP in Chicago, Illinois, an Fellow of the American College of Trust and Estate Counsel, past chair of the Illinois Bar Association's Trust and Estate Section Council, and adjunct professor at John Marshall Law School.

Getting to know the Trusts & Estates Section Council members

By Jennifer Bunker

The Trusts & Estates Section Council is comprised of attorneys throughout the State of Illinois with many different backgrounds, interests and achievements. This newsletter continues our monthly feature of Trusts & Estates Section Council members including their professional accomplishments and their roles within the Section Council. We hope that this recognition will not only allow us to know more about fellow members, but also serve as a way to show them our appreciation.

Sonia D. Coleman

Sonia Coleman is a member of the Trusts & Estates Section Council and serves on the Elder Care and Elder Law Subcommittee of the Legislation Committee. Ms. Coleman is the Principal and Founder of the Law Office of Sonia D. Coleman, a professional corporation. She assists her clients with the preservation of wealth through estate planning and estate administration. She also counsels business clients on labor and employment, business formation, preventive corporate law, contract negotiation and drafting, and risk management issues.

Prior to the inception of her own firm, Ms. Coleman served as an Assistant General Counsel for Health Care Service Corporation, a Mutual Legal Reserve Company d/b/a Blue Cross and Blue Shield of Illinois. There, she advised corporate clients on various issues, including employment, real estate, marketing, advertising and corporate contracts. Ms. Coleman has defended and managed the defense of several global corporations and institutions in lawsuits in a myriad of areas such as business disputes, premises liability, commercial property, personal injury, medical malpractice, insurance coverage, directors and officers and employment practices liability.

Ms. Coleman is an Adjunct Professor at Dominican University and Moraine Valley Community College. She has developed and taught courses such as Basic Estate Planning, Hiring Employees, Laws Affecting Employees, Terminating Employees, Strategic Corporate Communications, Contracts, and the Uniform Commercial Code. She also serves as a Faculty Advisor for the John Marshall Law School's Business Enterprise Law Clinic. Ms. Coleman has been featured in publications such as the *Chicago Daily Law Bulletin* and *Cleo Edge Magazine*. She earned her Bachelor of Science degree in Psychology from Howard University and her Juris Doctorate from Loyola University of Chicago.

Ms. Coleman has presented at bar associations, educational institutions, and community events on a wide array of topics including estate planning, health insurance, and employment law. As a law school student, she drafted and successfully argued a prisoner's civil rights case before the United States Court of Appeals for the Seventh Circuit. Since her matriculation from law school, she has spearheaded and chaired committees for professional organizations such as the Corporate Counsel Committee for the Black Women Lawyers' Association of Greater Chicago. She has served as a board member for several non-profit entities including the Council on Legal Education Opportunity, the Constitutional Rights Foundation of Chicago, the Midwest Minority In-house Counsel Group, and The Center for the Performing Arts at Governor's State University.

Ms. Coleman is currently a member of the Illinois State Bar Association, the American Bar Association, the Black Women Lawyers' Association of Greater Chicago and the South Suburban Bar Association. In recognition of her contributions to diversity and the professional development of others, she was awarded the Health Care Service Corporation's President's Diversity Award and the Black Women Lawyers' Association President's Award. She was also selected as a Fellow in the 2010 class of Leadership Greater Chicago.

Gary R. Gehlbach

Gary Gehlbach is a member of the Trusts & Estates Section Council and serves on the Powers of Attorney Subcommittee of the Legislation Committee. Mr. Gehlbach focuses his practice in Dixon, Illinois, on real estate transactions and estate and business planning and administration. He routinely handles residential, farm, and commercial real estate matters throughout Northern Illinois, with his stock of plat books from more than 20 counties attesting to the scope of his real estate practice. Mr. Gehlbach's clients include banks, businesses, and individuals, and he represents them in a myriad of personal and business matters, including purchases and sales and formation of limited liability companies, corporations, and other legal entities.

Mr. Gehlbach has published dozens of articles on real estate matters and served as an editor or associate editor of the Illinois State Bar Association's Real Property newsletter for 24 years. He received the Austin Fleming Newsletter Editorial Award in 2007. His articles on law-related matters have also appeared in the American Bar Association's Probate and Property magazine, the Illinois Bar Journal, and other newsletters of the Illinois State Bar Association. He has presented at numerous seminars for attorneys on real estate and estate planning topics and has lectured extensively to community groups, primarily on estate planning and administration subjects.

Mr.Gehlbach earned his undergraduate degree in mathematics at Knox College and he graduated with high honors from Chicago-Kent College of Law. He is a member of the Illinois Bar, the American, and Lee County Bar Association, and the National Academy of Elder Law Attorneys. Mr. Gehlbach has twice served as Secretary, Vice Chair, and Chair of the Real Estate Law Section Council of the Illinois State Bar Association and is presently Editor in Chief of the ISBA Bar Publications Editorial Board, a member of the ISBA Legislation Committee, and Treasurer of the ISBA LAWPAC. He is a former member of the ISBA's committee on the unauthorized practice of law and he has participated in drafting legislation for the ISBA.

