When Is a Person or Trust an Illinois Resident?

Rethinking income and estate taxes for snowbirds, transplants, and trustees.

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ARE THE THOUSANDS OF RESIDENTS LEAVING ILLINOIS EXTRICATING THEMSELVES correctly from their former home state? Have they properly moved their trusts to avoid Illinois taxation? Let's examine these questions in the context of Illinois estate and income taxes and consider a few special situations impacted by Illinois law. We'll also take a look at the present state-level tax environment in light of recent U.S. Supreme Court pronouncements pertaining to states' ability to tax their subjects.

Residence and estate taxes

The Illinois Estate and Generation-Skipping Transfer Tax Act (the "Estate Tax Act") provides:

> in the case of a decedent who was a resident of [Illinois] at the time of death, all of the transferred property has a tax situs in this State, including any such property held in trust, except real or tangible personal property physically situated in another state.[1]

The Estate Tax Act does not define "resident"; however, in its definition section, in referring to trusts that are subject to Illinois estate tax, the statute refers to "resident trusts" and "non-resident trusts" by cross referencing to the Illinois Income Tax Act (the "Income Tax Act").[2] So, we must look at the Income Tax Act for insight into what constitutes a "resident."

The Income Tax Act defines "resident" as "[t]he estate of a decedent who at his or her death was domiciled in this State."[3]

Whether a person is considered domiciled in Illinois is based on the facts and circumstances of each case. In general, an individual's domicile is the place where he has his true, fixed, permanent home and where he intends to return whenever he is absent. It is the place in which an individual has voluntarily fixed the habitation of himself and family, not for a special or limited purpose, and until some unexpected event shall require him to adopt a new permanent home.[4] An individual can have only one domicile at a time.[5]

The following factors are critical when establishing a new domicile:

- physically going to the new location with the intent to make it a new permanent home;
- abandoning the first residence;
- intentionally not returning to the first domicile;
- establishing physical presence in the new domicile; and
- having the intention of making the last-acquired domicile permanent.[6]

Other frequently cited factors are: 1) where a driver's license is issued; 2) where an automobile is registered; 3) where the taxpayer votes, worships, banks, shops, and obtains mail; 4) where the clubs the taxpayer belongs to are located; 5) where the taxpayer declares his address on tax returns and wills; 6) the location of the taxpayer's work assignments; 7) the location governing the taxpayer's professional licenses; and 8) the location of the taxpayer's health care advisors, attorneys, and accountants.[7]

Residence and the Illinois income tax

While the focus of the Illinois Estate Tax Act is strictly on domicile, the focus of the Illinois Income Tax Act is two-pronged: domicile or physical presence.

The Income Tax Act defines a "resident" who is subject to Illinois income tax as an individual who is in the state for other than a temporary or transitory purpose *or* domiciled in the state but is absent from the state for a temporary or transitory purpose during the tax year.[8] So, a person will be treated as an Illinois resident if they either have excessive physical presence or if the person's domicile is located in Illinois.

A person is also presumed to be an Illinois resident if they receive a homestead exemption for property in Illinois or were a resident for one year and in the next year are present in Illinois for more days than in any other state.[9]

As for the second prong of the definition, "domicile" has been addressed above and is

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1. 35 ILCS 405/5(a)(1).
2. *Id.* § 405/2.
3. 35 ILCS 5/1501(a)(20).
4. 86 Ill. Adm. Code 100.3020; see also *Holt v. Hendee*, 248 Ill. 288 (1910).
5. See *Hatcher v. Anders*, 117 Ill. App. 3d 236 (2d Dist. 1983).
6. See, *e.g.*, *Edmund Sweeney v. Ill. Dep't of Revenue*, No. 2010 L 050524 (Cook Cty. Cir. Ct., June 26, 2013), available at https://law.isba.org/37kToUH.
7. 86 Ill. Adm. Code 100.3020(g)(1).
8. 35 ILCS 5/1501; 86 Ill. Adm. Code 100.3020.
9. 86 Ill. Adm. Code 100.3020(f).

