

# Trusts & Estates

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

## *In re Estate of Agin*

BY MARY ANNE GERSTNER

On April 10, 2014, Stephen M. Agin, decedent, died at the age of 82 without a will. *In re Estate Of Stephen Michael Agin, Deceased v. Janice M. Marzovillo, Stephen L. Agin, Cynthia M. McKennas, and Mary L. Agin*, 2016 IL App (1st) 152362, involved the interpretation of an Illinois land trust ("the trust") established by Michael Yergovich, decedent's Uncle. Yergovich was beneficiary of the trust and retained sole power of direction. An amendment to the trust provided: "[i]n the event of death of said Michael Yergovich prior to

termination of this trust or prior to other disposition of his interest hereunder, then all interest of said Michael Yergovich shall immediately pass and vest, as follows, per stirpes." The amendment then listed a 20% interest to each of Yergovich's four then-living siblings, and a 4% interest to each of five named nieces and nephews, including the decedent.

Yergovich died on January 5, 2014. The real estate in the trust was sold on November 18, 2014. Decedent's wife, as

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## **Don't forget dad! Short-term guardianships aren't just for the kids**

BY J. AMBER DREW

**You and your partner are getting ready to take a long-deserved international anniversary trip.** The kids are going to stay with family friends. You are packed; they are packed; the "Important Information" list has been handed over; and you have even put a short-term guardianship in place for the kids. (See 755 ILCS 5/11-5.4) The dog has been boarded. You are all set, right? Not so fast—don't forget Dad!

Short-term guardianships are not just for minors. Let's say you are also the guardian of your elderly father. He is in a care facility and well looked after. You might be tempted to skip putting your brother temporarily in charge while you are gone. He is more than competent but you want to spare him the obligation. The reality is that if you are going to be difficult to reach you really should think about

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## In re Estate of Agin

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supervised administrator of his estate, claimed decedent's share of the funds from the sale as an asset of decedent's estate. Respondents, decedent's four children from a prior marriage, objected, and claimed that decedent's share of the funds passed to them directly under the trust as decedent's per stirpal descendants. The probate court determined that upon Michael Yergovich's death, the interest of the decedent in the trust "\*\*\*\* vested, it became his, and Mr. Agin could have done whatever he wanted to do with it." An Order entered finding that the trust agreement was not ambiguous, that the funds in issue were an asset of decedent's estate, and ordering that the funds be disbursed to the estate.

Respondents filed a motion for reconsideration which asserted new facts and new arguments. They claimed, *inter alia*, that subsequent to Yergovich's death, at the request of Yergovich's attorney, decedent and other contingent beneficiaries signed a ratification of the trust agreement and assigned their power of direction to two individuals in order to sell the property held in the trust. Respondents argued that since decedent transferred his share of the power of direction, and the trust still existed at the time of decedent's death, that upon his death decedent's interest in the trust passed under the terms of the trust to his per stirpal descendants. The motion was denied. Respondents appealed.

Respondents argued on appeal that the probate court failed to consider Yergovich's intent in entering into the trust. In its analysis, the Appellate Court reviewed the applicable law in the interpretation of trusts. This review included the legal principle that in interpreting trusts, which are construed according to the same principles as wills, the goal is to determine the settlor's intent, which the court will effectuate if not contrary to law or public policy.

Respondents claimed that the inclusion of the "*per stirpes*" language in the trust amendment meant that Yergovich intended that if one of the individuals identified by him was not alive at the time

of distribution, that person's share would go to his/her per stirpal descendants. The Appellate Court, however, could find no error in the finding by the probate court that the trust was not ambiguous, and that under the terms of the trust, decedent's interest in the trust vested upon Yergovich's death. "Under the express language of the trust amendment, in the event of Yergovich's death prior to termination of the trust, 'all interest of said Michael Yergovich shall *immediately* pass and vest' (emphasis added) in the way set out in the amendment. Thus, a 4% beneficial interest in the trust passed to decedent at the moment of Yergovich's death." (Citation omitted). 2016 IL App (1st) 152362, ¶23.

The Appellate Court found that there is no reason this would change with the inclusion of the *per stirpes* language. *Per stirpes* is a term used to specify the method of distribution of property, and denotes a taking by right of representation of that which an ancestor would take if living. The term has no application in determining who those entitled to share in the estate are.

