



# TRUSTS & ESTATES

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

## In the November issue...

By Darrell Dies & Jacob Frost

This month's newsletter offers readers a discussion by Gary Gehlbach regarding how to appropriately draft for the situation when a child as beneficiary is also named as a trustee or successor trustee given the potential conflict of interest. Sean Brady provides an interesting discussion regarding who is entitled to an accounting under the recent case of *Sanders v. Staci*. Finally, Joanna Lekkas provides a brief dis-

ussion regarding how the Civil Union Act impacts the Illinois Probate Act.

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>>. We thank the readership for the comments posted on the October issue and look forward to reading more of them. ■

## Child as trustee: A *per se* conflict?

By Gary Gehlbach

In a myriad of circumstances, clients routinely establish trusts naming one of several children as a trustee or successor trustee, or occasionally as a co-trustee with the settlor. For example, a married couple routinely establishes revocable living trusts, or perhaps a joint living trust for the two of them, designating themselves as the initial trustee. Frequently the other spouse is named as the first successor trustee or as a co-trustee and, particularly for estates that do not require considerable expertise, the couple's children in some order are named as successor trustees.

Considering that, statistically, most of us will reach a point in which we are no longer capable of or willing to handle our own financial affairs, it is customary for the first child listed as a successor trustee to assume the trusteeship during the parent's life.

In the estate tax planning context, one or more testamentary trusts may be involved in addition to the revocable living trust. For example, the estate plan of the first spouse to die may establish a credit-shelter trust, an Illinois QTIP trust

and, perhaps, a marital trust. Again, it is customary for the parents to designate each other as the first successor trustee and then the children, in order, as successor trustees. In most situations, the trusts provide that upon the death of the settlor, or upon the death of the surviving spouse if a trust is established for the benefit of the surviving spouse, the remaining trust estate is to be distributed to the couple's or the settlor's surviving children, with a provision for the descendants *per stirpes* of a deceased child to take the share their parent would have received. Thus, in most situations a child who may have assumed a trusteeship is also a contingent remainder beneficiary.

Is this a *per se* conflict that potentially disqualifies the child from acting as trustee? That is, is it permissible for a child of the settlor to act as a trustee of the settlor's revocable living trust or of a testamentary trust created by the settlor, if the child-trustee is also a contingent remainder beneficiary? If a child of the settlor assumes the trusteeship of a trust of which the child is a

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## Child as trustee: A *per se* conflict?

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contingent remainder beneficiary, does this provide a basis for another contingent remainder beneficiary to successfully move for the child-trustee to be removed as trustee? A recent Illinois Appellate Court decision suggests that the answer may be yes.<sup>1</sup>

Martin Burns signed his Will on August 19, 1939, and died soon thereafter. His estate created three distinct trusts: one for his wife Miriam Burns, one for his son Martin Burns, and one for his daughter Barbara Faville. Upon Miriam's subsequent death, her trust was divided equally between Martin and Barbara.

The trust that her father created for Barbara is the subject of *Faville v. Burns*, issued September 30, 2011. Barbara was the income beneficiary of this trust but was not entitled to any principal distributions. Rather, upon her death the principal was to be distributed "to her then living descendants *per stirpes*."

While the record is unclear as to the initial trusteeship of the trust for Barbara, she appointed her brother trustee in 1978. However, by early 2009 the relationship between Martin and Barbara had deteriorated and Barbara requested that Martin resign as trustee. When he failed to do so, Barbara tried to revoke her designation of Martin as trustee and appoint a bank in his stead. However, Martin refused to transfer the trust corpus to the bank, and by early 2010 Barbara filed a declaratory judgment action against Martin, asking the court to find that she had the power to remove Martin as trustee. Barbara died about a month after filing that action.

Apparently recognizing that, since she had no descendants, Martin would receive the corpus of her trust upon her demise, in May of 2009 Barbara legally adopted her two adult stepchildren in Florida. She then notified Martin of these adoptions and that these newly adopted stepchildren, who were in their 50s, would, provided that they survived Barbara, be the sole remainder beneficiaries of her trust.

Martin, however, disagreed, asserting that the adoptions would not, under Illinois law, allow the adoptees to be the remainder beneficiaries of the trust for Barbara.

The adopted stepchildren, after Barbara's death, amended the declaratory judgment complaint naming themselves as plaintiffs.