TAKEAWAYS >>

- Although many factors may determine where one is "domiciled," one pervasive characteristic is the permanence of the living situation.
- Real estate and tangible personal property based in Illinois may be subject to income and estate taxes regardless of the owner's residence; conversely, if an irrevocable *inter vivos* trust has no trustee, beneficiaries, or assets in Illinois, such trusts cannot constitutionally be subject to Illinois taxes.
- Wills and trusts should be based on the laws of the state where the trust grantor and trustee reside.

THE U.S. SUPREME COURT APPLIED A TWO-STEP 14TH AMENDMENT DUE-PROCESS CONSTITUTIONAL ANALYSIS. STEP ONE REQUIRES THE STATE TO HAVE A MINIMUM CONNECTION TO THE PERSON, PROPERTY, OR TRANSACTION THE STATE INTENDS TO TAX. STEP TWO REQUIRES THAT THE INCOME ATTRIBUTED TO THE STATE FOR TAX PURPOSES MUST BE RATIONALLY RELATED TO THE VALUES CONNECTED WITH THE STATE ….

equally applicable to the discussion of the Illinois income tax.

The Illinois Department of Revenue has published several examples to help determine residency. Here is one:

> Until the summer of 1969, Y admitted domicile in Illinois. At that time, however, to avoid the Illinois income tax, Y declared himself to be domiciled in Nevada, where he had a summer home. Y moved his bank accounts to banks in Nevada and each year thereafter spent about three or four months in Nevada. He continued to spend six or seven months of each year at his estate in Illinois, which he continued to maintain, and continued his social club and business connections in Illinois. The months not spent in Nevada or Illinois he spent traveling in other states. Y is a resident of Illinois and is taxable on his entire net income, for his sojourns in Illinois are not for temporary or transitory purposes.[10]

Special situations

Real estate and tangible personal property. Real estate and tangible personal property registered and present in Illinois could be subject to income [11] and estate taxes[12] in Illinois regardless of the owner's "residence." Specifically, the net rental income from real estate and net capital gains realized upon sale of real estate, when the real estate is in Illinois, is subject to tax in Illinois. Cars and boats physically present in Illinois are subject to tax upon gains arising from their sale. The physical presence of such assets gives Illinois a nexus to withstand constitutional challenges to taxing those items in Illinois for income tax and estate tax purposes.[13]

Business interests. An Illinois business, despite being owned by an out-of-state resident, could nonetheless be subject to Illinois income tax.[14] The net business income from businesses that are located in Illinois and conduct business solely in Illinois is subject to Illinois income tax. If the business is conducted partly in Illinois and partly in other states, then an apportionment formula applies to the net business income of all the business's sites to determine Illinois' share. Illinois' apportionment formula requires applying property, payroll, and sales factors to calculate the share of business income allocable to Illinois. For example, if a business in Illinois has a third of its property located in Illinois, a third of its payroll in Illinois, and half of its sales attributable to Illinois, the statute requires doubling the weight of the sales factor. The result is (1/3 x 1)+ (1/3 x 1) + (1/2 x 2) = 1.67 ÷ 4 = 41.75 percent of the net business allocated to Illinois.[15] Net business income is referred to in 35 ILCS 5/1501(a)(1) and means gross business income allocable to Illinois less deductions allocable to Illinois.[16]

For S corporations or partnerships, the *pro rata* share that a shareholder or partner (whether a resident or nonresident) owns represents the share of net taxable business income allocable to Illinois—the income taxes for which the shareholder or partner is responsible.[17] To make sure Illinois collects its share of taxes from business income, partnerships and S corporations are required to withhold from nonresidents their applicable Illinois income tax collectible on the nonresidents' shares of Illinois business income and the nonresidents' shares of business capital gain on the sale of real estate and tangible personal property. The withholding is then credited to the nonresident and treated as estimated payment of Illinois income tax.[18]

