

TRUST AND ESTATE LITIGATION

update



PERSONAL JURISDICTION

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In this edition of our newsletter, we focus on personal jurisdiction. It is an issue that arises regularly in trust and estate litigation, where there is often at least one party who does not reside in the forum state and has little connection to that state.

Background

Recent developments have tended to increase the geographic distance between trustees and their beneficiaries. As our society has become more mobile, many families have members scattered across the country. At the same time, the consolidation of the financial services industry has meant that trusts may be relocated and administered outside the settlor's home state. Many trusts expressly permit the trustee to change the situs state and governing law. And more liberal severance rules, such as Section 4.25 of the Illinois Trusts and Trustees Act (adopted in 1993), permit single trusts to be split into separate trusts that can then be moved to separate trustees, which can reside in different states. With "baby boomers" reaching retirement age and often relocating, it is likely that this trend toward geographic separation between trustee and beneficiary will accelerate.

Technology has made it easier for trustees to serve and communicate with their beneficiaries wherever they may be located. But when litigation arises, geography can be important because it affects the court's personal jurisdiction over the trustee and the beneficiaries. Personal jurisdiction is of particular concern to trustees because a judgment is not binding on a party who is not subject to the jurisdiction of the court. Even if no one who takes part in the dispute contests jurisdiction, other beneficiaries who do not participate in the litigation may not be bound, so the judgment will not "close the door" on the issue for the trustee.

Legal Basics

Personal jurisdiction is not an issue for plaintiffs, who agree to submit to the court's jurisdiction when they file suit there, or for defendants who reside in the forum state. But when non-resident defendants are involved, jurisdiction over them must be established. Typically, the first step is to consult the forum state's "long-arm" statute, which sets out the conditions under which jurisdiction is proper. See, e.g., 735 ILCS 5/2-209. Of course, any exercise of personal jurisdiction must also comport with constitutional due process requirements.

In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the U.S. Supreme Court held that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.” Thus, even actions that were formerly considered to satisfy constitutional requirements under an “in rem” theory of personal jurisdiction are now subject to the “minimum contacts” analysis.

Under this approach, the question is not whether the property that is the subject of the lawsuit is physically present in the forum state, but whether the defendant has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). In deciding whether personal jurisdiction is proper, courts consider three factors: (1) whether the non-resident defendant had minimum contacts with the forum state such that there was fair warning that the non-resident defendant may be brought into a forum court, (2) whether the action arose out of or related to the defendant’s contacts with the forum state, and (3) whether it is reasonable to require the defendant to litigate in the forum state. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-77 (1985). “[T]he constitutional touchstone remains whether the defendant purposefully established ‘minimum contacts’ in the forum State.” *Id.* at 474.

Despite the focus on the defendant’s contacts with the forum court, the underlying basis for “in rem” jurisdiction — the fact that the property in question (the “res”) was located in the forum state — remains an important consideration because it can supply the requisite contacts with the forum state. Thus, as a practical matter the state where a trust is being administered typically has personal jurisdiction over the trustee and the beneficiaries, wherever they may be.

Illustration 1: *Foster Walker*

Personal jurisdiction over a non-resident trustee was the central issue in two companion cases we recently won in the U.S. Court of Appeals for the Third Circuit. In *Foster Walker v. Northern Trust Co.* and *Foster Walker v. West Michigan National Bank & Trust*, the plaintiff was the beneficiary of two trusts established by her father. The first permitted her to withdraw assets when she turned 18, and

the second was payable to her at age 21. In 1985, when Plaintiff turned 18, she signed a waiver of her right of withdrawal under the first trust. In 1988, when she turned 21, Plaintiff executed an assignment of assets from the second trust to a new trust created for her benefit. The 1985 waiver and the 1988 assignment had the same effect: assets that would have flowed to Plaintiff outright instead remained in trusts for her benefit.

In 2003, Plaintiff sued to “bust the trusts.” She accused her father of misleading her into executing the documents and using “economic duress” to force her to sign. She also accused the fiduciaries of both trusts of complicity in the alleged wrongdoing — and of perpetuating it by continuing to hold the assets in trust.

Plaintiff brought suit in her home state of Delaware. On behalf of one of the trustees as well as the members of the “advisory committees” for the two trusts, we moved to dismiss both cases, arguing that there was no personal jurisdiction because none of these defendants was a Delaware resident, none had taken any action in Delaware that gave rise to Plaintiff’s claims, and the trusts were not administered in Delaware. The *West Michigan* case was complicated by the fact that the trust at issue owned a parcel of real estate in Delaware. In that case we argued that the real estate was one of many trust assets and did not represent a significant part of the trust, was not even held in the trust at the time the challenged assignment was executed, and was not the focus of Plaintiff’s claim. The Third Circuit ruled in our favor, affirming the district court. Schiff Hardin lawyers **Scott Bieber**, **Dave Blickenstaff**, and **Theresa Marx** worked on the case. Dave presented the successful Third Circuit argument.

Illustration 2: *Sullivan*

The Illinois Appellate Court recently decided a case concerning jurisdiction over a non-resident trustee. In *Sullivan v. Kodsi*, No. 1-04-1508, 2005 WL 2173662 (1st Dist. Sept. 8, 2005), Kodsi had created a trust and had transferred into the trust his interest in MG Capital, a company Kodsi had formed with Gracias. Plaintiff sued Kodsi, Gracias, and MG Capital. At the time the litigation began, the trustee of Kodsi’s trust was Gracias, an Illinois resident. He was succeeded by Geddes, a Pennsylvania resident, who was in turn succeeded by Neuberger

Berman Trust Company of Delaware (“NBTC”).

