



# ELDER LAW

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

## Message from the Chair

By Kristi Vetri

Lots of "hot topics" in the elder law field this year. Two of these topics include Health Care Reform in Illinois and the implementation of the DRA and SMART Act. Your Elder Law Section anticipates a two-day CLE addressing hot topics, reviewing the elder law basics and discussing ideas to advance your practices. We have a busy legislation sub-committee and will keep you abreast of important initiatives and bills affecting elder law and your practice.

Please visit our Section's ISBA Web page at <<http://www.isba.org/sections/elderlaw>> regularly for updates and current information about our section. If you haven't done so, please sign up for the Elder Law Discussion List. The link is

found on our Web page. Through this list-serve you can be involved in our activities and receive assistance from other members as questions or issues arise in your practice.

It is my pleasure to serve as your 2013-2014 Chair this year and I look forward to serving you.

Kristi Vetri ■



Kristi Vetri

## Adult protective services

By Karen Alice Kloppe, Deputy General Counsel, Illinois Department on Aging

[This article has been written by the author in her personal capacity for informational purposes only. It is not an official document of the Illinois Department on Aging or the State of Illinois.]

Following up on work initiated to strengthen reporting requirements and protective services for Adults with Disabilities pursuant to Executive Order 12-02, Governor Quinn signed House Bill 948 into law as Public Act 98-49, effective July 1, 2013. This new law adds Illinois to the ranks of other states that operate a single Adult Protective Services Program. Previously, administrative responsibility to investigate reports of alleged abuse had been split based on the age of the at-risk individual. Under the Abuse of Adults with Disabilities Intervention Act (20 ILCS 2435), the Office of the Inspector General

at the Department of Human Services (DHS) handled cases involving adults with disabilities aged 18 through 59 living in domestic settings in the community, and the Department on Aging ("Aging") responded to incidents affecting similarly-situated senior citizens 60 years of age or older under the Elder Abuse and Neglect Act (320 ILCS 20).

New reports of abuse, neglect, or financial exploitation should now be referred to Aging if an adult with disabilities or a senior citizen resides in a domestic, or non-institutional, setting. See 320 ILCS 20/3(a). Aging will use its statewide network of 41 local provider agencies to conduct investigations and offer early intervention services. DHS will continue to respond to allegations involving only individuals receiving services within mental

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## Adult protective services

*Continued from page 1*

health facilities, developmental disabilities facilities, and community agencies that it operates, licenses, funds or certifies which are not licensed or certified by any other State agency. See 20 ILCS 1305/1-17(a).

To report suspected abuse, neglect, or financial exploitation:

For persons with disabilities aged 18-59 and adults aged 60 and older who live in domestic (non-institutional) settings, call the statewide, 24-hour **Adult Protective Services Hotline** (formerly the Elder Abuse Hotline): **1-866-800-1409, 1-888-206-1327 (TTY)**.

For persons with disabilities aged 18-59 who live in institutional settings, call the **Illinois Department of Human Services Office of the Inspector General Hotline: 1-800-368-1463 (voice and TTY)**.

For residents who live in nursing facilities, call the **Department of Public Health's Nursing Home Complaint Hotline: 1-800-252-4343**.

For residents who live in Supportive living Facilities (SLFs), call the **Department of Healthcare and Family Services' SLF Complaint Hotline: 1-800-226-0768**.

You may also call your local Adult Protective Services Provider Agency listed on Aging's Web site at <[http://www.state.il.us/aging/1directory/APS\\_providerlist.pdf](http://www.state.il.us/aging/1directory/APS_providerlist.pdf)>.

Link to Executive Order 12-02: <<http://www.illinois.gov/Government/ExecOrders/Documents/2012/execorder2012-02.pdf>>.

Link to Public Act 98-49: <<http://www.ilga.gov/legislation/publicacts/98/098-0049.htm>>.

A chart summarizing key features of the new Adult Protective Services Act follows, on the next page, but practitioners should note that Public Act 98-49 also creates the Statewide Centralized Abuse, Neglect, Financial Exploitation, and Self-Neglect Act, repeals the Abuse of Adults with Disabilities Intervention Act, and amends various other statutes.

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The articles in this newsletter are not intended to be used and may not be relied on for penalty avoidance.