Wages. Nonresident individuals are taxable only with respect to income derived from or connected to Illinois sources.[19] Part-year residents are subject to tax on income received from all sources while a resident and the portion of income derived from Illinois sources while a nonresident.[20]

Wages earned from sources in Illinois are subject to Illinois taxes.[21] Whether wages are considered "earned" in Illinois are determined by looking at where the services were performed.[22] Wages are

ISBA RESOURCES >>

- Oliver R. Merrill, *U.S. Supreme Court Addresses State Income Taxation of Trusts in* Kaestner, Trusts & Estates (July 2019), law.isba.org/33VFHZR.
- Richard D. Felice & Joseph M. Beck, *Is It Income? Depends Who Is Counting*, Family Law (Feb. 2019), law.isba.org/2Pe0LqD.
- Cary A. Lind, *Estates and Trusts Have to File Income Taxes*, Trusts & Estates (Feb. 2018), law.isba.org/2P9yod4.

10. *Id.* § 100.3020(c), Example 2.
11. 35 ILCS 5/303.
12. 35 ILCS 405/5.
13. *Quill Corp. v. N. Dakota by & Through Heitkamp*, 504 U.S. 298 (1992) (enunciating the physical presence rule); *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) (enunciating the even broader substantial nexus rule).
14. 35 ILCS 5/303–308.
15. *Id.* § 5/304.
16. *Id.* § 5/1501(a)(1). *Id.* § 5/205 and *id.* § 5/1501 provide an exclusion from the Illinois replacement tax for Investment Partnerships, which engage in buying and selling investment securities not as a dealer.
17. *Id.* § 5/305; *id.* § 5/308.
18. *Id.* § 5/709.5.
19. *Id.* § 5/302–308; Ill. Dep't of Revenue, Gen. Info. Ltr., IT 15-0007-GIL (July 14, 2015), 2015 WL 13776911 (explaining that for allocation of wage income, all items of compensation paid in Illinois to a nonresident at the time of payment shall be allocated to Illinois).
20. 35 ILCS 5/301.
21. *Id.* § 5/302.
22. *Id.* § 5/304(a)(2)(B).

considered earned in Illinois if services are performed within Illinois or primarily in Illinois; or, the base of operations from which services are performed or the source of control of the business is located in Illinois.[23] For example, if a former Illinois resident who worked at an Illinois business moves to Florida and continues to provide services to the Illinois business, he or she must pay Illinois income tax on wages received.

There is one exception to the "wages earned in Illinois" rule: Where Illinois enters into an agreement with another state to not tax wages earned by residents of the other state *and* the other state agrees to not tax Illinois residents, the non-Illinois residents will not be subject to Illinois income tax. (They still will be subject to their home state's income tax.[24])

Trusts. The Income Tax Act requires "resident trusts" to pay tax on their income. A "resident trust" means a trust created by an Illinois person who was domiciled in Illinois at death and an irrevocable *inter vivos* trust created by a grantor who was domiciled in Illinois when the trust became irrevocable. (But if the trust is a grantor trust for federal income tax purposes, then the trust will not be considered irrevocable until the grantor trust status ends.[25]) The Illinois Department of Revenue reads this to mean that an "irrevocable" trust, once established in Illinois and subject to Illinois tax, can never be changed to remove it outside Illinois. Illinois' trust taxation regime is commonly known as a grantor-domicile trust taxation standard. States have also adopted trust taxation regimes by applying a beneficiary-domicile standard or a trustee-domicile standard.

Due process, physical presence, and caselaw

Fielding v. Commissioner of Revenue. *Linn v. Dep't of Revenue* is a critical 2013 Illinois appellate court opinion on grantor-domicile standards of trust taxation. *Linn* pointed out the unconstitutionality of that statutory position if the irrevocable trust, created as an *inter vivos* trust and not as a testamentary trust, no longer has contacts in Illinois. If the irrevocable *inter vivos* trust has no trustee, beneficiaries, or assets in Illinois, the court held such trusts cannot be subject to Illinois taxes under the Due Process Clause.[26]

A case very similar to *Linn* was recently presented to the U.S. Supreme Court for review in late 2018. The writ of *certiorari* to the Supreme Court on this similar case was rejected on June 28, 2019, which meant the Minnesota Supreme Court's decision stood, denying the state sufficient nexus to tax the trust on its undistributed income under the Due Process Clause. The name of the case is *Fielding v. Commissioner of Revenue*.[27] The history of the case is instructive for Illinois taxpayers.

