



# TRUSTS & ESTATES

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

## In the June issue...

By Darrell Dies & Jennifer Bunker

In this month's newsletter the outgoing Section Council Chair, Mary Lee Faupel, provides valuable parting comments. Sean D. Brady and Bryan Wellner provide a summary of the recent case, *Mikel vs. Comm'r*. Joseph O'Keefe provides a Flinn Report summary. Finally, Darrell Dies encourages us to review a recent law review article regarding gun trusts.

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/trustsandestates/newsletter>> and as always, comments are welcome. ■

## Chair's column

By Mary Lee Faupel

This will be my last column as Chair of the ISBA Trust and Estates Section Council. The incoming Chair, Tracy Dalton, begins her service at the ISBA Annual Meeting in June. Your officers for the 2015-2016 year will be in addition to Tracy, Gary Gehlbach as Vice Chair, Robert Kaufman as Secretary, and myself as Ex-Officio.

As a member of the Trust and Estates Section you receive our newsletter and are entitled to a discount at our Seminars. But there is more to be gained from a Section Council membership. I would encourage you to become active in the Trust and Estates Section Council by attending a meeting or writing for the newsletter. Over the course of the 30 years I have practiced law I have participated in several Section Councils as a member and an officer. The benefits I have received from my years of participation in the ISBA Section Councils have been many. From the camaraderie of working with like-minded attorneys on legislation germane to our practice areas, to the deep well of knowledge that is shared at the meetings, to the social events, the relationships I have developed have been both professionally and personally gratifying. If you are a young attorney new to the law, or an expe-

rienced practitioner looking to expand your base of knowledge, consider becoming involved in an ISBA Section Council. Your efforts will be rewarded many times over.

Best Wishes for a productive year. ■



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## Present gift or future interest? The enforceability of gifting to a Crummey Trust with a religious arbitration panel requirement

By Sean D. Brady and law clerk Bryan Wellner

### **Mikel v. Comm’r, T.C. Memo 2015-64, 2015 Tax Ct. Memo LEXIS 71, 109 T.C.M. (CCH) 1355 (T.C. 2015)**

Are you looking for law clarifying when a gift is a gift of a present interest? Are you looking for law on a religious arbitration panel requirement in an estate plan? If you answered yes to either of those questions, then take a look at *Mikel v. Comm’r*.<sup>1</sup> In *Mikel*, the United States Tax Court discussed what makes a gift a present interest gift and also discussed the enforceability of a trust’s religious arbitration panel requirement.

#### **Mikel Facts**

In *Mikel*, the IRS claimed that a husband and wife each owed \$268,950 in gift taxes and another \$67,238 for the late filing of their gift tax returns regarding split gifts the couple made to their irrevocable Crummey trust in 2007 totaling \$3,262,000.<sup>2</sup> In 2007, the grantors, who were husband and wife, each gifted \$1,631,000 into their irrevocable Crummey trust for a total of \$3,262,000.<sup>3</sup> The Crummey trust was for the benefit for their descendants and the spouses of their descendants and had 60 beneficiaries.<sup>4</sup> Each beneficiary had a withdrawal right.<sup>5</sup> The trust set forth a formula for the withdrawal rights.<sup>6</sup> In 2007, the formula provided that each beneficiary could withdrawal \$24,000 or two times the 2007 gift tax annual exclusion amount of \$12,000.<sup>7</sup> The Crummey trust language provided that written notice be sent to all of the beneficiaries of their demand right and that the demand right would lapse if it was not exercised within 30 days of the notice.<sup>8</sup> All of the beneficiaries were sent written Crummey notices in 2007.<sup>9</sup> The trust language provided that the trustee would make the distribution to the beneficiary outright and free from trust after the trustee’s receipt of the beneficiary’s timely demand for a withdrawal.<sup>10</sup> The trust expressly stated that it was the intent of the grantors that their transfers into the trust would qualify for the federal gift tax annual exclusion.<sup>11</sup> In addition to the beneficiaries demand right, the trustee could also make discretionary distributions to any beneficiary

for health, education, maintenance, and support.<sup>12</sup> The trustee’s discretion included the power to make distributions for reasonable wedding costs, the purchase of a primary residence, and entering a trade or profession.<sup>13</sup>