They thus pursued Martin's removal as trustee and also then alleged that they were the proper sole remainder beneficiaries of the trust for Barbara.

The appellate court essentially dealt with two (2) issues: whether the adoptees were, as a result of the adoption, the remainder beneficiaries of the trust for Barbara, and whether Martin should be removed as trustee. The first issue involved parsing the language of two potentially conflicting provisions of the Probate Act, namely, subsections (a) and (f) of section 2.4.<sup>2</sup>

Determining that the trust created by Barbara's father in 1939 is "an instrument," the court found that section 2-4(a), by its clear language, was only made applicable "to all instruments executed on or after January 1, 1998," and therefore did not apply to the trust created under the Will in 1939.

On the other hand, section 2-4(f) provides that "a child adopted at any time...[except, apparently, on September 30, 1989] is deemed a child born to the adopting parent for the purpose of determining the property rights of any person under any instrument executed before September 1, 1955, unless [an exception applies]." Conceding that none of the exceptions listed under section 2-4(f) was alleged to be applicable, the court found that section 2-4(f) applied, thereby determining that the adopted stepchildren were the sole remainder beneficiaries of the trust for Barbara.

The second issue was whether Martin should be removed as trustee. The adopted stepchildren contended that, because he was a contingent remainder beneficiary of the trust for Barbara, that was a sufficient basis for his removal. However, by the time that issue was decided by the trial and then the appellate court, Barbara had died, and, at that time Martin would either have been the sole remainder beneficiary, if the court had found that the adopted children were precluded under the Illinois Probate Act from being the remainder beneficiaries, or Martin would simply not have been a remainder beneficiary at all if, as it turns out, the adopted stepchildren were determined to be the remainder beneficiaries. Thus, while Martin was properly characterized as a contingent remainder beneficiary while Barbara was

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living, this was no longer the case after she died.

However, the appellate court did not address this distinction.

The adopted stepchildren also alleged that Martin should be removed for violating the prudent investor rule. The appellate court analyzed the prudent investor rule, finding that it is "a test of conduct and not of resulting performance" of the trust,<sup>3</sup> and that the plaintiffs had not alleged any facts by which the court could conclude that Martin's conduct as trustee violated the prudent investor rule.

Rather, the appellate court focused on the conflict of interest that was alleged, namely, whether one may serve as a trustee of a trust of which he is also a contingent remainder beneficiary. Asserting that this was a sufficient basis for removal, the adopted stepchildren supported their claim with an allegation that Martin had refused to recognize the adoptees as Barbara's children for purposes of the trust, instead considering himself to be the sole remainder beneficiary of the trust. However, that matter was part of the same

declaratory judgment action and there is no indication in the appellate court decision that Martin, after the court would have found that the adopted stepchildren were properly the remainder beneficiaries of Barbara's trust, would still refuse to acknowledge the adoptees as remainder beneficiaries. The appellate court nonetheless agreed with the adopted stepchildren.

Conceding that there are "very few cases directly address[ing] the alleged conflict presented" in this case, the appellate court found that a court has the latitude to remove an appointed successor trustee who was also a contingent remainder beneficiary of the trust "especially where the life beneficiary specifically objects to the trustee's appointment." (Citations omitted).

While conceding that "personal hostility between a trustee and a beneficiary is not a *per se* ground for removal of the trustee," the appellate court nonetheless found that, in this case, the plaintiffs, the adopted stepchildren, had sufficiently stated a cause of action for Martin's removal "based on the conflict"

The conflict, however, ceased to exist

upon the appellate court's finding that the adopted stepchildren were in fact the sole remainder beneficiaries of the trust for Barbara, that is, that Martin was not a beneficiary at all.

Fortunately, the appellate court does recognize an exception to the apparent *per se* conflict "where the instrument creating the trust expressly contemplates, creates and sanctions such a conflict of interest." (Citation omitted).

The lesson for practitioners, therefore, when we name a child who is also a contingent remainder beneficiary as a successor trustee, is to include a provision that expressly acknowledges and sanctions this potential conflict of interest. ■

Gary Gehlbach is co-chair of the Estate Planning Committee of the ISBA Trusts & Estates Section Council and practices with the firm of Ehrmann Gehlbach Badger & Lee, LLC in Dixon, Illinois. He can be reached at Gary Gehlbach gehlbach@egbbl.com or at 815.288.4949.

