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Trusts & Estates

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

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In the October issue...

BY JENNIFER L. BUNKER

In this month's newsletter, Robert W. Kaufman, Secretary of the Trusts and Estates Section Council, and Amanda B. Puplava provide insight into the recent *Mendelson* decision. Sarah LeRose discusses the implications of the *Howell* decision on estate planning for disabled adults. Additionally, Robert W. Kaufman shares the Minutes of the Council's June 19, 2015 meeting.

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 comment on the articles in the newsletter by way of the online discussion board on the ISBA Web site at <http://www.isba.org/sections/trustsestates/newsletter> and as always, suggestions for improvement of the newsletter are welcome. If any readers have articles that they would like to be considered for publication, please contact me at jennifer@zukowskilaw.com. ■

How do you trust?

BY AMANDA B. PUPLAVA AND ROBERT W. KAUFMAN

When the Second District Appellate Court released its opinion in the *Estate of Diane Mendelson v. Michael Mendelson*[1] on September 9, 2015, it was probably unaware that the decision would spark the highest level of volume on any issue to date on the Discussion Group of the Illinois State Bar Association Trusts and Estates Section,[2] with wide-ranging comments regarding the underlying premise for the decision, and whether or not it established new law in Illinois. Most particularly, however, it was clear from the comments of the members of the Illinois State Bar Association Trusts and Estates Section, that the Court had essentially created a variation of the 1950s and 1960s television game show "Who Do You Trust?" by creating a new "game show" for estate planners in this State with respect to "how" one can effectively transfer assets into a living trust.

PERTINENT FACTS

Diane Mendelson had four sons and owned her home in Highland Park. In 2004 or 2005, her son, Michael, moved into her home, together with his girlfriend and two children. Later in 2005, Diane executed a deed transferring the home to

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herself and Michael as joint tenants, but the deed was never recorded. In 2006, Diane worked with an attorney to create an estate plan, including a pour over will and a living trust, and a deed in trust for the Highland Park home that was recorded. The 2006 trust provided that all of Diane's assets were to be distributed equally to her four sons. The attorney that prepared the estate plan and deed in trust was never told that the home was held in joint tenancy between Diane and Michael, but rather, Diane told him that Michael had been pressuring and threatening her to sign some documents that she did not read or understand and that she wanted to be fair to all her children. Diane refinanced the mortgage on her home in 2011 and stated that she was the sole owner of the home in the refinancing settlement agreement.

On July 1, 2011, Diane executed a new trust, designating herself as trustee and Michael as successor trustee, and revoking any and all prior trusts. The 2011 trust was new; it was not an amended restated version of the 2006 trust. The 2011 trust identified the Highland Park home as part of the trust estate, and stated that Diane intended the home to go exclusively to Michael upon her death. Diane did not execute a pour over will in 2011, so her 2006 pour over will, naming the now revoked 2006 trust as beneficiary, remained in effect. Although Diane did not execute a new deed in trust prior to her death on October 1, 2011, after her death, Michael recorded the 2005 deed transferring the property to him and Diane as joint tenants.

LOWER COURT

The decedent's estate filed a petition to determine the proper distribution of the home in Highland Park. In April 2014, the Trial Court held a hearing on the issue (as well as on a custodial claim filed by Michael for caring for Diane which will not be addressed in this article), finding that the Highland Park home should be distributed in equal shares to the four sons. The Trial Court held that since the decedent did not intend to convey a present interest in the 2005 deed, it did not then create an ownership interest in Michael. It further found that the 2011 trust was valid and, as a result, it revoked the 2006 trust. Its key holding, however, found that since there was no deed transferring the home into the 2011 trust, and the 2006 trust was revoked, the home passed equally to the four sons under the laws of intestacy.

APPEAL

The Appellate Court found that it was not against the manifest weight of the evidence for the trial court to determine that the 2005 deed was not delivered, as it was not recorded prior to decedent's death, and the decedent has made several representations to third parties that she was the sole owner of the property. The Appellate Court also upheld the finding of the lower court that the 2011 Trust was valid and effectively revoked the 2006 trust.