The Minnesota Tax Court and the state's Supreme Court both found that a state statute that taxed a trust simply because the grantor of the trust was domiciled in Minnesota at the time the *inter vivos* trust became a nongrantor trust violated the U.S. Constitution's Due Process Clause and the Minnesota Constitution. Minnesota treated the trust as irrevocable when the status changed from a grantor trust to a nongrantor trust; once it was set up as irrevocable, the *inter vivos* trust was forevermore subject to Minnesota taxes, much like Illinois' grantor-domicile trust taxation law.

In *Fielding*, the grantor, a domiciliary of Minnesota, created irrevocable trusts in 2009 and funded them with stock of a Minnesota S corporation. The trusts were governed by Minnesota law. At the time the grantor created the trusts, he retained a power to substitute the trusts' assets, which made the trusts "grantor trusts" for federal income tax purposes. A "grantor trust" means that all income and expenses of the trust are treated as belonging to the grantor and reported on the grantor's personal income tax return, not on a separate trust income tax return. An "*inter vivos* trust" means a trust created during the grantor's lifetime. In 2011, the grantor relinquished the power to substitute assets, making the trusts "nongrantor trusts" and "irrevocable" under Minnesota law.

TO AVOID THE POTENTIAL IMPOSITION OF ILLINOIS TAXES, THE TRUSTEE SHOULD NOT BE AN ILLINOIS RESIDENT; THE APPLICABLE TRUST LAW SHOULD BE CHANGED FROM ILLINOIS; THE ADMINISTRATION OF THE TRUST SHOULD NOT BE BASED IN ILLINOIS; AND THE BENEFICIARIES SHOULD NOT BE LOCATED IN ILLINOIS.

Consequently, all undistributed income and expenses were then treated as belonging to the trusts and reported on the separate trusts' income tax returns. The trusts filed income tax returns and paid taxes to Minnesota on all undistributed income earned in 2012 and 2013. In 2014, the trusts filed income tax returns under protest and also sought refunds for past years' income taxes. The trusts admitted they owed income taxes to Minnesota on operating income of the Minnesota-based S corporation that flowed through to the trusts as owners.[28] But the trusts denied that they owed any taxes for the interest, dividends, and other investment returns retained in trust and not distributed to the beneficiaries, arguing that the Minnesota statute that imposes taxes on the trusts' worldwide income, based on the residency of the grantor at inception, and thereafter

23. *Id.*
24. *Id.* § 5/302(b).
25. *Id.* § 5/1501(a)(20).
26. *Linn v. Dep't of Revenue*, 2013 IL App (4th) 121055.
27. *Fielding v. Comm'r of Revenue*, No. 8911-R, 2017 WL 2484593 (Minn. Tax May 31, 2017) (tax court decision), aff'd, 916 N.W.2d 323 (Minn. 2018), petition for certiorari denied, U. S. Supreme Court, June 28, 2019 (No. 18-664).
28. If a trust distributes business income or sale proceeds from the sale of real estate or tangible personal property located in Illinois, it must withhold income taxes from distributions to a nonresident beneficiary, enabling the beneficiary who will owe taxes on such income to get credit as estimated Illinois income taxes. 35 ILCS 5/709.5.

indefinitely into the future, was unconstitutional. At no time was the trustee of the trusts a Minnesota resident and only one of the four beneficiaries, the grantor's son, was a Minnesota resident. The Minnesota law firm hired to draft the trusts represented the grantor—not the trust.