The trust also included an arbitration clause provision. However, the arbitration provision was unique in that disputes were to be submitted to an arbitration panel consisting of members of the Jewish faith known as a “beth din.” The trust stated that disputes “shall be submitted to arbitration before a panel consisting of three persons of the Orthodox Jewish faith.”<sup>14</sup> Under the trust, the beth din would give any party the rights the party was entitled to under the law of the State of New York.<sup>15</sup>

In addition to the arbitration clause, the trust also contained the following *in terrorem* provision:

In the event a beneficiary of the Trust shall directly or indirectly institute, conduct or in any manner whatever take part in or aid in any proceeding to oppose the distribution of the Trust Estate, or files any action in a court of law, or challenges any distribution set forth in this Trust in any court, arbitration panel or any other manner, then in such event the provision herein made for such beneficiary shall thereupon be revoked and such beneficiary shall be excluded from any participation in the Trust Estate \* \* \*.<sup>16</sup>

The grantors did not file federal gift tax returns in 2007. In 2011, the IRS contacted the grantors and notified them that they owed gift taxes for 2007. As a result, in December of 2011, each grantor filed a 709 federal gift tax return for gifts in 2007 of \$1,631,000. Thus, the gifts to the trust in 2007 totaled \$3,262,000. Each grantor claimed \$720,000 in annual exclusions - \$12,000 for each of the 60 beneficiaries. Each grantor’s gift tax return claimed that no gift taxes were due.<sup>17</sup>

The parties agreed that the gifts were completed gifts. The IRS also admitted that the trust gave each beneficiary an “unconditional right of withdrawal” but the IRS argued

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that the gift was not a present interest gift because the beneficiary's rights were not legally enforceable in state court because a beneficiary would be reluctant to go into state court because of the trust's *in terrorem* clause.<sup>18</sup> The Service argued hypothetical that the trustee could refuse the beneficiary's demand right, the beneficiary could take the matter to the beth din, the beth din could refuse the beneficiary's withdrawal right, and then the beneficiary would be reluctant to seek relief in state court because of the trust's *in terrorem* clause. The Service concluded that a beneficiary's withdrawal rights were illusory and therefore not a gift of a present interest in property.

### Analysis

The parties filed cross-motions for partial summary judgment. The tax court noted that a gift tax annual exclusion is only available for a gift that is a present interest in property. A present interest in property involves the "unrestricted right to the immediate use, possession, or enjoyment of property or the income from property."<sup>19</sup> The trust stated that after the receipt of a timely withdrawal demand, the trustee "shall immediately distribute to such beneficiary or Guardian the properties allocable to them, free of trust." The court also commented that the Service offered no legal basis on which the trustee could refuse a beneficiary's timely withdrawal demand. Generally, Crummey trusts have annual exclusion problems when: (1) the withdrawal rights are not in substance what they appear to be in form; or (2) there is a preexisting arrangement that the withdrawal rights will not be exercised; or (3) exercising the withdrawal rights results in adverse consequences to the beneficiary.

Here there was a timely notice of an unconditional withdrawal right. The Service did not suggest that the trustee could lawfully resist a beneficiary's timely withdrawal demand. Furthermore, no evidence was presented that there was a prearranged understanding not to exercise withdrawals rights.

The IRS argued that the withdrawal rights were illusory because enforcement would result in adverse consequences to the challenging beneficiary. The court stated that if a trustee refused to honor a beneficiary's withdrawal right, the beneficiary could take the issue to the beth din. The IRS failed to provide any reason why the beth din was not enough to enforce the beneficiary's withdrawal rights.

As to the *in terrorem* clause, the court found that the IRS misinterpreted the clause. The court determined that the *in terrorem* clause applied to challenges to the trustee's discretionary distributions but not to the beneficiary's demand rights. The IRS argued that the "or files any action in a court of law" language in the *in terrorem* clause would prevent a beneficiary from going into state court to challenge a trustee's refusal to honor the beneficiary's withdrawal demand. But the court disagreed and found that under a *pari materia* analysis, the "any action" language does not apply to "any action" but rather only to "any action" that deals with the trustee's discretionary distributions.<sup>20</sup> The court remarked that to adopt the Service's broad interpretation of the "any action" clause would be unreasonable because it would mean that even a beneficiary's lawsuit that had nothing to do with the trust, such as a lawsuit against a neighbor for a problem caused by the neighbor's dog, would terminate the beneficiary's interest in the trust.<sup>21</sup> The court declined to interpret the *in terrorem* clause that broadly.