1. *Faville v. Burns*, 2011 IL App (1st) 110335.
2. 755 ILCS 5/2-4(a) and (f).
3. Citing 760 ILCS 5/5(2) (West 2008).

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# Who gets an accounting? A case summary of *Sanders v. Stasi*, 2011 IL App (4th) 100750

By Sean D. Brady

Is a beneficiary of a trust entitled to receive an accounting from the trustee even when there is not sufficient income generated by the trust to trigger the income payment to that beneficiary? The Fourth District Appellate Court said yes in *Sanders v. Stasi*, 2011 IL App (4th) 100750.

In *Sanders v. Stasi*, the plaintiff, Lisa Sanders, was one of several beneficiaries of a testamentary trust. Sanders wanted an accounting from the trustee. The trustee refused to provide Sanders with an accounting. Sanders argued that she was entitled to an accounting under 760 ILCS 5/11(a) of the Trusts and Trustees Act. Sanders filed a two-count complaint against defendant, Carol K. Stasi, the trustee, seeking an accounting and seeking to remove Stasi as the trustee for the defendant's failure to provide the plaintiff with an accounting. The trustee's position was that since Sanders was not actually receiving trust income distributions, Sanders was not entitled to an accounting.

The testamentary trust at issue was created under the will of decedent Otto Stasi. A component of the trust's corpus was a piece of commercial real estate and the income associated with that real estate. The trust's income was to be distributed as follows:

1. \$150 per week for trustee's fees;
2. \$100 per month to beneficiary Ruth Barnes for life; and
3. Pay the taxes, insurance, and utilities associated with the trustee's personal residence.

Once those three priority income payments had been satisfied, any surplus income remaining would be distributed at least annually to six individuals as follows:

- A. One fourth to Ruth Barnes for life;
- B. One fourth to Carol Stasi
- C. One eighth to Lisa Sanders;
- D. One eighth to Jodie Stasi,
- E. One eighth to Jamie Stasi; and
- F. One eighth to James Stasi;

The trustee filed a motion for summary judgment. The trustee's motion stated that the trust had no surplus income after the three priority income payments had been satisfied. The motion also stated that surplus

income was required before the plaintiff was entitled to an accounting. The trustee attached an affidavit to the motion and the trust's tax returns. The affidavit stated that the trustee only received distributions to which she was entitled and that the tax returns accurately showed all the income and expenses of the trust.

The trial court granted defendant's motion for summary judgment and dismissed the complaint with prejudice. The trial court found that plaintiff was only entitled to an accounting if the trust had surplus income after the three priority income disbursements had been satisfied. The trial court found that the trustee's affidavit and the tax returns demonstrated that the trust did not have any surplus income. The trial court found that since there was no surplus income, plaintiff was not entitled to receive an accounting. Accordingly, the trial court granted defendant's motion beneficiary is for summary judgment as to both counts.

On appeal, the Fourth District Appellate Court had to interpret section 11(a) of the Trusts and Trustees Act (Act) (760 ILCS 5/11(a) (West 2008)). Section 11(a) of the Trust and trustee's Act provides:

Every trustee at least annually shall furnish to the beneficiaries then entitled to receive or receiving the income from the trust estate, or if none, then those beneficiaries eligible to have the benefit of the income from the trust estate a current account showing the receipts, disbursements and inventory of the trust estate.

760 ILCS 5/11(a) (West 2008).

The court looked at the initial inquiry of "whether any beneficiary is currently entitled to receive or is currently receiving trust income." *Sanders v. Stasi*, 2011 IL App (4th) 100750, ¶ 19. The court stated, "A trustee must report to all beneficiaries who are entitled to receive or are receiving income. However, if no beneficiaries are entitled to receive or are receiving income, a trustee must report to any beneficiaries who are eligible to have the benefit of the income from the trust estate." *Sanders v. Stasi*, 2011 IL App (4th) 100750, ¶ 19, quoting 760 ILCS 5/11(a) (West 2008).

The key question presented was whether or not the plaintiff was "entitled" to receive trust income. *Sanders* at ¶ 21. The court first looked at whether or not any beneficiary was "entitled to receive or is receiving trust income." *Id.* at ¶ 22. The court and the parties acknowledged that the trustee had received income payments (\$150 a week for trustee's fees and the payment of taxes, insurance, and utilities for the trustee's personal residence).