The court discounted the retention of the legal documents at the Minnesota law firm's offices as a convenience for the grantor. Although the trusts held stock of a business that operated in Minnesota, the stock in the business (an intangible asset) was titled in the name of the trustee, who was not a Minnesota resident. In 2014, the trustee of the trusts made discretionary distributions to some of the beneficiaries who were not Minnesota residents, and to the grantor's son, who reported the distribution on his 2014 personal Minnesota income tax return.

The Minnesota Supreme Court held: 1) the trusts are legal entities separate from the grantor and the beneficiary; 2) the relevant inquiry is to examine the connections between the state and the trustee; and 3) the connections between the state and the trustee must be examined to weigh the need for the state to tax the trusts against the protections and benefits provided to the trusts' activities that generated their income in the years in question. The Minnesota Supreme Court decided that the trustee, a nonresident of Minnesota, had too tenuous a connection to Minnesota to satisfy the due-process standard. In closing, the Minnesota Supreme Court contrasted testamentary trusts, which owe their existence to the state probate courts that legalize their existence, with *inter vivos* trusts created by the grantor before he died. The *Fielding* appellees in their reply brief to deny *certiorari* pointed out that the four other state courts that addressed the question of grantor-domicile status for tax nexus of *inter vivos* irrevocable trusts rejected that nexus as unconstitutional when based solely on the domicile of the grantor.[29]

On June 28, 2019, the U.S. Supreme Court denied *certiorari* and let the Minnesota Supreme Court's decision stand. It certainly can be argued by analogy to *Fielding* (and by invoking *Linn*) that an Illinois trust, created by an Illinois grantor during his lifetime, with no other connections to Illinois, cannot be subjected to Illinois income tax.

North Carolina Dep't of Revenue v. Kimberley Rice Kaestner. In contrast to the grantor-domicile trust taxation rule, states have also adopted a beneficiary-domicile trust taxation standard. That standard says that a state has adequate nexus to tax the undistributed income of a trust when the beneficiary resides in state. That scope of the standard recently was litigated before the U.S. Supreme Court in *North Carolina Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, resulting in a decision issued on June 21, 2019.[30]

The *Kaestner* case involved North Carolina's ability to tax an *inter vivos* trust's income earned from 2005 through 2008 based on the in-state residency of the beneficiary who had no right to demand the trust income,[31] did not receive income in the relevant tax periods, and may never receive the income or principal of the trust. The trust was created by a New York grantor under New York law when no beneficiaries lived in North Carolina and was managed by a New York trustee (who was succeeded by a Connecticut trustee). The trustee kept the trust documents and records in New York; the trust asset custodians were located in Massachusetts. The trust had no physical presence in North Carolina, made no direct investment in the state, and held no real property there. The trustee did not distribute any income to the beneficiary during the years in question. Instead, the trust accumulated income. The trustee had paid income taxes on the trust's income during the years in question, but then had a change of heart and filed for refunds.

The U.S. Supreme Court applied a two-step 14th Amendment due-process constitutional analysis. Step one requires the state to have a minimum connection to the person, property, or transaction the state intends to tax. Step two requires that the income attributed to the state for tax purposes must be rationally related to the values connected with the state (a sort of *quid pro quo* equation). The court never reached step two because it found the state flunked step one: There was no minimum connection between the state and the beneficiary, who had no possession, control, or assured right to the trust property. In deciding *Kaestner*, the justices echoed the U.S. Supreme Court's earlier decisions in *Wayfair* and *Quill*. *Wayfair* expanded the due-process, *quid-pro-quo* standard of *Quill* and overturned the physical-presence-requirement-for-minimum-connection-necessary-for-the-protection-of-interstate-commerce standard previously enunciated in *Quill*. But taking inspiration from *Quill*, the Court relied on the minimum-connection principle.