The court concluded that the Crummey trust beneficiaries had a present interest in the trust property since they each had an unconditional right to withdrawal trust property and the trustee could not lawfully resist the withdrawal.<sup>22</sup> The court noted that even if the court accepted the Service's argument that the rights of the trust beneficiaries had to be enforceable in New York State court, a State court remedy was available since the *in terrorem* clause did not apply to the beneficiary's withdrawal rights and therefore the clause had no chilling effect. Thus, summary judgment was granted in favor of the taxpayers.<sup>23</sup>

### Conclusion

*Mikel* is a good case to review with respect to the issue of the gift of a present interest in property or on the issue of the validity of trust language requiring a religious arbitration panel. ■

Sean D. Brady is a member of the Trusts & Estates Section Council, practices with the firm of Mahoney, Silverman & Cross, LLC in Joliet, Illinois and can be reached at sbrady@msclawfirm.com or at (815) 730-9500.

1. *Mikel v. Comm'r*, T.C. Memo 2015-64, 2015 Tax Ct. Memo LEXIS 71, 109 T.C.M. (CCH) 1355 (T.C. 2015)

2. *Mikel v. Commissioner*, T.C. Memo 2015-64, at \*1-\*2.

3. Id. at \*2.
4. Id. at \*3.
5. Id. at \*3-\*4.
6. Id. at \*4.
7. Id. at \*10.
8. Id. at \*4.
9. Id. at \*10.
10. Id. at \*4.
11. Id. at \*4-\*5.
12. Id. at \*5.
13. Id.
14. Id.
15. Id. at \*5-\*6.
16. Id. at \*6.
17. Id. at \*8.
18. Id. at \*10-\*11.

19. Id. at \*10, quoting Sec. 25.2503-3(b), Gift Tax Regs.

20. Id. at \*19.
21. Id. at \*19.
22. Id. at \*20.
23. Id.

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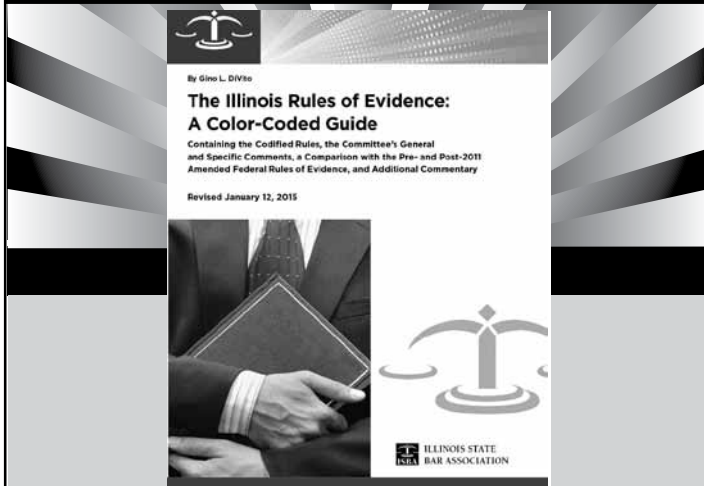
## Flinn Report summary – April 10, 2015 through May 8, 2015

By Joseph P. O'Keefe, O'Keefe Law, LLC, Belleville, Illinois

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

1. The Department of Public Health proposed an amendment to the Assisted Living and Shared Housing Establishment Code to double the nonrefundable licenses fees, increasing the fees for assisted living establishments from \$1,000 plus \$10 per unit to \$2,000 plus \$20 per unit. For shared housing establishments, the proposed fee increases from \$500 to \$1,000. (See 77 IAC 295; 39 Ill Reg 5339).
2. The Department of Children and Family Services (DCFS) adopted amendments to regulations regarding background checks including raising from 17 to 18 the age at which fingerprinting and criminal background checks are necessary for adult members of the household; and to clarify that the background check requirement also governs certain non-licensed service providers with access to children for whom DCFS is responsible, etc. (See 89 IAC 385; 38 Ill Reg 13570).
3. The Department of Public Health adopted the Student Loan Repayment Program Code effective April 10, 2015, to implement the rule for managing and overseeing the Federal Student Loan Repayment Program for health professionals who work in underserved areas. The program, which is open to Illinois licensed physicians, physician assistants, nurses, dentists, and psychiatrists, requires participants to provide two years of full time service or four years of part time service at qualifying services located in certain areas designated by the Federal Department of Health and Human Services. The rulemaking sets forth eligibility criteria and conditions for suspension or termination of a repayment agreement and payment of the remaining loan obligation. (See 77 IAC 582; 38 Ill Reg 29623).
4. The Department of Children and Family Services (DCFS) proposed amendments to the Inter-country Adoption Services to implement recent changes in the Illinois Adoption Act. The rulemaking provides that a prospective adoptive family may care for no more than eight children, including the adoptive parents own children under the age of 18, unless DCFS waives this limit in writing. The rulemaking, among other requirements, provides that prospective adoptive parents or caregivers may not use or possess medical cannabis. (See 89 IAC 333; 39 Ill Reg 6073). ■