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

	Past	Present
<b>Act name</b>	Elder Abuse and Neglect Act	Adult Protective Services Act
<b>Citation</b>	320 ILCS 20	Same; Public Act 98-49
<b>Legislative Action</b>	Renamed Act	
	Amended Sections 1, 2, 3, 3.5, 4, 4.1, 5, 8, 9, and 15	
	Added new Sections 7.1, 7.5, and 15.5	
<b>Effective Date</b>		July 1, 2013
		January 1, 2014 for Section 7.5
<b>Protected Population – eligible adults</b>	A person 60 years of age or older who resides in a domestic living situation and is, or is alleged to be, abused, neglected, or financially exploited by another individual or who neglects himself or herself	Same
		An adult with disabilities aged 18 through 59 who resides in a domestic living situation and is, or is alleged to be, abused, neglected, or financially exploited by another individual or who neglects himself or herself
<b>Defined terms</b>		Adult with disabilities (new)
		Disability (new)
		Domestic living situation (amended; also see Public Act 98-0104, effective July 22, 2013)
		Eligible adult (amended)
		Financial exploitation (new)
		Mandated reporter (amended)
		Provider agency (amended)
<b>Reporting of abuse, neglect, or financial exploitation</b>	Voluntary reporting authorized by 320 ILCS 20/4(a)	Same
	Mandated reporters defined at 320 ILCS 20/2(f-5)	Added an employee of an entity providing developmental disabilities services or service coordination funded by the Department of Human Services
	Mandated reporting authorized by 320 ILCS 20/4(a-5)	Same citation; report required within 24 hours after reporter develops a belief that an eligible adult (who has been abused within the previous 12 months) is unable to seek assistance for himself or herself because of a disability or other condition or impairment
<b>Reporting by provider agencies, law enforcement agencies, and coroners or medical examiners</b>	Provider agencies must refer criminal conduct referred to law enforcement agencies (320 ILCS 20/3(c) and 5)	Same
	Provider agencies required to immediately report deaths believed to result from abuse or neglect to coroners or medical examiners (320 ILCS 20/5(b))	Same
		Law enforcement agencies and coroners or medical examiners must supply records as requested by multi-disciplinary teams in particular cases (320 ILCS 20/3(a-5))

		Provider agencies required to immediately reports suspicious deaths to law enforcement agencies and coroners or medical examiners (320 ILCS 20/3(c-5))
		Law enforcement agencies and coroners or medical examiners must supply provider agencies with a summary of actions taken in response to a report of a suspicious death upon request (320 ILCS 20/3(c-5))
	Law enforcement officer continue to report incidents of alleged abuse pursuant to the Illinois Domestic Violence Act of 1986 (320 ILCS 20/4(a-9))	Same
<b>Access to records</b>	All records concerning reports, neglect, financial exploitation, or self-neglect are confidential (320 ILCS 20/8(a))	Same
	All records generated as a result of such reports are confidential (320 ILCS 20/8(a))	Same
	Disclosure authorized to individuals specifically listed in the Act (320 ILCS 20/8(1-9))	Same
		Authority to disclose expanded to include members of the Illinois Medical Disciplinary Board or other licensing bodies at the discretion of the Director of the Department on Aging (320 ILCS 20/8(9))
		Authority to disclose expanded to include staff at Department of Healthcare and Family Services when services funded for eligible adult (320 ILCS 20/8(9-a))
		Authority to disclose expanded to include staff at Department of Human Services when services funded for eligible adult or providing reimbursement for services provided by the abuser or alleged abuser (320 ILCS 20/8(9-b))
		Authority to disclose expanded to include hearing officers determining whether abuse warrants reporting to the Health Care Worker Registry ( (320 ILCS 20/8(10))
<b>Anticipated rulemaking projects</b>	Promulgated rules are located at 89 Ill. Adm. Code Part 270	Standards for minimum staffing levels and staff qualifications (320 ILCS 20/3(a-1))
		Standards for investigation and procedures for linking eligible adults to appropriate services and supports (320 ILCS 20/3(a-1))
		Establishment of multi-disciplinary team by provider agencies (320 ILCS 20/3(a-5))
		Notice for caregivers regarding abuse reports to the Health Care Worker Registry (320 ILCS 20/7.5(d))
		Procedures for caregiver challenges regarding abuse reports to the Health Care Worker Registry (320 ILCS 20/7.5(g))
		Standards for the removal of a name from abuse reports in the Health Care Worker Registry (320 ILCS 20/7.5(i))
		Action necessary to ameliorate risk in cases of serious injury or death (320 ILCS 20/9(d))
		Determinations regarding whether an eligible adult lack capacity to consent to necessary services (320 ILCS 20/9(d-5))
		Implementation of Abuse Fatality Review Teams in each Planning and Service Area in Illinois (320 ILCS 20/15(g))
		Monitoring of the adult protective service system (320 ILCS 20/15.5)

# Snowbirds fly free of Illinois tax

By Steven E. Siebers and Emily Schuering Jones

The taxpayers in *Cain v. Hamer*<sup>1</sup> were classic snowbirds. Residents of Illinois since 1964, they built a second home in Florida in 1990. Within several years, they began spending a portion of each year in Florida. Every October through May, they enjoyed Florida's warmer climes. They returned to Illinois once during the holidays, before again fleeing the Midwest winters.