Quill Corp v. North Dakota. In *Quill Corp v. North Dakota*,[32] the U.S. Supreme Court concluded that the Due Process Clause of the 14th Amendment requires a *quid pro quo* between the benefits the state offers to a taxpayer and the tax obligations imposed on that taxpayer. In the *Quill* case, the Court did not find it necessary, in applying the due process test, for a mail-order vendor to have a physical presence in the state to avail itself of the state's marketplace. The Court also would have allowed the state to impose sales tax on the vendor. However, the *Quill* Court denied the enforceability of the North Dakota tax mandate on vendors by applying the Commerce Clause of the U.S. Constitution, saying the mandate failed to meet the substantial nexus test (a "physical presence") and unfairly burdened interstate commerce. *Quill* is important

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29. *Fielding*, U.S. Sup. Ct. No. l8-664, Respondent's Brief in Opposition to Certiorari, filed Jan. 22, 2019, p. 19.

30. *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, No. 18-457, 2019 WL 2552488 (U.S. June 21, 2019).

31. Interestingly, Kaestner (the beneficiary), had a later right to demand the principal of the trust in 2009 at her 40th birthday (after the tax years in question), but after consulting with the trustee, the trustee "decanted" the trust into a new trust in 2009 (after the tax years in question), before Kaestner's 40th birthday, which eliminated her withdrawal right.

32. *Quill Corp. v. N. Dakota by & Through Heitkamp*, 504 U.S. 298 (1992).

because it originated the *quid pro quo* measure for the due-process inquiry into a state's right to tax.

South Dakota v. Wayfair, Inc. More recently, on June 21, 2018, the U.S. Supreme Court upset *stare decisis* in *South Dakota v. Wayfair, Inc.*[33] and reversed its own self-imposed "physical presence" test for measuring whether state taxes inordinately burdened interstate commerce. The majority in *Wayfair* found that the physical-presence standard distorts commerce, discriminates in favor of out-of-state vendors, costs states millions of dollars in lost tax revenue, and impedes upon state sovereignty. Thus, the majority dismissed its prior Commerce-Clause barrier preventing states from taxing vendors for lack of physical presence. The majority also cited the holding in *Quill* to support its due-process argument. After applying the newly revised standard, which said there were sufficient economic and virtual contacts with the state to impose tax burdens on the vendor, the majority remanded the case to the South Dakota Supreme Court to consider the amount of tax owed by the vendor who sold products in South Dakota by long distance. The dissent generally said *stare decisis* should prevail, and the long-established principle of "physical presence," critical to the Commerce Clause nexus standard, should be left to Congress to address.

The unresolved trustee-domicile standard

The *Kaestner* opinion mused upon prior judicial holdings that describe when the Due Process Clause is satisfied. When a trustee is a state resident, or when the site of trust administration is located in the state, there is a constitutional basis for the state to tax the trust activity. This is frequently called the trustee-domicile standard.

One of the remarkable aspects of the *Kaestner* decision is the number of times Justice Sotomayor, writing for a unanimous opinion, limited the scope of the decision by saying the Court: 1) did not address the Commerce Clause; 2) did not address the second step in the due-process analysis (the *quid pro quo* standard); 3) limited its decision to the facts of the case (it was conceivable that an in-state beneficiary with a different relationship to trust assets would be an adequate nexus for taxation); 4) expressed no opinion on whether an in-state settlor of a trust with less than the right to revoke the trust and regain possession of the assets would be an adequate nexus for taxation; 5) expressed no opinion on the degree of possession, control, or enjoyment lodged in the beneficiary sufficient to impose tax on an in-state beneficiary; 6) expressed no opinion on whether an in-state beneficiary's right to assign its interest in the trust constituted enough control to establish an adequate nexus for taxation; 7) reserved for another day whether an in-state beneficiary, who was certain to obtain trust funds in the future, established an adequate nexus for taxation; 8) found it unnecessary to address whether the test of nexus is determined solely by the trustee's relationship to the state; 9) expressed no opinion on other state income taxes of trusts where the residencies of the beneficiary and grantor are relevant factors, or where the state taxes the trust only because of the residency of the noncontingent beneficiaries; 10) observed that the trust raised no objection to a state's income taxation of throwback income, which taxes a trust's accumulated income that is currently distributed to a beneficiary, and is not addressing that subject; and 11) limited its decision to circumstances in which an in-state beneficiary receives no trust income, has no right to demand that income, and is uncertain to receive a specific share of that income.[34]