However, the Appellate Court reversed the lower court by finding that the home should not pass by intestacy, but rather should go exclusively to Michael under the terms of the 2011 trust. Citing a Kentucky Appellate Case, *Ladd v. Ladd*,[3] a tangentially related 2003 Illinois decision[4] and the Restatement (Second) of Trusts,[5] the Court found that the failure to create, let alone record, a deed did not negate the grantor's stated intention to dispose of the home in accordance with the terms of the trust. Rather, it held that the transfer of the home into the 2011 trust by deed was not necessary to dispose of the home under the terms thereof, and the Appellate Court held that "a settlor who declares a trust naming herself as trustee is not required to separately and formally transfer the designated property into trust."[6]

RESTATEMENT

The Court acknowledged that "no Illinois court has yet adopted §17(a) of the Restatement (Second) of Trusts,"[7] but stated that our Supreme Court has cited certain sections with approval. However, reliance on the Restatement (Second) of Trusts is tenuous at best, since "[r]estatements are not binding on Illinois courts unless adopted by our supreme court...."[8] This appellate case is the first in Illinois that has cited §17(a) of the Restatement (Second) of Trusts with approval, which obviously falls short of being a binding authority. The

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Court also refers to the comment section in Restatement (Third) of Trusts §10 [we presume looking at the comment on clause (c) of that section, to the effect that "the trust instrument may serve as an instrument of transfer."], which similarly has never been cited by any Illinois Court, prior to this case, with approval. While it is not unusual for a Court to look to a Restatement for guidance or additional support, given that the only other on-point authority is an out-of-state appellate decision is unusual, and perhaps a bit troubling.

LOOKING AHEAD

While this ruling could ultimately provide some protection to practitioners whose clients do not heed their advice in transferring assets into their living trusts after creating estate plans, in most cases, the property in question would still be distributed pursuant to the terms of trust through the probate of a companion pour over will. However, not executing a deed in trust for real estate would apparently be a nonissue given the ruling in *Mendelson*. Of course, best practice would still dictate that the lawyer prepare the deed in trust, but perhaps a lawyer can rest easier if his/her client never executes it.

But how far can we take *Mendelson*, which only addresses real estate? The Restatement and *Mendelson* aside, will financial institutions transfer individually titled accounts directly to trust beneficiaries simply because the settlor owned the account, created a trust and listed the asset on an attached schedule? Similarly, dealing with stock transfer agents is difficult enough when all of the stars are aligned. Trying to convince a transfer agent that Probate is not required simply because "Schedule A" so states, is something we do not see as being possible.

However, as pointed out by Indiana attorney Calvin E. Bellamy, in his articles[9] reporting on the similar 2012 Indiana decision of *Kesling v. Kesling*,[10] "[r]eliance on Schedule A usually will require judicial enforcement, but whatever its limitations, a detailed listing of assets on Schedule A may be an estate plan savior." It would be our hope that Mr. Bellamy is correct, and that *Mendelson* will not lead to numerous citation actions, and possibly will and trust contests, but rather to some convenience and certainty, and the "game" of how to fund a trust will prove to be less complicated for attorneys and their clients in the future. ■

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1. 2015 IL App (2nd) 150084 (no Motions to Reconsider or Rehear were filed; as of the writing of this article, an appeal to the Supreme Court has not been filed).
2. isba-trustsandestates@list.isba.org
3. 323 S.W.3d 772 (Ky. Ct. App. 2010).
4. *Mary Whittaker v. Carol Lee Stables*, 339 Ill. App. 3d 943, 791 N.E. 2d 588 (2003).
5. Restatement (Second) of Trusts §17(a)
6. *Mendelson*, at ¶ 35.
7. *Mendelson*, at ¶ 34.
8. *Collins v. Northern Trust Co. (In re Estate of Lieberman)*, 391 Ill. App. 3d 882; 909 NE 2d 915 (2009).
9. *Saving the Careless Trust Settlor: Schedule A – Parts 1 & 2*, Hoosier Banker, September and October, 2012,
10. 967 N.E. 2d 66 (Ind. App. 2012).