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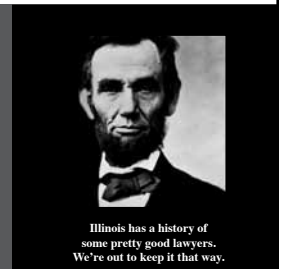
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## Gun trusts...

By Darrell Dies

**M**ore and more Illinois residents own and bear firearms. Until July of 2013, the Village of Goreville, Illinois had an ordinance that required its residents to own a firearm.<sup>1</sup> Of course we are well aware of the Second Amendment right to bear arms.<sup>2</sup> We also know that Illinois recently was forced to allow concealed carry for self-defense.<sup>3</sup> With the recent adoption of the right-to-carry in Illinois under the Firearm Concealed Carry Act,<sup>4</sup> an Illinois attorney might be confronted with a client that wants and/or believes there is a need for a gun trust.

While the attorney unfamiliar with this area of law could consult with one of several firms that specialize in this area, a first step might be to review the recent article by Professor Lee-ford Tritt<sup>5</sup> entitled, *Dispatches from the Trenches of America's Great Gun Trust Wars*.<sup>6</sup> The article can also be found on SSRN at the following link: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2611781](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611781)>.

Below is the abstract of the article.

Without question, the national dialogue pertaining to the right to bear arms and the possible expansion of gun control regulations is shaping up to be one of the more heated political topics of the twenty-first century. At the moment, fervent participants on both sides of this ongoing debate have focused a spotlight on an estate planning instrument commonly referred to as a "gun trust." Typically, estate planning products rarely cause the kind of nationally impassioned discussion as seen with gun trusts. So why have trusts, a commonly used estate planning tool, become entangled in this lively, and often vitriolic, national discussion concerning the purchase and possession of firearms? Moreover, is recent attention paid to these trusts beneficial to, or distracting from, the broader national discourse concerning federal firearms policy? Unfortunately, America's gun trust wars have been waged by both sides in an atmosphere of frenzied controversy littered with misinformation. Regardless of the tenor of the debate concerning gun rights and gun control, the fact remains that millions of Americans own

firearms, and they have legitimate estate planning concerns. As detailed in this Essay, firearms in an estate can be problematic and may expose an executor, fiduciary, or beneficiary to severe criminal penalties. Although there might be some need for tailored tightening of the laws concerning the transfers to trusts, gun trusts are a legitimate and important estate planning technique with the ability to alleviate the troublingly prejudicial access to guns inherent in current laws. This Essay will examine the legitimate, worrisome, and inaccurate concerns surrounding the uses of gun trusts. ■

Darrell Dies is a member of the Trusts & Estates Section Council, maintains a law practice

located in the heart of Woodford County, Illinois and can be reached at [dies@darrelldies.com](mailto:dies@darrelldies.com) or at 309.282.9112.

1. See <<http://www.kfvs12.com/story/22553196/goreville-expected-to-rid-ordinance-require-gun-ownership>>.
2. Amendment II, U.S. Constitution. A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.
3. On December 11, 2012, a ruling from the United States Court of Appeals for the Seventh Circuit invalidated Illinois' total ban on carrying firearms in public for self-defense.
4. 430 ILCS 66/1 et seq.
5. Professor of Law at the University of Florida - Fredric G. Levin College of Law; Director, Center for Estate Planning.
6. 108 Northwestern University Law Review 743 (2014).

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**Tuesday, 7/7/15- Teleseminar**—Business Planning with Series LLCs. Presented by the ISBA. 12-1.

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**Thursday, 7/9/15- Teleseminar**—Settlement Agreements in Litigation- LIVE REPLAY. Presented by the ISBA. 12-1.