After determining a beneficiary was receiving income, the court next looked at whether or not the plaintiff was "entitled to receive or was receiving trust income when she filed suit." *Id.* at ¶ 24. The parties both agreed that the plaintiff was not receiving trust income.

The court looked at whether the plaintiff was "entitled" to receive income. The case discusses prior case law which distinguished between "entitled" and "eligible". In *Sanders v. Stasi*, the appellate court concluded that the plaintiff was "entitled to receive" income from the trust within the meaning of the statute." *Id.* at ¶ 28. The court stated that the will makes the plaintiff entitled to income. The court stated that "The trustee has a duty to be transparent in the performance of her duties." *Id.* at ¶ 29. The appellate court went on to say, "Here the plaintiff is unable to enforce her entitlement if she does not receive an accounting of the trust's receipts, disbursements, and holdings. We interpret section 11(a) of the Act to entitle her to such an accounting." *Id.* at ¶ 29. The appellate court found that the plaintiff was entitled to an accounting from the trustee and the trial court was reversed.

So, keep *Sanders v. Stasi* in mind whenever you are counseling a trustee or a beneficiary on who is entitled to receive an accounting. Under *Sanders v. Stasi*, 2011 IL App (4th) 100750, an income beneficiary is entitled to an accounting from the trustee even if when the beneficiary is not currently receiving income distributions. ■

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



# The new Civil Union Act and its effect on the Illinois Probate Act

By Joanna M. Lekkas

On June 1, 2011, Illinois became the sixth state to recognize civil unions for same-sex couples. The Illinois Religious Freedom Protection and Civil Union Act provides for all parties entering into a civil union arrangement to be treated as spouses under Illinois law.<sup>1</sup> The Act further provides that all parties to a civil union are entitled to equal obligations, responsibilities, protections and benefits given by Illinois law to spouses. Some of these protections and benefits include, but are not limited to, health care benefits, the right to hold real estate as tenants by the entirety, the right to seek spousal financial support, visitation rights and child custody, and the right to be recognized as a spouse under the Illinois Probate Act. This latter right is extremely important in today's society, where more and more households depend on two incomes, especially when children are involved. For couples who have not planned for the disposition of their estate, either through a simple will or more complex estate planning, the Illi-

nois Probate Act provides certain safeguards for surviving spouses.

Some of the most important rights afforded spouses under the Illinois Probate Act include the right to receive a spousal award, primary preference in nomination as representative of the deceased spouse's estate, and the right to either half or the entire estate of the deceased spouse, depending on if the deceased spouse has children. During the administration of a decedent's estate in Illinois, the surviving spouse is entitled to "a sum of money...for the proper support of the surviving spouse for the period of nine months after the death of the decedent in a manner suited to the condition in life of the surviving spouse."<sup>2</sup> The award must be no less than \$20,000 along with an additional sum of no less than \$10,000 for each minor child.

Along with spousal awards, parties to a civil union in Illinois will now have a say as to who is entitled to act as Administrator if his or her spouse dies without a will. In Illinois, a surviving spouse or any individual nominat-

ed by a surviving spouse is entitled to preference in obtaining letters of administration.<sup>3</sup> Regarding the disposition of the deceased spouse's remains, parties to a civil union who are also appointed as administrator will now have priority to direct how and where the decedent is to be buried or cremated.<sup>4</sup>

While intestacy laws may protect surviving spouses who are parties to a civil union, it is important to keep in mind that only six states recognize these unions. Therefore, estate planning for disability and death remain important tools for same-sex couples. The importance of having healthcare and property power of attorney forms, Health Insurance Portability and Accountability Act (HIPAA) authorizations, living wills, and other estate planning documents remains in place for same-sex couples. ■

1. S.B. 1716, 97th Gen. Assembly (Ill. 2011).
2. 755 ILCS 5/15-1(a) (2011).
3. 755 ILCS 5/9-3(a) (2011).
4. 755 ILCS 65/5 (2011).

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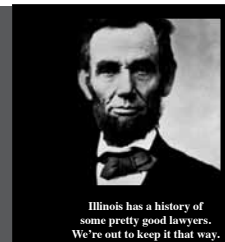
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### December

**Thursday, 12/1/11- Chicago, ISBA Chicago Regional Office**—Recent Developments in State and Local Tax- 2011. Presented by the ISBA State and Local Tax Committee. 9-12.