This pattern raises an important question: how can an Illinois resident who maintains contacts with Illinois qualify as a nonresident who is no longer subject to Illinois income tax? In a surprisingly taxpayer-friendly decision, *Cain v. Hamer* provides a judicial road map for an Illinois snowbird.

## The background

From 1964 until 1995, the taxpayers lived and worked in Illinois. They were admittedly Illinois residents and filed resident income tax returns for those years. In 1995 they began to take steps to change their domicile to their second home in Florida, while continuing their snowbird pattern of spending more than five months a year in Illinois. In 1996 they discontinued filing Illinois income tax returns, asserting they were nonresidents.

Apparently and not surprisingly, their tax advisors became concerned that failing to file Illinois tax returns for the years 1996 through 2004 resulted in indefinite exposure to a notice of deficiency. To bring certainty to their potential Illinois tax exposure of \$1.8 million (tax and penalties) for those years, the taxpayers paid under protest and filed suit for declaratory judgment. The suit sought a judicial determination that they were not residents for purposes of the Illinois income tax for the years 1996 through 2004. When the trial court granted the taxpayers' motion for summary judgment, the State appealed, presumably anticipating a favorable result under the least deferential de novo standard of review.

## Facts favorable to the taxpayers

As a first step to freeing themselves of the Illinois income tax, in November 1995 the taxpayers filed a written declaration of domicile in Florida. They renounced their Illinois residency, asserting they had changed domicile to the Florida home constructed in 1990. This action was taken in accordance

with a Florida statute providing for such a declaration.<sup>2</sup>

The taxpayers also took a number of other steps to establish their Florida domicile. They:

- Obtained Florida permanent resident identification cards in 1995 and 1996,
- Held Florida drivers' licenses,
- Voted in Florida,
- Received Florida jury duty summonses during the relevant time period,
- Had newspapers delivered to their Florida residence,
- Purchased burial plots in Florida,
- Developed relationships with several medical professionals in Florida (while continuing relationships with their Illinois doctors),
- Retained legal advisors in both Florida and Illinois,
- Kept some records to prove their physical presence in Florida, Illinois, and other locations during the years in question.

The husband also used a cellular telephone with a Florida area code and maintained a Florida firearm license. The couple's credit card statements for 2001 through 2004 showed that 73% of their expenditures were made outside of Illinois and that they were making those expenditures outside of Illinois 61% of the time.

## Facts detrimental to the taxpayers

In August 1995, the year taxpayers claimed their Illinois residency ended, they began construction of an addition to their Illinois house. They continued to own their Illinois home and occupied it for more than five months a year. The opinion provides incomplete facts on their precise physical presence during the nine years at issue, 1996-2004. However, the facts discernible from the opinion are summarized in the following table:

Calendar Year	Florida days	Illinois days	Other location days
1996	159	161	45
2004	170	171	24
1996-2005	1700	1666	284

The table discloses that in calendar years 1996 and 2004 the taxpayers actually spent more days in Illinois (161 and 171) than Flor-

ida (159 and 170). During the ten years from 1996 to 2005, the days spent in Florida (1700) only narrowly exceeded the time spent in Illinois (1666).<sup>3</sup> No mention is made in the opinion of their physical presence in Illinois for the other seven tax years in question.

The couple continued to own Illinois businesses, although the opinion said the taxpayers had "distanced" themselves from their businesses. What that means is unclear, other than to suggest the taxpayers were no longer working in the businesses. The wife renewed her Illinois interior design license without showing a change of address, despite doing no business in either Illinois or Florida.

The couple used Illinois income tax preparers to help them file their federal tax returns. They made political contributions to Illinois and national candidates and some other state candidates, but no Florida candidates. They continued memberships in various expensive clubs in Illinois, spending \$236,000 from 2003 to 2006. (They did, however, spend even more on clubs in Florida during those same years: \$422,500.)

## The law on Illinois income tax: when does the privilege end?

The Illinois Income Act imposes income tax "on the privilege of earning or receiving income in or as a resident of the state."<sup>4</sup> Since the taxpayers in this case were not earning or receiving income in Illinois, the issue was of residency.

Individuals are considered Illinois residents if they are present in the state for other than a "temporary or transitory purpose" or are "domiciled" in Illinois but leave for a temporary or transitory purpose.<sup>5</sup> If individuals leave the state for other than a temporary or transitory purpose or establish domicile elsewhere, they cease to be Illinois residents.<sup>6</sup> Stated differently, an individual loses his Illinois domicile:

- 1) by locating elsewhere with the intention of establishing the new location as his domicile, and
- 2) by abandoning any intention of returning to Illinois.<sup>7</sup>

The taxpayers were admittedly Illinois residents prior to their move to Florida in 1995. The question to be decided was whether their move to Florida constituted a change

in domicile or a departure from Illinois for "other than a temporary or transitory purpose" so that they lost their Illinois residency, or, conversely, whether their periodic returns to Illinois were for "other than a temporary or transitory purpose" so that they should be classified as Illinois residents.