The Court concluded that the express language of the trust itself sets out a dividing line between the time prior to Yergovich's death and the time after Yergovich's death. As the Court stated: "...at the moment of death, Yergovich's interest would pass to those named in the amendment, *per stirpes*. This means that if decedent was not alive at the moment of Yergovich's death, his 4% interest would pass to his descendants, *per stirpes*. However, because decedent *was* alive at the moment of Yergovich's death, his 4% interest passed to decedent directly." 2016 IL App (1st) 152362, ¶25.

The argument that decedent had assigned his share of the power of direction in the trust after Yergovich's death and thus his interest in the trust had not vested at the time of his death, was rejected. Unlike a situation where it is the settlor who retains the power to direct the trustee to the exclusion of a beneficiary, here, a beneficiary voluntarily assigned his power of direction to another after the

## Trusts & Estates

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settlor's beneficial interest had passed to him. Further, the terms of the trust only concerned themselves with the status of the beneficiaries at the time of Yergovich's death.

With respect to the claim that the probate court ignored the actions taken by Yergovich's attorney after Yergovich's death to effectuate Yergovich's intent, and overlooked decedent's ratification of the trust, the Court stated that in construing a trust, the settlor's intent is to be determined solely by reference to the plain language of the trust itself, and extrinsic evidence may be admitted only if the language of a trust is ambiguous and the settlor's intent cannot be ascertained. The Court pointed out that the probate court found that the trust agreement was not ambiguous and respondents do not argue that it was ambiguous. The probate court properly focused on the trust agreement itself, and not on the actions of Yergovich's attorney after Yergovich's death. Further, it is within the discretion of the trial court to deny a motion for reconsideration

and ignore its contents when the motion contains material that was available prior to the hearing at issue but never presented. The determination of the probate court was affirmed.

This Opinion demonstrates the importance of a clear expression of the settlor's intent in the trust language itself, the meaning of the term *per stirpes*, and reflects the impediments which exist to presenting extrinsic evidence in interpreting a trust. ■

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This article was originally published in the August 2016 issue of the ISBA's General Practice, Solo and Small Firm newsletter.

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## Don't forget dad!

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utilizing a short-term guardianship for all of the reasons that you needed to get a guardianship in the first place.

Getting the short-term guardianship in place is simple and doesn't involve going into court. The Illinois Probate Code specifically authorizes, without court approval, the use of short-term guardianships for disabled adults when the guardian is unavailable or unable to carry out his or her guardianship duties. (755 ILCS 5/11a-3.2) Along with filling out the proper paperwork, the guardian should:

- consult with and duly consider the ward's preference for a short-term guardian;
- provide the ward with the name, address, and telephone number of the short-term guardian as well as when the short-term guardian will be taking over such duties;
- tell the ward how long the short-term guardian will be acting as such; and
- advise the ward of his or her right to object to the appointment of the short-term guardian by filing a petition in court.

As a practice tip, it is also a good idea for the guardian to let the *guardian ad litem* know of the short-term appointment as well.

Only one appointment can be in effect at a time. This might not be an issue if Dad lives in a facility. However, if Dad lives with you the plan may be for him to stay with your brother the first half of your trip and your sister the second half of the trip. This shouldn't deter you – since the short-term guardian appointments can be made date-specific, you have the flexibility of making two separate appointments. The first appointment should name your brother as short-term guardian for the dates Dad will stay with him. The second appointment should name your sister as short-term guardian for the dates Dad will stay with her. Just take care that the date ranges do not overlap.


With respect to the form of the

appointment, it must be in writing and dated. The appointment must set out the particulars of who the guardian is, who the ward is, who the short-term guardian is to be, and when the short-term guardianship is to be terminated. The guardian and at least two adult witnesses must sign the appointment. The witnesses cannot be the person or people being appointed as the short-term guardian. Ultimately the appointed short-term guardian must sign the appointment as well but does not have to sign it at the same time the guardian and witnesses sign it. The appointment by default is effective immediately upon being signed by the guardian. However the guardian can choose instead to include a specific effective start date in appointment. The appointment can be for a cumulative

total of 60 days in any 12-month period. If you end up coming home early from your trip you can always amend or revoke the short-term guardianship. The statute sets forth that the appointment may be “amended or revoked by the appointing guardian at any time and in any manner communicated to the short-term guardian or to any other person” with the caveat that if you notify someone other than the short-term guardian, that person must make efforts to notify the short-term guardian of the amendment or termination. (755 ILCS 5/11a-3.2(c))

The Illinois Probate Code also sets out the following sample form and notes that a guardian may, but need not, follow this form: (*the author has added formatting only*).