**Thursday, 12/1/11- Teleseminar**—Business Planning with S Corps, Part 1. Presented by the Illinois State Bar Association. 12-1.

**Friday, 12/2/11- Teleseminar**—Business Planning with S Corps, Part 2. Presented by the Illinois State Bar Association. 12-1.

**Friday, 12/2/11- Chicago, ISBA Chicago Regional Office**—Motion Practice- From Pleadings through Post-Trial. Presented by the ISBA Civil Practice & Procedure Section. 8:50-2:15.

**Thursday, 12/6/11- Teleseminar**—Estate Planning for Retirement Benefits. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 12/8/11- Chicago, Sheraton Hotel**—ISBA Basic Skills Course 6.0 Live. Presented by the Illinois State Bar Association. 9-4:30.

**Friday, 12/9/11- Chicago, Sheraton Hotel**—Master Series: Divine Ethics: Avoiding the Chasm of Incivility. Presented by the Illinois State Bar Association. 1:00-4:14.

**Tuesday, 12/13/11- Teleseminar**—Individual Liability for Corporate Obligations: Piercing the Corporate Veil. Presented by the Illinois State Bar Association. 12-1.

**Wednesday, 12/14/11- Webcast**—Jury Selection. Presented by the ISBA Criminal Justice Section. 12-1.

**Thursday, 12/15/11- Teleseminar**—UCC Issues in Real Estate Transactions. Presented by the Illinois State Bar Association. 12-1.

**Tuesday, 12/20/11- Teleseminar**—Asset Protection Strategies for Real Estate. Presented by the Illinois State Bar Association. 12-1.

**Wednesday, 12/21/11- Teleseminar**—Tax Efficient Methods of Getting Money out of a Business. Presented by the Illinois State Bar Association. 12-1.

### January

**Thursday, 1/5/12- Teleseminar**—Estate Planning in 2012: Now That the Federal Tax is a Dead Letter, Part 1. Presented by the Illinois State Bar Association. 12-1.

**Friday, 1/6/12- Teleseminar**—Estate Planning in 2012: Now That the Federal Tax is a Dead Letter, Part 2. Presented by the Illinois State Bar Association. 12-1.

**Tuesday, 1/10/12- Teleseminar**—Dangers of Using “Units” in LLC Planning. Presented by the Illinois State Bar Association. 12-1.

**Friday, 1/13/12- Teleseminar**—Bridging the Valuation Gap: “Earnouts” and Other Techniques. Presented by the Illinois State Bar Association. 12-1.

**Tuesday, 1/17/12- Teleseminar**—Real Estate Finance in A World With Tight Credit and Less Leverage. Presented by the Illinois State Bar Association. 12-1.

**Wednesday, 1/18/12- Live Studio Webcast**—Step-by-Step Appeals in Child Custody. Presented by the ISBA Child Law Section; co-sponsored by the ISBA Family Law Section. 11-1.

**Thursday, 1/19/12- Teleseminar**—Ethics, Technology and Solo and Small Firm Practitioners. Presented by the Illinois State Bar Association. 12-1.

**Friday, 1/20/12- Teleseminar**—Rescission in Business Transactions: Techniques for Fixing Transactions Gone Awry. Presented by the Illinois State Bar Association. 12-1.

**Friday, 1/20/12- Chicago, ISBA Chicago Regional Office**—Practical Professional Responsibility for Health Care, Life Sciences and Corporate Attorneys and their Outside Counsel. Presented by the ISBA Health Care Section. 1-4:15.

**Friday, 1/20/12- Collinsville, Gateway Center**—Motion Practice. Presented by the ISBA Tort Law Section. 9-12. Max 66.

**Tuesday, 1/24/12- Teleseminar**—Incentive Trusts: Approaches and Limits to Encouraging “Good” Behavior in Beneficiaries. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 1/26/12- Chicago, Union League Club**—Making the Record on Appeal and Ethics and Civility in the Court Room. Presented by the Illinois State Bar Association, the Illinois Judges Association and the Women’s Bar Association of Illinois. 1:30-4:55 CLE; 5-6:30 Reception. ■

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