Because of the remarkable number of disclaimers, limitations, and distinctions made by Justice Sotomayor, Justices Alito, Gorsuch, and Roberts filed a concurring opinion to say that the Court merely applied existing precedent and its decision "[n]ot to answer questions not presented by the facts of this case does not open for reconsideration any points resolved by our prior decisions."[35] The concurring opinion reframed the question of due process as requiring an examination of the connections between the assets held in trust and the state. It started the argument by citing how easy it is to identify tangible personal property with a nexus to a particular state where the property is located. It then contrasted the treatment of intangible property held in trust. The concurring justices, relying on a 1947 U.S. Supreme Court decision, concluded that a trustee's state of residence can tax the trust's intangible assets. They also concluded that two U.S. Supreme Court decisions from the 1920s indicate that a state can tax intangible assets and undistributed income in a trust when looking at the residency of the beneficiary and only when the in-state beneficiary of the trust has control, possession, and ability to use and enjoy the trust assets. In a footnote, the concurring justices noted that even if an in-state beneficiary had a present right to receive income from the trust, that alone would not justify the state taxing the corpus of the trust.

The *Kaestner* majority reserved the question of whether an in-state grantor of a trust with less than the right to revoke the trust and regain possession of the assets would be an adequate nexus for taxation and did not clarify the grantor-domicile rule. Because the majority and concurring opinions in *Kaestner* deliberately left open the question of the residency of the grantor as sufficient nexus and by denying *certiorari* in the *Fielding* case a few days after issuing its *Kaestner* opinion, the Court failed to solve the very dilemma it created. No light was shed on the type of grantor-domicile standard used in Illinois.

Leaving Illinois behind?

What should former Illinois residents do with their trusts? First, they should address the grantor-domicile standard

33. *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).
34. *Kaestner*, 2019 WL 2552488.
35. *Id.* (J. Alito, J. Gorsuch, and J. Roberts concurring).

by assuring the grantor has no retained powers to influence the trust. Second, to avoid the potential imposition of Illinois taxes, the trustee should not be an Illinois resident; the applicable trust law should be changed from Illinois; the administration of the trust should not be based in Illinois; and the beneficiaries should not be located in Illinois. Doing so means the undistributed income of the trust can be accumulated free of Illinois income tax and the accumulation can be distributed to beneficiaries free of Illinois income taxes. If the beneficiaries remain located in Illinois, their rights to receive distributions should be governed by the discretion of the trustee. The beneficiaries should not have control over the trust.

How are these changes to an existing trust to be accomplished? Many irrevocable trusts include language for changing the situs of the trust and its applicable law, and most trusts permit changing trustees. Some trusts give powers of appointment that allow trusts to be reconstructed; some appoint trust protectors to accomplish needed changes. Illinois law also permits changes to trusts by nonjudicial settlement agreements[36] and decanting one trust into another newly created trust[37] as means by which changes could be accomplished. (See "The New Illinois Trust Code: Practical Pointers" on page 26 of this issue.)

Conclusion

Snowbirds and transplants who no longer want to be characterized as Illinois residents should meet several tests to avoid estate and income taxes there: a) have a domicile clearly established outside of Illinois; b) avoid spending more time in Illinois than in any other state; c) have no real estate or tangible personal property in Illinois; d) own no interests in Illinois businesses that allocate business income to its owners; and e) receive no wages from an Illinois employer.

Any former Illinois resident who created an existing irrevocable trust should discuss with the trustee terminating any connection with Illinois, including the trustee's residence, and make sure that no beneficiaries located in Illinois can administer assets or control how assets are distributed, and that the beneficiaries rely on a third-party trustee's discretion for distributions. Former residents also should redo their will and trust, name trustees located outside of Illinois, and apply the laws of their newly adopted state for the will and trust. IBJ

36. 760 ILCS 5/16.1.
37. *Id.* § 5/16.4.

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