



# ELDER LAW

The newsletter of the Illinois State Bar Association's Section on Elder Law

## What can counsel do when assets pass to unintended beneficiaries that inherit?

By Anthony B. Ferraro, BS, MS-Tax, CPA, JD, The Law Offices of Anthony B. Ferraro, LLC

### I. The Problematic Situation

You represent the personal representative of an estate where the decedent made one person their joint tenant on real property, accounts, stocks, or other assets.

It becomes clear upon reading the decedent's will, which was prepared after the creation of the joint tenancy accounts, that the decedent did not actually intend for the co-tenant to take a 100% beneficial interest in the property at the decedent's death. Rather through the prior conversations with the co-tenant and others, the decedent was merely trying to avoid the probate

process and wanted to assign the responsibility for the re-distribution of the jointly owned assets to one person: the surviving joint-tenant.

Unfortunately, the decedent may not have realized or may have forgotten that when the first co-owner of joint tenancy property passes away, the surviving joint tenant takes title to 100% of the legal and beneficial interests in the jointly owned property.

This may create an unintended consequence where the surviving joint tenant wishes to "nor-

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## Power of Attorney's execution of admission contract with arbitration clause is binding on principal's common law and Nursing Home Care Act claims

By Jason G. Schutte

### Overview of case

Plaintiff filed a lawsuit against Defendant, Bickford Senior Living, asserting violations of the Nursing Home Care Act and various common law claims in *Fiala v. Bickford Senior Living Group, LLC*.<sup>1</sup> Bickford filed a Motion to Dismiss the Complaint and enforce the arbitration agreement included in the assisted-living establishment contract. Susan Kahanic, plaintiff's daughter and his health-care power of attorney, executed the contract on plaintiff's behalf. The trial court denied the Bick-

ford's motion.<sup>2</sup>

The issues:

1. Did plaintiff's claims fall within the scope of the arbitration provision of the establishment contract?
2. Did Kahanic have authority to enter into a contract for plaintiff's medical care and to bind plaintiff to arbitrate disputes arising out of that agreement?

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## What can counsel do when assets pass to unintended beneficiaries that inherit?

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malize" the inherited assets and redistribute them among the beneficiaries stated, for example, in the decedent's will. The unintended consequence is that the surviving joint tenant will incur gift taxes (and possible estate taxes if the interest passed is large enough), upon distributing the inherited assets to the intended beneficiaries.

One possibility for mitigating the burden on the surviving joint tenant is to argue that the assets were in fact held in a "resulting trust."

### II. Illinois Law

Under Illinois law a resulting trust can be created by operation of law when property is transferred to a person who did not pay for the property, and it is implied that that person hold the property for the benefit of another person.

Resulting trusts should not be confused with "constructive trusts," even though they are both judicially imposed "trusts." A constructive trust arises when a *wrongdoer* party has taken title to property rightfully owned by another. That party is then ordered to transfer the property back to the rightful owner. In a resulting trust, however, the party vested with the mistakenly inherited assets (for example a surviving joint tenant) is acting like a mere trustee, and did not commit any wrongdoing to obtain title to the property.

Under Illinois law, a resulting trust is a trust created by operation of law based on the intent of parties.<sup>1</sup> Resulting trusts arise when property is bought with the money of one person, but the title is taken in the name of another.<sup>2</sup> The creator of the resulting trust must not intend to give the recipient a present interest.<sup>3</sup>

Illinois law further provides that although there is a presumption that transfers between family members are gifts, the presumption can be overcome by showing the intentions of the family members.<sup>4</sup> If the property was (1) purchased solely with the creator's own funds, (2) the recipient did not contribute to the taxes, management, or maintenance for the property, or (3) the property was put in joint tenancy for the purpose of probate avoidance, these factors contribute to over-

coming the presumption of a gift.<sup>5</sup>

The recipient's understanding of the arrangement is also a factor that Illinois courts consider.<sup>6</sup> If the recipient believed that she had no present interest in the property that, along with the other factors, contributes to the court's finding a resulting trust.<sup>7</sup> When a resulting trust is established, the recipient has title to the property *in name only* and is acting instead as a trustee. (Emphasis added).<sup>8</sup>

### III. Practical Applications

So, what are the practical applications of the use of the resulting trust?