The court reviewed the four common law elements required for a change of domicile: (i) physical abandonment of the first domicile; (ii) an intent not to return to the first domicile; (iii) physical presence in the new domicile; and, (iv) an intent to make that one's domicile.<sup>8</sup> The first three tests are easily met in this case: the taxpayers physically left their Illinois home, renounced their Illinois residency, moved to Florida, and declared Florida their domicile. According to the court, the "difficulty comes in determining whether the taxpayers "abandon[ed] any intention of returning" to their Illinois home."

After their move, the taxpayers split their time roughly equally between the two states. The court found the taxpayers maintained an intent to return to both Illinois and Florida for approximately half of their time during 1996 through 2004. The income tax regulations make clear that individuals may have only one domicile, and the Illinois Department of Revenue was not arguing that the taxpayers' domicile alternated between Florida and Illinois. So the court held that a concept of "intent to return" cannot be the basis to decide residency. Instead, the court adopted the concept of domicile as an intended permanent home (and of "return" as a permanent, indefinite, or lengthy return). Here, the taxpayers chose Florida as their domicile. The court found the contacts, memberships and real property holdings maintained in Illinois after their 1995 move were outweighed by "changing their voter registrations to Florida, paying Florida income taxes,<sup>9</sup> obtaining residency cards and drivers' licenses in Florida, and filing a declaration of their Florida residency." Thus, the court concluded the taxpayers' intent was quite clear: they wished to establish Florida as their permanent residence in 1995, even though they planned to keep ties in Illinois and have regular seasonal visits. The court said the taxpayers intended to live in Florida for half the year and to visit Illinois, not the other way around.

Looking for further support, the court reviewed examples contained in the income tax regulations. The regulations state that whether an individual in Illinois is there tem-

porarily or transitorily will depend on the facts and circumstances.<sup>10</sup> Again, in this case the taxpayers split their time roughly equally between Florida and Illinois. The court recited verbatim and analyzed three examples contained in the income tax regulations. According to the court, the examples make clear that the degree of time splitting does not render individuals' presence in Illinois other than "temporary or transitory." In two of the examples, the hypothetical individuals' three- to four-month-long yearly trips to another state did not affect their residency because other factors regarding their intent are considered controlling. In the third example, the individuals spent over four months in Illinois and actually owned a home in Illinois, but were nonetheless considered Minnesota residents because the connection of the individuals to Minnesota was closer than it was to Illinois. The court found this third example to be applicable to the Cains. Although the taxpayers maintained some Illinois ties, including social club memberships and the continued ownership of their long-time home, the court found the facts showed a much stronger connection to Florida. The court then reviewed those connections: spending more money on Florida social clubs, holding drivers' licenses and residency cards in Florida, voting in Florida, using a Florida telephone number, spending more money in Florida than in Illinois, and purchasing burial plots in Florida. The court said that while the ties between Illinois and their companies continue, the taxpayers have distanced themselves from their companies. Likewise, although the taxpayers' charitable foundation is still involved in Illinois causes, the taxpayers had "begun to shift its focus to Florida." In the court's opinion, these facts established the taxpayers had a much stronger connection to Florida than to Illinois. Based on the examples given in the regulations' definition of "temporary and transitory purpose," the court found the "regularity and duration of the taxpayers' visits to Illinois do not affect their residency status in the face of this disparity in connections."

Last, the court pointed to the income tax regulations that list the types of evidence that help to determine whether an individual is an Illinois resident. Those include evidence of "voter registration, automobile or driver's license registration, filing an income tax return as a resident of another state, home ownership or rental agreements, club and/

or organizational memberships and participation, telephone and/or other utility usage over a duration of time."<sup>11</sup> The court found the evidence the taxpayers introduced of their connections with Florida were consistent with the taxpayers being Florida residents.

### **Ten planning points for taxpayers with Illinois contacts who seek to avoid Illinois income tax – The lessons of Cain**

1. If the taxpayer works in Illinois or earns income from an Illinois source (such as real estate located in Illinois), that income is subject to Illinois income tax regardless of residency.<sup>12</sup>
2. If the taxpayer has only retirement income, Illinois exempts it by allowing a subtraction of retirement income in computing Illinois taxable income.<sup>13</sup>
3. An Illinois resident has the right to establish a domicile different from Illinois under the four part test:
  - a. physical abandonment of the first domicile;
  - b. an intent not to return to the first domicile;
  - c. physical presence in the new domicile; and
  - d. an intent to make that one's domicile.
4. The taxpayer should pick a state like Florida, which has a statute authorizing the individual to designate it as the state of residency. The taxpayer should fully comply with the statute.
5. Individuals may have only one domicile, and domicile does not alternate between two states during a calendar year.
6. The taxpayer should maintain logs of physical presence during the year.
7. The issue of whether a taxpayer's presence in Illinois is other than "temporary or transitory" is a fact and circumstances test but the following do not make a person an Illinois resident:
  - a. being physically present in Illinois for a significant amount of time each year (more than five months but less than six months),
  - b. retaining ownership of an Illinois house,
  - c. being a member of social clubs in Illinois
8. The taxpayer should take all action in the new state of residence as if the taxpayer resided solely in that new state: register