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## APPOINTMENT OF SHORT-TERM GUARDIAN

*[IT IS IMPORTANT TO READ THE FOLLOWING INSTRUCTIONS:*

*By properly completing this form, a guardian is appointing a short-term guardian of the person with a disability for a cumulative total of up to 60 days during any 12-month period. A separate form shall be completed each time a short-term guardian takes over guardianship duties. The person or persons appointed as the short-term guardian shall sign the form, but need not do so at the same time as the guardian.]*

1. Guardian and Ward. I, \_\_\_\_\_ (insert name of appointing guardian), currently residing at \_\_\_\_\_ (insert address of appointing guardian), am the guardian of the following person with a disability: \_\_\_\_\_ (insert name of ward).

2. Short-term Guardian. I hereby appoint the following person as the short-term guardian for my ward:  
\_\_\_\_\_ (insert name and address of appointed person).

3. **Effective date.** This appointment becomes effective: (check one if you wish it to be applicable)

On the date that I state in writing that I am no longer either willing or able to make and carry out day-to-day care decisions concerning my ward.

On the date that a physician familiar with my condition certifies in writing that I am no longer willing or able to make and carry out day-to-day care decisions concerning my ward.

On the date that I am admitted as an in-patient to a hospital or other health care institution.

On the following date: \_\_\_\_\_ (insert date).

Other: \_\_\_\_\_ (insert other).

*[NOTE: If this item is not completed, the appointment is effective immediately upon the date the form is signed and dated below.]*

4. Termination. This appointment shall terminate on: \_\_\_\_\_ (enter a date corresponding to 60 days from the current date, less the number of days within the past 12 months that any short-term guardian has taken over guardianship duties), unless it terminates sooner as determined by the event or date I have indicated below: (check one if you wish it to be applicable)

On the date that I state in writing that I am willing and able to make and carry out day-to-day care decisions concerning my ward.

On the date that a physician familiar with my condition certifies in writing that I am willing and able to make and carry out day-to-day care decisions concerning my ward.

On the date that I am discharged from the hospital or other health care institution where I was admitted as an in-patient, which established the effective date.

On the date which is \_\_\_\_\_ (state a number of days) days after the effective date.

Other: \_\_\_\_\_ (insert other).

*[NOTE: If this item is not completed, the appointment will be effective until the 60th day within the past year during which time any short-term guardian of this ward had taken over guardianship duties from the guardian, beginning on the effective date.]*

5. Date and signature of appointing guardian. This appointment is made this \_\_\_\_\_ (insert day) day of \_\_\_\_\_ (insert month and year).

Signed: \_\_\_\_\_ (appointing guardian)

6. Witnesses. I saw the guardian sign this instrument or I saw the guardian direct someone to sign this instrument for the guardian. Then I signed this instrument as a witness in the presence of the guardian. I am not appointed in this instrument to act as the short-term guardian for the guardian's ward. (insert space for names, addresses, and signatures of 2 witnesses)

7. Acceptance of short-term guardian. I accept this appointment as short-term guardian on this \_\_\_\_\_ (insert day) day of \_\_\_\_\_ (insert month and year).

Signed: \_\_\_\_\_ (short-term guardian)

# The other side of the Power of Attorney coin

BY MIKE MASLANKA

Most attorneys who do any estate planning work have represented clients who wanted to prepare a power of attorney for health care and/or a power of attorney for property. From time to time, however, a client may come in to consult with the attorney and relate facts, including that someone else is acting as agent under another person's power of attorney, and that there may be some misfeasance, malfeasance, or abuse going on. That is the other side of the coin.

Pursuant to Section 2-10 of the Power of Attorney Act, the court can become involved in such a situation and do one of many things. The court could make

an interpretation of a power of attorney and instruct the agent on how to proceed. The court may order a guardian of the principal's person or estate to exercise any powers under the agency, including the power to revoke it. The court could also leave the power of attorney in place and not appoint a guardian, but enter such orders as necessary to provide for the best interests of the principal. The court could also allow a guardian to be put in place, as well as keep the agent under a power of attorney, with different roles and duties.