In an amended complaint, Plaintiff named NBTC as a defendant in its capacity as trustee of Kodsí’s trust. NBTC filed a motion to dismiss, arguing that it was not subject to personal jurisdiction in Illinois.

NBTC is a wholly owned subsidiary of Neuberger Berman, LLC (“Neuberger Berman”), a national company with offices in Chicago. NBTC is authorized to act as a trustee in Illinois, but its operations all take place in Wilmington, Delaware. It has its own offices, board of directors, and management committees and files its own financial statements and annual reports.

NBTC first argued that Kodsí’s trust was not an independent legal entity and therefore could not be the basis for jurisdiction over the trustee in its representative capacity. The Appellate Court rejected this position, holding that “[a] written trust possesses a distinct legal existence that is recognized by statute ... and can sue or be sued through its trustee in a representative capacity on behalf of the trust.”

The Appellate Court then held that jurisdiction over NBTC was proper. “In determining where a trust is administered and whether it is under Illinois jurisdiction, courts consider the provisions of the trust instrument, the residence of the trustees, the residence of its beneficiaries, the location of

the trust assets, and the location where the business of the trust is to be conducted. Where those factors indicate that a trust is administered in Illinois and litigation arises with reference to the trust, an Illinois court would have jurisdiction over the trust and the designated trustee.” 2005 WL 2173662 at *4 (citation omitted). The trustee at the time

the litigation initially arose was an Illinois resident, and the trust property in question (MG Capital) was based in Illinois. Therefore, jurisdiction over the trust and its trustee was proper. “Such a finding would be in accordance with the terms of the long-arm statute, which provides that Illinois may exercise jurisdiction over any person with an ownership interest in a trust administered in Illinois and who is domiciled or resides in Illinois when the cause of action arose.” *Id.* at *5.

“We also find that subjecting [NBTC], or whoever the designated trustee may be at the time of remand, to the jurisdiction of Illinois courts would not offend federal notions of due process.” NBTC “has succeeded to assets, those held by [Kodsí’s trust], from which a judgment in plaintiff’s favor might be satisfied and where the inclusion of the trustee in the

proceedings would most certainly facilitate and expedite their resolution. [NBTC] agreed to serve as the trustee and assumed continuing obligations for a trust which was administered in Illinois and the trust assets of which were located in Illinois. At the time each successor [trustee] was appointed, the immediate Illinois proceedings against Kodsí and MG Capital had already commenced. It should have occurred to these trustees that Kodsí’s assets, held by the Trust, would likely be subjected to the pending litigation and

Personal jurisdiction over an individual: Appellate Court affirms *Hodges* judgment

The same trends that make personal jurisdiction an increasingly important question in the trust context are present in the estate context as well. In fact, we recently litigated an estate dispute in which our opponent, a non-resident, argued that the Illinois courts lacked jurisdiction over her.

The case involved a series of IRAs that had been designated in favor of the decedent’s ex-wife. The decedent decided to make a change but died before completing the forms. After the decedent’s death, the ex-wife collected the IRA proceeds. We sued, asserting that the beneficiary change should be deemed effective under *Dooley v. James A. Dooley & Associates Employees Retirement Plan*, 92 Ill. 2d 476 (1982).

The decedent’s ex-wife was a resident of Alabama who had not visited Illinois in many years. She argued that the Illinois courts did not have jurisdiction over her. We pointed out that the ex-wife had affirmatively contacted the decedent’s broker in Illinois to collect the IRA assets that had previously belonged to the decedent. The ex-wife had also directed the Illinois broker to transfer the assets into a new account for her benefit, which was held in Illinois.

The trial court agreed with us that jurisdiction was proper under these circumstances, and the Appellate Court affirmed. *Estate of Hodges*, No. 2-04-1136. The ex-wife has filed a petition for leave to appeal to the Illinois Supreme Court, which remains pending. [Dave Blickenstaff](#) and [Samantha Norris](#) tried the case and briefed it on appeal.

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its eventual judgment.” *Id.* at *6.

Note that the *Sullivan* court relied in part on pre-*Shaffer* case law, but nonetheless applied the minimum contacts test as set forth in *Burger King*.

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Although both *Foster Walker* and *Sullivan* concern non-resident fiduciaries, the same issues arise with respect to beneficiaries (see sidebar). In each case, the constitutional standard must be satisfied as well as any additional requirements imposed by the forum state’s long-arm statute.



Patricia Brown Holmes Joins Schiff Hardin’s Chicago Office

On August 1, 2005, Schiff Hardin welcomed former Cook County Circuit Court Judge Patricia Brown Holmes as a partner in our litigation practice group.

Patricia served for eight years on the Cook County bench. In addition to her courtroom duties, she was involved in training fellow judges from Illinois and elsewhere. Before taking the bench, Patricia had extensive trial experience as an Assistant United States Attorney in the Northern District of Illinois and as an Assistant Cook County State’s Attorney.



John Dadakis Joins Schiff Hardin’s New York Office

John D. Dadakis joined Schiff Hardin as a partner in the Estate Planning and Administration Group in the New York City office. John has a national private client practice that provides estate planning and

wealth preservation counsel to a select group of prominent Fortune 500 executives, successful private business entrepreneurs, and high net worth individuals and families. He previously served as regional chair of the private client groups at Morrison & Foerster and Clifford Chance. In its December 2005 edition, *Worth* magazine names John to its first-ever list of Top 100 Attorneys, which recognizes lawyers with imagination, experience, and a keen sense of service to affluent individuals.



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