to vote, obtain all licenses there (driver's, car, firearms, hunting, and any others), use the new mailing address, have newspaper subscriptions delivered, change telephone cell numbers, do banking, change registrations, buy a burial plot, obtain medical care, retain legal advisors, contribute to political candidates of the new state.

9. Not filing an Illinois tax return results in an indefinite time for Illinois to assert a notice of deficiency.<sup>14</sup> Consider having the client receive some Illinois source of income requiring the filing of an Illinois non-resident return so at least some statute of limitations is running.
10. If a dispute with the State of Illinois occurs, argue the taxpayer has closer contacts with the non-Illinois state and hope you draw the same appellate panel that decided *Cain*.

## Conclusion

Advising Illinois snowbirds seeking to avoid Illinois income tax while maintaining a house in Illinois remains a tricky business. There is inherent uncertainty in a fact and circumstances test. This case provides appellate authority to try to avoid the privilege of being subject to Illinois income tax. Still, not filing tax returns results in an indefinite period to assess a notice of deficiency. Taxpayers need to be advised of this risk. ■

This article was originally published in the February 2013 issue of the ISBA's Trusts & Estates newsletter.

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1. *Cain v Hamer* 2012 IL App (1st) 112833
2. Fla. Stat. § 222.17(2)
3. Opinion includes facts of physical presence for year 2005 even though relevant years were 1996-2004.
4. 35 ILCS 5/201(a) (West 2010)
5. 35 ILCS 5/1501(a)(20)(A)(West 2010)
6. 35 ILCS 5/1501(a)(17) (West 2010)
7. 86 Ill. Adm. Code § 100.3020(d)
8. *Viking Dodge Inc. v. Hoffman*, 147 Ill. App. 3d 203, 205, 497 N.E.2d 1346, 101 Ill. Dec. 33 (3<sup>rd</sup> Dist. 1986)
9. Where this finding came from is unclear since Florida has no personal income tax.
10. 86 Ill. Adm. Code § 100.3020(c)
11. 86 Ill. Adm. Code § 100.3020(g)(1)
12. 35 ILCS 5/201(a)(West 2010)
13. 35 ILCS 5/203(a)(2)(F)(2012)
14. 35 ILCS 5/905(c)(2012)

## A comment on the "Snowbirds Fly Free of Illinois Tax" article

By Donald L. Shriver

I read with great interest the Siebers/Jones article "Snowbirds Fly Free of Illinois Tax" in the February 2013 newsletter. The points made were well taken and with many states screaming for tax revenue (Illinois the loudest) when advising clients (usually long-time Illinois residents) who flee to Florida, an attorney or tax adviser should be cautious and careful to warn of these issues.

I would also suggest as estate planners and advisers for clients who are former Illinois "residents," we need to be careful of other matters related to our estate planning documents. Often we are asked to review and update documents previously prepared by ourselves or other attorneys. When doing so we need to change domicile/resident references to the new Florida address. Even if not asked to review we need to remind our clients that at the very least a codicil and/or amendment to the trust should be executed to reflect the change. Since Florida currently has no "estate" tax, you may find other updates being recommended, so executing new wills or restated trusts may be the better way to proceed.

A more difficult concern might be Power of Attorneys previously executed by clients as Illinois residents. Florida refers to a Health

Care Surrogate rather than agent and Florida attorneys customarily freelance these POAs for their clients. Other states, for example Wisconsin, have standard statutory forms. Recognition and acceptance in other states by banks, brokerage houses, hospitals, doctors, etc. of Illinois. Standard forms may require plenty of explanation, so careful drafting of a POA needs to expressly state and recognize the Florida residence, and I suggest it should contain a provision similar to the following:

It is my intention that this document shall be effective and interpreted not only in my state of residence, Florida, but also in the states of Illinois and Wisconsin where I have vacation homes as well as in all other states or countries where I may be when medical treatment and services are sought or may become necessary. To the extent that any provision may be declared invalid or is unenforceable in any such jurisdiction, it shall not void the effectiveness or validity of all the remaining provisions.

Because those new Florida residents I would also suggest to remind client to have brokerage and bank accounts reflect the new Florida address even though physically

maintained in Illinois.