The first application relates to the elimination of potential gift taxes when the unintended sole beneficiary, the surviving joint tenant, wishes to reallocate or redistribute the assets to the true intended beneficiaries of the decedent's estate as expressed. In these cases, I think it may be possible to make a resulting trust argument to the IRS. I think the resulting trust argument would apply specifically in cases where the personal representative of the estate was listed as a joint owner on assets belonging to the decedent, despite the fact that the personal representative did not contribute any of their own money towards the purchase of the assets, nor did the personal representative assist in their maintenance or pay any of the taxes on the property.

This application and argument is further bolstered by evidence that the decedent (a relative) who passed away had expressed during his lifetime that he did not want his estate to go through probate, but merely wanted the personal representative to handle distributions to other family members, for example, in a well-executed will subsequent to the creation of the joint tenancy. We all know that gratuitous transfers will be viewed as gifts from the transferor, thereby either causing gift taxes to be paid or, at a minimum, creating a charge against their lifetime exclusion amount, assuming that the gift exceeds the annual exclusion amount. Thus, we believe that by arguing for a resulting trust, we will be able to spare the surviving joint tenant from incurring the unwanted gift taxes, or perhaps estate tax at death,

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by gratuitously re-conveying the assets received through joint tenancy to the intended beneficiaries described in the decedent's will that a decedent may subsequently have prepared after creating the "temporary" or "convenience-type" joint tenancy asset with the surviving joint tenant.

A second application may arise in the handling of matters pertaining to the elderly. One may use the resulting trust argument to posit to the state Medicaid agencies that an asset held by a Medicaid applicant is not a "countable asset" because it is being held merely in a resulting trust. Of course, some practitioners of Medicaid eligibility law will argue: "Why not just make a complete return of the asset prior to application?" The implication of this argument is that the asset will be out of the Medicaid applicant's estate; thus, no problem with ineligibility.

Generally, I would agree with this line of argument, *but*, there are some assets that cannot be returned at least on a timely basis.

Sometimes Medicaid eligibility is something that is required immediately with greater urgency because of lack of other funds.

Furthermore, practitioners of Medicaid eligibility should be aware of the potential counter-argument by the State Medicaid agency that indicates that any asset held by the Medicaid applicant that is available, but is instead disclaimed or transferred without compensation, will result in a possible penalty for uncompensated transfers. While practitioners are well aware of this prohibition, the essence of the resulting trust argument is that the Medicaid applicant was never intended to be in possession of this asset or countable resource in the first place, thus creating the resulting trust and thus eliminating the need for a disclaimer or a compensated transfer.

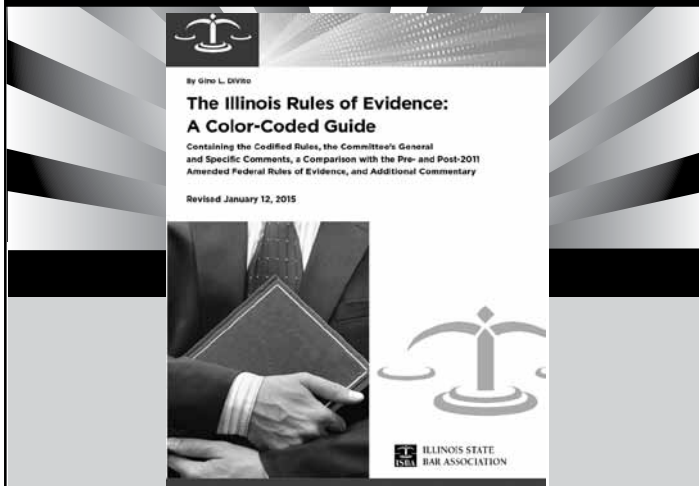
#### IV. Conclusion

In conclusion, one hopes that both the IRS and Illinois state Medicaid agency can

see and agree to practical applications and usage of the resulting trust argument: 1) for avoidance of IRS imposed gift taxes on the re-distribution of assets inadvertently held by the surviving joint tenant taxpayer who erroneously came into title through joint tenancy, and 2) in the avoidance of having a State Medicaid agency consider an asset inadvertently acquired by operation of law to be a countable asset for Medicaid eligibility purposes and thereby delaying or preventing the eligibility that a senior needs. ■

1. *Suwalski v. Suwalski*, 40 Ill. 2d 492, 495 (1968).
2. *Id.*
3. *In re Estate of Wilson*, 81 Ill.2d 349, 355 (1980).
4. See *In re Estate of Koch*, 297 Ill. App. 3d 786, 789 (1998)
5. *Ludwig v. Ludwig*, 413 Ill. 43, 52 (1952).
6. *Id.*
7. *Id.*
8. *In re Estate of Koch*, 297 Ill. App. 3d 789.