A former Citizen of the Year for Dixon, Mr. Gehlbach serves as Chairman of the Lee County Industrial Development Association, Vice President of an insurance company, and Treasurer of his church. He previously served as President of the Dixon School Board and was a member of the board for 14 years. He thrice served as President of the Dixon Family YMCA and also has been President of the Dixon Library Board.

Frank M. Greenfield

Frank Greenfield is a member of the Trusts & Estates Section Council and serves on the Taxation Subcommittee of the Legis-

lation Committee. Mr. Greenfield graduated with a B. S. in Business Administration from Roosevelt University and in 1968 graduated from John Marshall Law School. He was associated with the litigation firm of Barbera and Friedlander as a trial lawyer and subsequently was a founding member of Rizzi and Greenfield where he continued representing clients in both the trial and appellate courts. Mr. Greenfield has been a sole practitioner since 1980 and practices in the areas of estate planning, general commercial transactions, and real estate. He has also served as a commercial arbitrator in real estate and commercial matters for the American Arbitration Association.

Mr. Greenfield has tried numerous jury and non-jury cases, in both civil and chancery courts, and he has authored briefs and presented oral arguments in numerous cases in the appellate courts of Illinois. His trial practice in recent years has been primarily in the chancery courts where he has successfully defended debtors in mortgage foreclosure cases and prosecuted and defended temporary and permanent injunction cases in business matters. He has served as lead counsel in a securitization of premium finance loans, counseled developers of single-family homes and condominiums including conversions and new construction, and has counseled buyers and sellers of single-family residences. Mr. Greenfield has appeared before various municipal zoning boards and administrative tribunals.

Mr. Greenfield is a member of the American Bar Association, Illinois Bar Association, Chicago Bar Association, American Bar Association Section on Real Property, Probate and Trust Law, and the Decalogue Society. He has presented estate planning seminars to community organizations and to staff members of financial planning companies. Mr. Greenfield has also provided pro bono work, often to senior citizens at the request of local agencies and organizations. ■

Estate- and income tax-related numbers for 2014

Below is a summary of some of the more salient estate and income tax rates that may have relevance for the estate and trust practitioner.

1. **Unified Credit Against Estate Tax.** For an estate of any decedent dying during calendar year 2014, the basic exclusion amount is $5,340,000 for determining the amount of the unified credit against estate tax under § 2010.

2. **Valuation of Qualified Real Property in Decedent's Gross Estate.** For an estate of a decedent dying in calendar year 2014, if the executor elects to use the special use valuation method under § 2032A for qualified real property, the aggregate decrease in the value of qualified real property resulting from electing to use § 2032A for purposes of the estate tax cannot exceed $1,090,000.

3. **Annual Exclusion for Gifts.** For calendar year 2014, the first $14,000 of gifts to any person (other than gifts of future interests in property) are not included in the total amount of taxable gifts under § 2503 made during that year. For calendar year 2014, the first $145,000 of gifts to a spouse who is not a citizen of the United States (other than gifts of future interests in property) are not included in the total amount of taxable gifts under §§ 2503 and 2523(i)(2) made during that year.

4. **Interest on a Certain Portion of the Estate Tax Payable in Installments.** For an estate of a decedent dying in calendar year 2014, the dollar amount used to determine the "2-percent portion" (for purposes of calculating interest under § 6601(j)) of the estate tax extended as provided in § 6166 is $1,450,000.

5. **Attorney Fee Awards.** For fees incurred in calendar year 2014, the attorney fee award limitation under § 7430(c)(1)(B)(iii) is $190 per hour.

6. **Periodic Payments Received under Qualified Long-Term Care Insurance Contracts or under Certain Life Insurance Contracts.** For calendar year 2014, the stated dollar amount of the per diem limitation under § 7702B(d)(4), regarding periodic payments received under a qualified long-term care insurance contract or periodic payments received under a life insurance contract that are treated as paid by reason of the death of a chronically ill individual, is $330.

7. **Estates and Trusts Income Tax Rates.** If Taxable Income Is – then The Tax Is:
   a. Not over $2,500 – then 15% of the taxable income
   b. Over $2,500 but not over $5,800 – then $375 plus 25% of the excess over $2,500
   c. Over $5,800 but not over $8,900 – then $1,200 plus 28% of the excess over $5,800
   d. Over $8,900 but not over $12,150 – then $2,068 plus 33% of the excess over $8,900
   e. Over $12,150 – then $3,140.50 plus 39.6% of the excess over $12,150

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