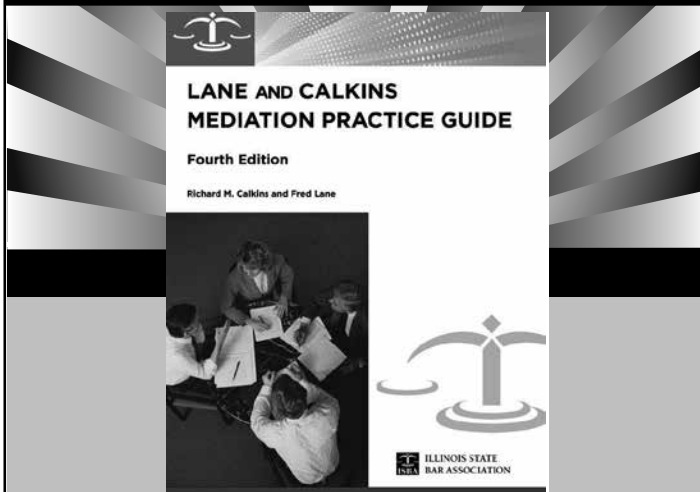
All of these things that the court can do are under the premise that someone believes the principal cannot control or

revoke the agency any more, or that an agent is not acting for the benefit of the principal.

Should a client request assistance in this type of case, you could suggest writing to the principal and/or agent and asking for a copy of the power of attorney and some detailed explanation as to the actions taken or not taken by the agent. Should there be no response or, perhaps, an inadequate response, your client may need to consider filing the appropriate petition under the Power of Attorney Act. ■

This article was originally published in the October 2016 issue of the ISBA's Senior Lawyers newsletter.

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# A summary of the Trusts & Estates Section's June 2016 Business Meeting

BY COLLEEN SAHLAS

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## 1. Presentation to Immediate Past Chair, Tracy S. Dalton

With the appreciation of the entire Section Council and on behalf of the Illinois State Bar Association, Chair Gehlbach presented a Plaque to Tracy Dalton honoring her service as Chair of the Trusts and Estates Section Council during the 2015-2016 Bar Year.

## 2. Continuing Legal Education

William Kuehn gave the Legislation Subcommittee Report. He discussed upcoming CLE programs planned. During the upcoming Bar year, there is a need for an additional, full day program on basic estate planning with another webinar, perhaps on the implementation of the amended Trust Code.

The Practical Estate Planning Skills for New and Young Attorneys program presented in May of 2016 with the Young Lawyers Division went well, with over 100 in attendance.

## 3. Legislation

Justin Karubas gave the Legislation Subcommittee Report, indicating that very little is being accomplished in the State Legislature because of the budget situation.

No action was reported relating to the proposed amendments to the Illinois Trust Code.

Both the Senate and the House of Representatives have passed legislation addressing issues raised by the Mendelson case. A copy of the approved legislation was attached to the Agenda as Exhibit B. Questions remain, however, as the legislation requires evidence of acceptance by the Trustee, in the case of a conveyance of real property to a Trust.

There was no Flinn Report given.

Chair Gehlbach gave the report relating to the Statute of Repose, indicating that this would be a major issue considered during

the upcoming Bar year. A particularly political issue, there will be coordination of ISBA efforts with Jim Covington, legislative liaison.

Chair Gehlbach reported that he is talking to the Elder Law Section Council leadership about addressing issues arising out of the Masquera court decision relating to adult dependent child awards.

Amendments to the Limited Liability Company Act as adopted in Illinois were attached to the Agenda as Exhibit C. There was discussion of the possibility of presentation of a CLE seminar relating to estate planning considerations when creating Limited Liability Companies.

Justin reported that both HB4697 (Land Trust Beneficiary Rights) and HB5924 (Changes to Personal Guardian Act) were passed by the Legislature and was sent to the Governor for signature. Both pieces of Legislation were supported by the Section Council. Copies of said legislation were attached to the Agenda, respectively, as Exhibits D and E.

## 4. Tax Legislation Subcommittee

James Nepple reported for the Tax Legislation Subcommittee, including discussion of the following:

- Legacy IRA regulations
- Investment Advisor fiduciary status
- IRAs as owners of businesses

## 5. Technology Subcommittee

Patrick Owens gave the Technology Subcommittee report. The Uniform Fiduciary Access to Digital Assets Act (HB4846) was attached to the Agenda as Exhibit F. This legislation has passed both houses of the Legislature but has not been signed by the Governor. There is a question as to what will happen if the Governor does not sign the Bill.

## 6. IllinoisBarDocs

Chair Gehlbach reported that the IllinoisBarDocs service provided by the ISBA requires updating in the area of basic estate planning. A summary of the Estate Planning Form Set Project was attached to the Agenda as Exhibit G.