Obviously, working with a Florida attorney on any estate planning documents will assure acceptance in Florida and provide comfort to all involved. ■

This comment was originally published in the April 2013 issue of the ISBA's Trusts & Estates newsletter.

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## Illinois tries to ensnare snowbirds (again)

By Steven E. Siebers and Emily Schuering Jones

This is a follow-up to the article titled “Snowbirds Fly Free of Illinois Tax” that was published in the February 2013 edition of the ISBA Trusts & Estates Newsletter. For many long-time Illinois residents, living part of each year in Florida is an ideal lifestyle. These “snowbirds” typically flee the state during the winter months, trading in snow boots for sandals. But the snowbird lifestyle may offer something more than weather-related benefits. A nonresident does not pay Illinois income tax on income from a non-Illinois source. The question is, then, can Illinois snowbirds, while retaining their Illinois homes, become nonresidents for Illinois income tax purposes? The Illinois Appellate Court ruled that it is possible. The Illinois Department of Revenue (“Department”) has now said, “Not so fast.”

The Department is smarting from the snowbird taxpayer victory in *Cain v. Hamer*.<sup>1</sup> In *Cain*, the taxpayers claimed Florida residency despite having been Illinois residents for many years and continuing to own a house in Illinois. The taxpayers spent about equal time in Florida and Illinois during the tax years in question. Nevertheless, the taxpayers prevailed in litigation over a \$1.8 million Illinois income tax bill. We examined the *Cain* case in detail in a previous article, which was published in the *Trusts & Estates Newsletter*, Volume 59, No. 7, page 1 and the *Agricultural Law Newsletter*, Volume 22, No. 5, page 1.

Not surprisingly, the decision in *Cain* has prompted the Department to respond. Instead of appealing *Cain* to the Illinois Supreme Court, the Department has elected to change its regulations. The obvious purpose is to try to ensnare imprudent Illinois snowbirds.<sup>2</sup>

### The Old Regulations – Presumption of Residence

The Department’s previous regulations provided that if an individual spends in the aggregate more than nine months of any taxable year in Illinois, the individual will be presumed to be an Illinois resident. The old regulations further provided a presumption of *non-residence* if an individual was absent from Illinois for one year or more. These old presumptions have now been washed away

like a sand castle on the beach.

### The Amended Regulations – Presumption of Residence

Under the amended regulations, effective April 19, 2013, snowbirds are now subject to two separate “rebuttable presumptions:”

1. An individual receiving an owner-occupied homestead exemption (see 35 ILCS 200/15-175) for Illinois property is presumed to be a resident of Illinois.
2. An individual who is an Illinois resident in one year is presumed to be a resident in the following year if (s)he is present in Illinois more days than (s)he is present in any other state.<sup>3</sup>

These presumptions are not conclusive and may be overcome by “clear and convincing evidence” to the contrary.

The first rebuttable presumption is an obvious attempt to trap the unwary snowbird who has been a resident of Illinois and retains an Illinois house. Illinois home owners regularly claim the owner-occupied exemption for real estate tax purposes. The exemption reduces assessed value by \$6,000 or \$7,000.<sup>4</sup> Typically the exemption is claimed once and automatically renewed each year thereafter. The Department is trying to use this automatic qualification for the owner-occupied exemption as an admission that the Illinois resident is claiming the Illinois house as the taxpayer’s principal residence.

The second rebuttable presumption affects owners who spend less time in Illinois than in any other state in the first year of non-residency. In *Cain* during some of the years at issue, the taxpayers actually spent more days in the State of Illinois than in any other state, including Florida. Still, the taxpayers were found to be nonresidents of Illinois.

The amended regulations also provide that if either one of these two new rebuttable presumptions is applicable, the taxpayer must file an Illinois income tax return that contains full disclosure of all facts.<sup>5</sup> The full disclosure would give the Department the information needed to easily issue a notice of deficiency against the snowbird taxpayer claiming nonresident status.

Further, the amended regulations expand the types of evidence that may be submit-

ted to rebut the presumption of residence or non-residence. The new types of evidence are:

- the location of spouse and dependents,
- the permanency or temporary nature of work assignments in the state,
- the location of professional licenses, and
- the location of medical and other health-care providers, accountants and attorneys.<sup>6</sup>

The amended regulations include one taxpayer-friendly concession: making financial contributions to an Illinois charity is not a factor in determining whether the donor is an Illinois resident.<sup>7</sup> This “non-factor” is good news for taxpayers and for Illinois based not-for-profits, but it is in stark contrast to the other amendments that heavily favor the Department.