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## Power of Attorney's execution of admission contract with arbitration clause is binding on principal's common law and Nursing Home Care Act claims

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3. Does the Federal Arbitration Act provide an independent basis by which to enforce the arbitration provision?

### Facts

Upon admission to Bickford's facility, Kahanic as attorney-in-fact executed the establishment contract which set forth the obligations and duties of the plaintiff and Bickford while plaintiff resided at the facility. The contract obligated Bickford to provide numerous services, including meals, snacks, house-keeping and laundry. Additionally, services available to the plaintiff included oversight of medication, assistance in bathing, dressing, ambulation and transfer.<sup>3</sup>

The contract also included a "Binding Arbitration Provision" which provided that "Any controversy, claim or dispute arising out of or relating to this Establishment Contract or breach thereof, shall be settled by arbitration administered by the American Arbitration Association ..." The arbitration provision was an integral part of the establishment contract. A prospective resident's agreement to the arbitration provision was required in order to secure admission to Bickford's facility.<sup>4</sup>

### Scope of the Arbitration Provision

Illinois law states that parties are only bound to arbitrate those issues that they have clearly agreed to arbitrate.<sup>5</sup> A "generic" arbitration clause provides that all claims arising out of or relating to the contract at issue shall be decided at arbitration; whereas, an arbitration clause stating "arising out of the agreement" (or a variation thereof), but fails to contain the phrase "or relating to [the agreement]" (or a variation thereof), is narrower in scope and any arbitration should be limited to the specific terms of the contract or agreement containing the more limited arbitration clause.<sup>6</sup>

The trial court in *Fiala* found that the language of the arbitration clause in the contract at issue was not a generic clause. Hence, "the arbitration provision was limited narrowly to the terms of the establishment contract."<sup>7</sup> The *Fiala* appellate court found that the language within the arbitration provision, specifically "any claim ... arising out of or relating to" in the establishment contract

indicated that the arbitration provision was generic and should be construed broadly.<sup>8</sup>

The *Fiala* Appellate Court then analyzed the provisions of the establishment contract to determine if the allegations of the Complaint "arose out of or were related to" the establishment contract. The court noted that the plaintiff's allegations against Bickford asserted that Bickford administered plaintiff medications that were not included in his medical chart. The establishment contract contained provisions stating "oversight/supervision of medications" were available to plaintiff; also, that a resident "may receive ... assistance with medication."<sup>9</sup>

The court found that the underpinnings of the plaintiff's claims arose out of and were related to the establishment contract since they were services within contemplation of the establishment contract. Hence, the arbitration clause language encompassed the issues included in the plaintiff's complaint.

### Authority of Healthcare Power of Attorney to Enter into Establishment Contract

The *Fiala* court next examined whether Kahanic, as plaintiff's healthcare power of attorney, had authority to execute the contract containing the arbitration provision. The court noted that the power of attorney law is intended "to allow an individual to designate an agent to stand in his or her shoes and to make health-care decisions in the event of disability" to the same extent as if the individual made them.<sup>10</sup> Further, the Power of Attorney Law provides the agent under the health-care power of attorney agreement authority to make any type of healthcare decision, including admitting the principal into an assisted living facility such as Bickford.<sup>11</sup>

The Appellate Court in *Fiala* also noted that Kahanic and the plaintiff executed a statutory short form power of attorney from the Illinois Probate Act. The court cited specific sections of §45/4-10(c), part of the statutory form, authorizes the agent to "make any and all health care decisions on behalf of the principal" and to "sign and deliver all instruments, negotiate and enter into all agreements and do all other acts reasonably necessary to implement the exercise of the

powers granted" by the health-care power of attorney. This authority extends to making decisions on medical care, admitting and discharging the principal from care facility and contracting with providers for services.<sup>12</sup> The Power of Attorney Law expressly includes the power to enter into necessary contracts for the provision of health care services.<sup>13</sup>

In the *Fiala* case, Kahanic, as plaintiff's agent, entered into an agreement for Bickford to provide living quarters and health care related services for the plaintiff. The agreement included the arbitration provision which is an integral part of the contract. Acceptance of the arbitration provision was a *prerequisite* to admission into Bickford's facility. Under the power of attorney statute, Kahanic had authority to bind the plaintiff to the establishment contract, including the arbitration provision.<sup>14</sup>