## 7. Spousal Elective Share Proposal

Chair Gehlbach reported that a communication was received from Angela Vallario, Associate Professor of Law at the University of Baltimore inquiring about possible efforts to reform Illinois law relating to the Elective Share Statute. A copy of the communication received was attached to the Agenda as Exhibit H. There was a discussion of both past considerations by the Section Council of related issues as well as the possibility of a future revisit. No action was taken.

## 8. New Business. ABA Proposal on Model Rule of Professional Conduct 8.4

A copy of the ABA Proposal on Model Rule of Professional Conduct 8.4 was attached to the Agenda as Exhibit I. After discussion, upon Motion duly made and seconded, the Section Council voted unanimously to oppose the proposed change to Rule 8.4.

## 9. Future Meetings

The next meeting of the Section Council will be at The ISBA Midyear Meeting on Friday, December 9, 2016 at the Sheraton Grand Chicago at 301 East North Water Street, Chicago, IL. Lunch will not be provided. Any Section member is welcome to attend. Registration is required for the Midyear Meeting. Please also RSVP by December 1, 2016 by emailing Melissa Burkholder at [mburkholder@isba.org](mailto:mburkholder@isba.org). ■



# Flinn Report Summary – August 5, 2016 through September 16, 2016

BY JOSEPH P. O'KEEFE

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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 adopted amendments to the Illinois Vital Records Code to allow for the temporary removal of a dead human body to an out of state location for organ and or tissue donation. The rulemaking clarifies the application and approval process, requiring that the permit be signed prior to disposition of the body. (See 40 Ill Reg 5172.)
2. The Department of Insurance adopted amendments requiring life, accident, and health insurance companies to use the most recent edition of an Accounting Practices and Procedures manual for purposes of maintaining reserves. (See 40 Ill Reg 5802.)
3. The Department of Revenue adopted amendments effective July 29, 2016, to allow the Department of Revenue to make adjustments to liability outside the statute of limitations, pursuant to recent case law and statute. The rulemaking applies in instances involving, among other reasons, an omission exceeding 25% of base income, no return filing, or a fraudulent filing. (See 40 Ill Reg 5823.)
4. The Department of Revenue proposed amendments to the real estate transfer tax regulations to detail the requirements for counties using electronic revenue stamps. Among other things, the rule requires recorders of deeds offices to file returns electronically and pay the proceeds the 10<sup>th</sup> day of the month following the month that the tax was required to be collected. (See 40 Ill Reg 11235.)
5. The Illinois Student Assistance Commission adopted an emergency amendment to the Illinois Prepaid

Tuition Program effective August 29, 2016 for a maximum of 150 days to implement the expanded eligibility for the College Illinois 529 Prepaid Tuition Program. The amendment includes all educational institutions whose students are eligible for prepaid tuition benefits under Section 529 of the Internal Revenue Code. The amendments remove the State criteria regarding types of degrees offered, accreditation, and the previous 12-month Illinois residency requirement for benefit recipients. Now, the recipient qualifies if they are Illinois residents on the due date of the first payment. (See 40 Ill Reg 13029.)

6. The Secretary of State adopted amendments to securing laws to combine two separately proposed rulemakings. The rulemakings require investment advisors to establish and maintain a business continuity and succession plan to address backup and recovery of books and records, alternate means of communication with customers and employees, key personnel, etc. (See 40 Ill Reg 175 and 329.) ■

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## December

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**Thursday, 12-01-2016—Webcast—** Written Discovery: Knowing What to Ask for and How to Get It—Part 1. Presented by Labor and Employment. 1:00 p.m. – 3:00 p.m.

**Friday, 12-02-2016—Chicago,** ISBA Regional Office and Live Webcast—Decedent's Trust and Estate Administration. Presented by Trusts and Estates. 9:00 a.m. – 5:00 p.m.

**Friday, 12-09-16- Chicago, Sheraton—** Midyear Meeting—Protecting Our Courts: Why Privacy and Security are Important to Our System of Jurisprudence. Presented by the ISBA and the Illinois Judges Association (IJA). 9:00-10:15 a.m.

**Friday, 12-09-16- Chicago, Sheraton—** Midyear Meeting. Invisible Bias Creating Racial Disparities. Presented by the ISBA and the Illinois Judges Association (IJA). 10:30-11:45 a.m.