### Practice Tip

To avoid the snares contained in the regulations enacted in response to *Cain*:

1. Make sure your snowbird client does NOT claim the owner-occupied exemption (sometimes called the “homestead exemption”) on the client’s Illinois real estate tax bill. The exemption normally reduces assessed value by \$6,000 or \$7,000. The additional real estate tax cost is fairly insignificant. The taxpayer simply needs to go to the supervisor of assessments office in the county where the house is located to withdraw the owner-occupied exemption on his or her Illinois house.
2. Make sure that in the first year of non-residency your Illinois snowbird client does not spend more time in Illinois than any other state in which the client is present during the year. For example, if Florida is the new state of residency, the snowbird client needs to be able to document spending more time in Florida than the client spends in Illinois, regardless of whether the client spends time in places other than Illinois and Florida.

Through newly adopted “rebuttable presumptions,” the Department is more aggressively attempting to catch snowbirds who retain an Illinois house.



## Thirteen Lessons to Follow

We now have 13 lessons for establishing nonresident status. Ten are from our previous article and three are new.

1. If the taxpayer works in Illinois or earns income from an Illinois source (such as real estate located in Illinois), that income is subject to Illinois income tax regardless of residency.<sup>8</sup>
2. If the taxpayer has only retirement income, Illinois exempts it by allowing a subtraction of retirement income in computing Illinois taxable income.<sup>9</sup>
3. An Illinois resident has the right to establish a domicile different from Illinois under the four part test:
  - a. physical abandonment of the first domicile;
  - b. an intent not to return to the first domicile;
  - c. physical presence in the new domicile; and
  - d. an intent to make that one's domicile.
4. The taxpayer should pick a state like Florida, which has a statute authorizing the individual to designate it as the state of residency. The taxpayer should fully comply with the statute.
5. Individuals may have only one domicile, and domicile does not alternate between two states during a calendar year.
6. The taxpayer should maintain logs of physical presence during the year.
7. The issue of whether a taxpayer's presence in Illinois is other than "temporary or transitory" is a fact and circumstances test, but the following do not make a person an Illinois resident:
  - a. being physically present in Illinois for a significant amount of time each year (more than five months but less than six months),
  - b. retaining ownership of an Illinois house,
  - c. being a member of social clubs in Illinois
8. The taxpayer should take all action in the new state of residence as if the taxpayer resided solely in that new state: register to vote, obtain all licenses there (driver's, car, firearms, hunting, and any others), use the new mailing address, have newspaper subscriptions delivered, change telephone cell numbers, do banking, change registrations, buy a burial plot, obtain medical care, retain legal advisors, and

contribute to political candidates of the new state.

9. Not filing an Illinois tax return results in an indefinite time for Illinois to assert a notice of deficiency.<sup>10</sup> Consider having the client receive some Illinois source of income requiring the filing of an Illinois nonresident return so at least some statute of limitations is running. A taxpayer presumed to be an Illinois resident but claiming nonresident status is required to file a return complying with the regulation.<sup>11</sup>
10. If a dispute with the State of Illinois occurs, argue the taxpayer has closer contacts with the non-Illinois state and hope you draw the same appellate panel that decided *Cain*.
11. Be sure the taxpayer withdraws the owner-occupied homestead exemption for real estate taxes on the Illinois house.
12. For at least the first year of establishing non-residency, the taxpayer should be able to document more time is spent in the resident state than in Illinois.
13. Charitable gifts to Illinois based charities are a non-factor.

Following these lessons can avoid potential pitfalls. The snowbirds can then fly free of Illinois income tax—again. ■

This article was originally published in the August 2013 issue of the ISBA's Trusts & Estates newsletter.

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1. *Cain v. Hamer* 2012 IL App (1st) 112833

2. In addition to *Cain*, the Department has lost other recent cases involving residency. See e.g., *Grede v. Hamer* 2013 Ill. App. 2nd 120731-U, 4/22/13; *Dods v. Hamer*, Ill. App. (1st) 1-09-2548 Rule 23 Order 8/19/10; *Sweeney v. Hamer*, Cook County Circuit Court Order, Case No.10-L-050524, 6/26/13.

3. 86 Ill. Adm. Code § 100.3020

4. 35 ILCS 200/15-175(b)

5. 86 Ill. Adm. Code § 100.3020(g)(3)

6. 86 Ill. Adm. Code § 100.3020(g)(1)

7. 86 Ill. Adm. Code § 100.3020(g)(2)


8. 35 ILCS 5/201(a)(West 2010)

9. 35 ILCS 5/203(a)(2)(F)(2012)

10. 35 ILCS 5/905(c)(2012)

11. 86 Ill. Adm. Code § 100.3020(g)(3)

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### October

**Thursday, 10/3/13 - Saturday, 10/5/13 - Itasca, Westin Hotel**—9th Annual Solo and Small Firm Conference. Presented by the Illinois State Bar Association. Thur 9-8:30; Fri 8:30-8:00; Sat 8:30-12:05.