The court further noted that health care powers of attorney are generally limited in scope to matters involving the principal's health care and that such an agent has no authority over the principal's property or financial matters. After analyzing cases from foreign courts, the *Fiala* court accepted the principle that "if an arbitration provision is required for admission to a care facility then it becomes part and parcel of the health-care decision to admit the patient to the facility."<sup>15</sup>

In this case, consent to arbitration was *integral* to admission into Bickford's facility. Hence the health care power of attorney authorized Kahanic to bind plaintiff to the arbitration provision because it was part of the establishment contract that gained plaintiff admission into Bickford's facility which provided health care services.<sup>16</sup>

### Enforceability Under the Federal Arbitration Act

The *Fiala* court next analyzed whether the plaintiff's causes of action under the Illinois Nursing Home Care Act could be arbitrated pursuant to the arbitration clause of the establishment contract. The court noted that §3-606 of the Act states that "[a]ny waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607 ... shall be null and void and without legal effect."<sup>17</sup> Further, "any par-

ty to an action pursuant to 3-601 throughout 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by jury ... shall be null and void...<sup>18</sup>

The *Fiala* court noted that sections 3-606 and 3-607 of the Nursing Home Care Act conflicted with and were preempted by the Federal Arbitration Act.<sup>19</sup> Further, the Illinois Supreme Court had “definitively held that the Nursing Home Care Act’s prohibition of arbitration agreements between a nursing home and a resident was precluded by the Federal Arbitration Act.”<sup>20</sup>

**Effect of Case**


A healthcare power of attorney has authority to bind a long term care facility resident to arbitrate claims that the resident may

hold against the long term care facility, provided certain prerequisites are met. First, the individual signing the admission contract with the facility must be operating under a valid power of attorney for the anticipated resident. Second, the arbitration provision of the admission contract must be sufficiently broad to include the issues and causes of action complained of by the plaintiff. Finally, the arbitration contract must be an integral portion of the admission contract where agreement to arbitration is a requirement for entry into the facility. ■

1. *Fiala v. Bickford Senior Living Group, LLC*, 2015 Ill App (2d) 141160
2. *Fiala* at ¶¶1-6.
3. *Fiala* at ¶ 7.
4. *Fiala* at ¶ 8.

5. *Keeley & Sons, Inc. v. Zurch American Insurance Co.*, 409 Ill.App. 3d 515, 520 (2011);
6. *Fiala* at ¶19, internal citation omitted.
7. *Fiala* at ¶ 13.
8. *Fiala* at 21.
9. *Fiala* at 22.
10. *Fiala* at ¶ 30, discussing 755 ILCS 45/4-1 (2012).
11. *Fiala* at ¶ 31
12. *Fiala* at ¶ 33, 755 ILCS 45/4-10(c)(1)-(3) (2012)
13. *Fiala* at ¶ 35
14. *Fiala* at ¶ 39
15. *Fiala* at ¶ 45
16. *Fiala* at ¶45
17. *Fiala* at ¶52, 210 ILCS 45/3-606 (2012)
18. *Fiala* at ¶52, 210 ILCS 45/3-607 (2012)
19. *Fiala* at ¶53
20. *Fiala* at ¶53, *Carter v. SSC Odin Operating Company*, 237 Ill.2d 30, 47, 50

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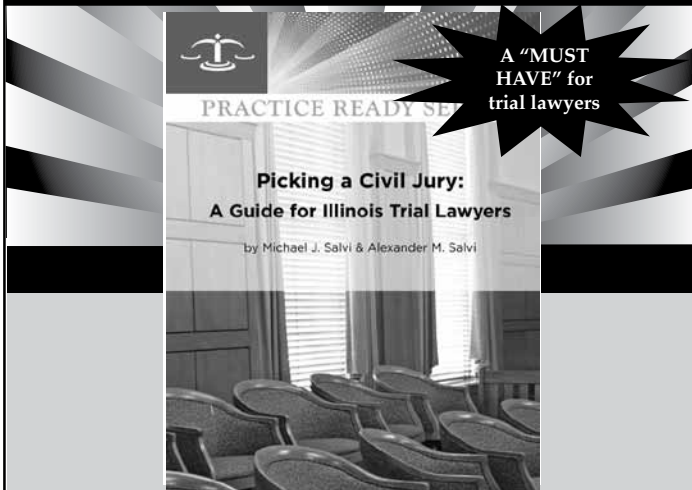
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