**Friday, 12-09-16- Chicago, Sheraton—** Midyear Meeting. History on Trial: The Alton School Cases (Tentative Title). Presented by the ISBA; co-sponsored by the Illinois Supreme Court Historical Preservation Commission. 1:15-2:45 p.m.

**Friday, 12-09-16- Chicago, Sheraton—** Midyear Meeting—Lessons in Professional Responsibility: From the Law Practice of Abraham Lincoln (Tentative Title). Presented by the ISBA. 3:00 p.m. - 4:30 p.m.

**Tuesday, 12-13-16- Webinar—** Practice Toolbox Series. Microsoft Word Power Hour. 12:00 – 1:00 p.m.

**Wednesday, 12-14-16- Webcast- HOT TOPIC—** Traffic Case Law and Legislative Update 2016 – Changes Which Affect Your

Practice and Clients. Presented by Traffic Law. 12:00 p.m. – 1:00 p.m.

**Thursday, 12-15-16- Webcast—** Senate Bill 100: Sweeping Changes to Student Discipline in Illinois in 2016. Presented by Education Law. 10 a.m. - 12 p.m.

## January

**Tuesday, 01-10-17- Webinar—** Technology and Business Planning for a Law Firm. Practice Toolbox Series. 12:00 -1:00 p.m.

**Thursday, 01-12-17- Live Webcast—** Immigration Law Update Spring 2017—Changes which Affect Your Practice and Clients. Presented by International and Immigration. 12:00- 1:30 p.m.

**Friday, 01-13-17- Chicago, ISBA Regional Office—** Implicit Bias in the Criminal Justice System. Presented by Criminal Justice. 9:00 a.m. – 4:45 p.m.

**Wednesday, 01-18-17- Live Webcast—** The Nuts and Bolts of Drafting Non-Disclosure Agreements: Tips for the Practicing Lawyer. Presented by Business & Securities. 10:00 a.m. – 11:00 a.m.

**Wednesday, 01-18-17—Live Webcast—** TITLE TBD. Presented by Labor and Employment. 12:00 p.m. – 1:30 p.m.

**Tuesday, 01-24-17- Webinar—** How to Stop the 8 Things Killing Your Law Firm. Practice Toolbox Series. 12:00 -1:00 p.m.

**Wednesday, 01-25-17- Live Webcast—** Helping Immigrant Children- Special Immigrant Juveniles. Presented by International and Immigration; co-sponsored by Bench and Bar. 11:00 a.m. – 12:00 p.m.

**Wednesday, 01-25-17- Live Webcast—** Housing Justice v. Housing Injustice: How Unfair Housing Practices Keep Segregation Intact. Part 1: SCOTUS Opinion, Fair

Housing Policies and Housing Voucher Programs. Presented by REM; multiple cosponsors (see agenda). 1:00 – 3:00 p.m.

**Thursday, 01-26-17—Chicago, ISBA Regional Office—** Family Law Table Clinic Series—Session 3. Presented by Family Law.

**Friday, 01-27-17- Chicago, ISBA Regional Office & Live Webcast—** Recent Developments in State and Local Tax—Spring 2017. Presented by SALT. 8:30 a.m. – 12:45 p.m.

## February

**Wednesday, 02-01-17—Chicago, ISBA Regional Office—** Cybersecurity: Protecting Your Clients and Your Firm. Presented by Business Advice and Financial Planning; co-sponsored by IP (tentative). 9:00 a.m. – 5:00 p.m.

**Friday, 02-03-17- Springfield, Illinois Department of Agriculture—** Hot Topics in Agricultural Law- 2017. Sponsored by Ag Law. All Day.

**Friday, 02-03-17- Chicago, ISBA Regional Office—** 2017 Federal Tax Conference. Presented by Federal Tax. 8:20 a.m. – 4:45 p.m.

**Monday, 02-13 to Friday, 02-17—** Chicago, ISBA Regional Office—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

**Tuesday, 02-14-17- Webinar—** Hardware & Software: You Bought It, You've Got It... Now Use It! Practice Toolbox Series. 12:00 -1:00 p.m.

**Monday, 02-20-2017- Chicago, ISBA Regional Office & Fairview Heights—** Workers' Compensation Update – Spring 2017. Presented by Workers' Compensation. 9:00 a.m. – 4:00 p.m. ■

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- When the Deceased Spouse Unused Exemption can be used;
- What your professional responsibility obligations are and how to handle conflicts of interest;
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