**Tuesday, 10/8/13 - Webinar**—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 3:00 - 4:00 p.m. CST.

**Tuesday, 10/8/13- Teleseminar**—Ground Leases: Structuring and Drafting Issues. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 10/10/13-Friday, 10/11/13-Galena, Eagle Ridge Resort and Spa**—A Child Custody Trial. Presented by the ISBA Family Law Section. 8-5 both days.

**Thursday, 10/10/13- Chicago, ISBA Regional Office**—Estate Planning: Hot Topics. Presented by the ISBA Trust and Estates Section. 9-4:30.

**Thursday, 10/10/13- Live Webcast**—Estate Planning: Hot Topics. Presented by the ISBA Trust and Estates Section. 9-4:30.

**Thursday, 10/10/13 - Webinar**—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 3:00 - 4:00 p.m. CST.

**Friday, 10/11/13- Chicago, ISBA Regional Office**—Insurance and Surety Bond Issues For Construction Projects. Presented jointly by the ISBA Commercial Banking, Collections and Bankruptcy Section, ISBA Construction Law Section and the ISBA Insurance Law Section. 8:30-4:30.

**Monday, 10/14/13- Chicago, ISBA Regional Office**—Advanced Workers' Compensation. Presented by the ISBA Workers' Compensation Section. 9-4.

**Monday, 10/14/13- Fairview Heights, Four Points Sheraton**—Advanced Workers' Compensation. Presented by the ISBA Work-

ers' Compensation Section. 9-4.

**Tuesday, 10/15/13- Teleseminar**—Planning with Family Limited Partnerships/Family LLCs, Part 1. Presented by the Illinois State Bar Association. 12-1.

**Wednesday, 10/16/13- Teleseminar**—Planning with Family Limited Partnerships/Family LLCs, Part 2. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 10/17/13- Bloomington-Normal, Marriott Hotel and Conference Center**—Real Estate Law Update-2013. Presented by the ISBA Real Estate Law Section. 8:50-4:45.

**Friday, 10/18/13- Chicago, ISBA Regional Office**—Advising Providers- The Future of Healthcare Reimbursement. Presented by the ISBA Health Care Section. 8:30-12:30.

**Friday, 10/18/13- Live Webcast**—Advising Providers- The Future of Healthcare Reimbursement. Presented by the ISBA Health Care Section. 8:30-12:30.

**Tuesday, 10/22/13- Teleseminar**—2013 American with Disabilities Act Update. Presented by the Illinois State Bar Association. 12-1.

**Wednesday, 10/23/13 - Webinar**—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 3:00 - 4:00 p.m. CST.

**Wednesday, 10/23/13- Bloomington, Holiday Inn and Suites**—Estate Administration Boot Camp. Presented by the ISBA Trusts and Estates Section. 9-4:30.

**Friday, 10/25/13- Chicago, ISBA Regional Office**—Estate Administration Boot Camp. Presented by the ISBA Trusts and Estates Section. 9-4:30

**Friday, 10/25/13- Rockford, Northwestern Illinois Area Agency on Aging**—Family and Consumer Law Pro Bono Bootcamp. 9-5.

**Tuesday, 10/29/13- Teleseminar**—Planning to Avoid Probate. Presented by the Illinois State Bar Association. 12-1.

**Thursday, 10/31/13- Lombard, Lindner Conference Center**—Real Estate Law Update- 2013. Presented by the ISBA Real Estate Law Section.

**Thursday, 10/31/13- Teleseminar**—Attorney Ethics and ADR. Presented by the Illinois State Bar Association. 12-1.

### November

**Friday, 11/1/13- Chicago, ISBA Regional Office**—Everything a Lawyer Needs to Know about Representing a Firefighter or a Police Officer Before A Pension Board. Presented by the ISBA Administrative Law Section; co-sponsored by the ISBA Standing Committee on Racial and Ethnic Minorities and the Law. 9-12:30.

**Friday, 11/1/13- Live Webcast**—Everything a Lawyer Needs to Know about Representing a Firefighter or a Police Officer Before A Pension Board. Presented by the ISBA Administrative Law Section; co-sponsored by the ISBA Standing Committee on Racial and Ethnic Minorities and the Law—9-12:30.

**Tuesday, 11/5/13 - Webinar**—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 1:30 - 2:30 p.m. CST.

**Tuesday, 11/5/13- Live Webcast, ISBA Studio**—Children and Trauma; A Guide for Attorneys. Presented by the ISBA Child Law Section. 11-12.

**Tuesday, 11/5/13- Live Webcast, ISBA Studio**—2013 Immigration Law Update-Changes which Affect Your Practice & Clients. Presented by the ISBA International & Immigration Law Section, ISBA Young Lawyers Division and the ISBA General Practice, Solo and Small Firm Section. 1:00-2:00.

**Thursday, 11/7/13 - Webinar**—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 1:30 - 2:30 p.m. CST. ■

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