**Thursday, 7/9/15- Webinar**—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4 pm.

**Tuesday, 7/14/15- Teleseminar**—Tax Planning for Real Estate, Part 1. Presented by the ISBA. 12-1.

**Tuesday, 7/14/15- Webinar**—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3-4 pm.

**Wednesday, 7/15/15- Teleseminar**—Tax Planning for Real Estate, Part 2. Presented by the ISBA. 12-1.

**Tuesday, 7/21/15- Teleseminar**—Restrictive & Protective Covenants in Real Estate. Presented by the ISBA. 12-1.

**Wednesday, 7/22/15- Teleseminar**—Fiduciary Duties & Liability of Nonprofit/Exempt Organization Directors and Officers.

Presented by the ISBA. 12-1.

**Thursday, 7/23/15- Teleseminar**—Ethics and Digital Communications- LIVE REPLAY. Presented by the ISBA. 12-1.

**Friday, 7/24/15- Teleseminar**—Estate Planning for Farms and Ranches- LIVE REPLAY. Presented by the ISBA. 12-1.

**Tuesday, 7/28/15- Teleseminar**—Business Planning with S Corps, Part 1. Presented by the ISBA. 12-1.

**Wednesday, 7/29/15- Teleseminar**—Business Planning with S Corps, Part 2. Presented by the ISBA. 12-1.

**Thursday, 7/30/15- Teleseminar**—Eminent Domain, Part 1- LIVE REPLAY. Presented by the ISBA. 12-1.

**Friday, 7/31/15- Teleseminar**—Eminent Domain, Part 2- LIVE REPLAY. Presented by the ISBA. 12-1.

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**Tuesday, 8/4/15- Teleseminar**—Construction Agreements, Part 1. Presented by the ISBA. 12-1.

**Tuesday, 8/4/15- Webinar**—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 11-12.

**Wednesday, 8/5/15- Teleseminar**—Construction Agreements, Part 2. Presented by the ISBA. 12-1.

**Thursday, 8/6/15- Webinar**—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 11-12 pm.

**Tuesday, 8/11/15- Teleseminar**—Estate Planning with Annuities & Financial Products. Presented by the ISBA. 12-1.

**Tuesday, 8/11/15- Webinar**—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association

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**Thursday, 8/20/15- Teleseminar**—Easements in Real Estate. Presented by the ISBA. 12-1.

**Monday, 8/24/15- Teleseminar**—Like-Kind Exchanges of Business Interests- LIVE REPLAY. Presented by the ISBA. 12-1.

**Tuesday, 8/25/15- Teleseminar**—Estate Planning for Guardianship and Conservatorships. Presented by the ISBA. 12-1.

### September

**Tuesday, 9/1/15- Teleseminar**—Estate & Trust Planning With the New 3.8% on Income. Presented by the ISBA. 12-1.

**Wednesday, 9/2/15- Teleseminar**—Drafting Service Agreements in Business. Presented by the ISBA. 12-1.

**Thursday, 9/3/2015- CRO and LIVE WEBCAST**—The Basics of LLC Operating Agreements. Presented by the ISBA Business and Securities Section. 1:00-4:45 pm.

**Thursday, 9/3/15- Teleseminar**—Drafting Effective Employee Handbooks- LIVE REPLAY. Presented by the ISBA. 12-1.

**Friday, 9/4/15- Teleseminar**—Rights of First Refusal/Rights of First Offer in Transactions. Presented by the ISBA. 12-1. ■

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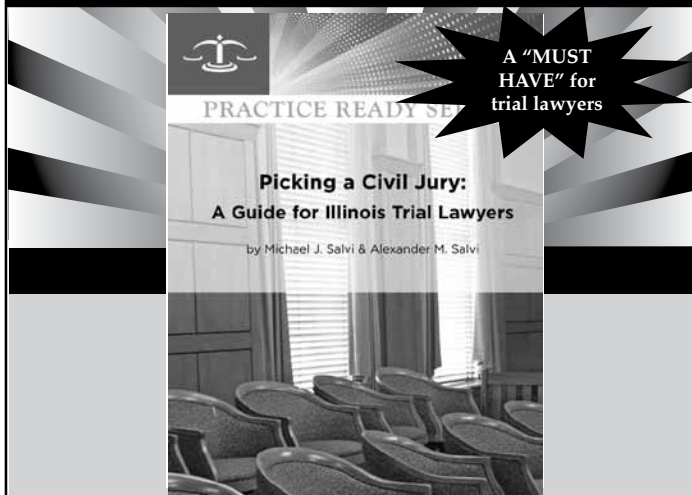
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some pretty good lawyers.  
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