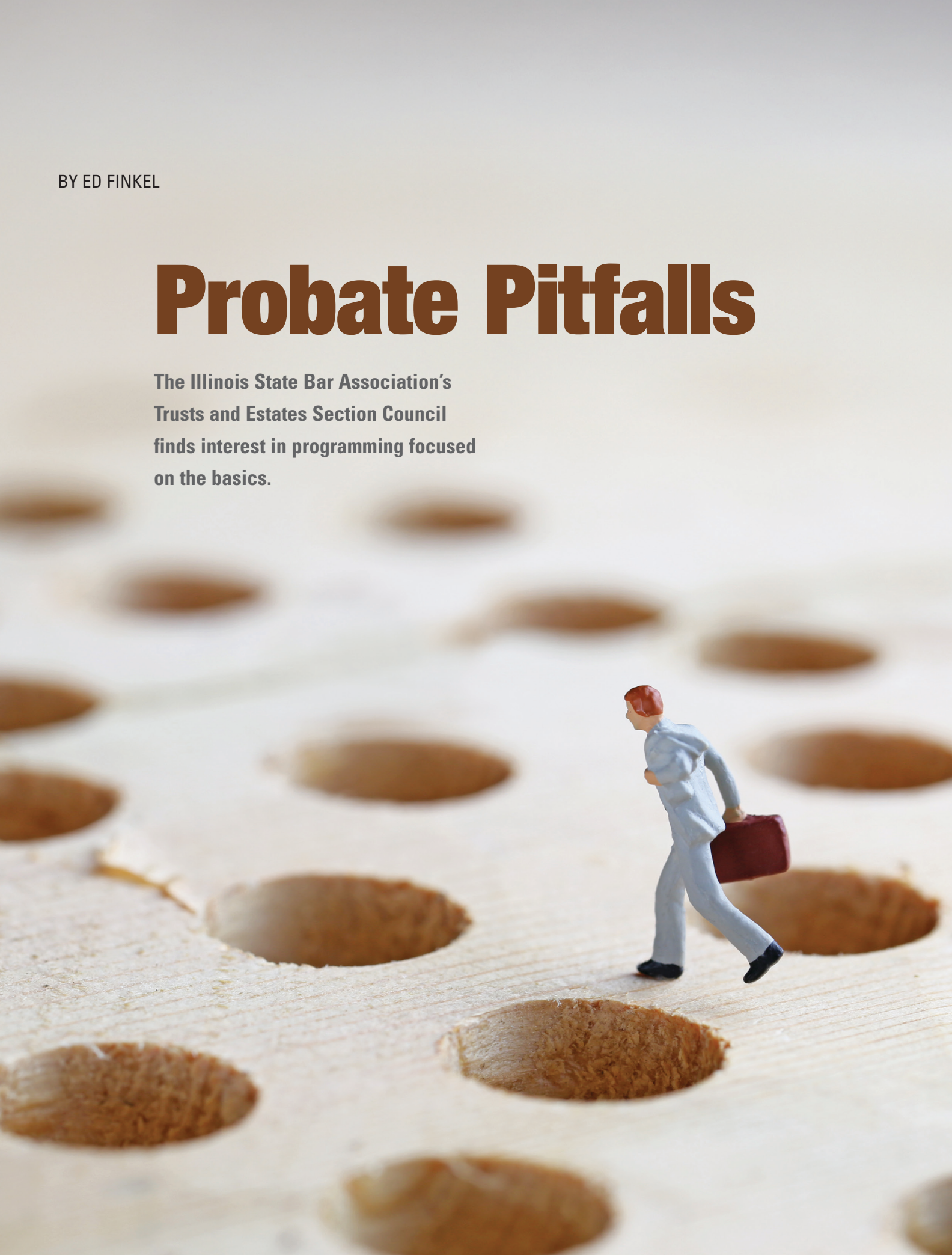
BY ED FINKEL

Probate Pitfalls

The Illinois State Bar Association's Trusts and Estates Section Council finds interest in programming focused on the basics.



A FLOOD OF BASIC QUESTIONS IN THE ISBA CENTRAL'S TRUSTS AND ESTATES COMMUNITY from those seeking the guidance of seasoned attorneys recently began drawing the attention of section council leaders.

So when Colleen Sahlas became chair of the Trusts and Estates Section Council last July, she pledged a "back to basics" approach that would educate practitioners, especially those new to trusts and estates law.

"Many are hanging out a shingle and going into solo practice for the first time," wrote Sahlas, managing partner at Oak Brook-based Hoy & Sahlas, in Trusts & Estates, the section's newsletter. "At a recent ISBA Mutual risk management seminar, one of the speakers mentioned that there are a greater number of new attorneys becoming solo practitioners right out of the gate, rather than working at a firm to learn from seasoned attorneys. Solo practitioners can be isolated, lacking a second set of eyes to review their work or provide feedback, and thus be at greater risk for malpractice."

Such attorneys don't have the luxury of walking down the hall to ask another attorney for feedback or advice, Sahlas added. "Rather than directing attorneys who are new to trusts and estates law to other resources, our [section] will be that resource," she pledged.

Probate pitfalls

In an interview with the Illinois Bar Journal, Sahlas mentioned the questions being asked on ISBA Central. "I kept seeing the same questions," she says. "What do I do with unknown heirs? And confusion about the same pitfalls over and over and over."

Section Council Vice-Chair Sarah LeRose says she also hears basic questions asked by trusts and estates attorneys in court, mostly from those newer to the practice, perhaps under the impression that probate practice mostly involves completing easy-to-understand forms.

"It's a lot more than that," says LeRose, of Chicago-based Leonard J. LeRose, Jr., Ltd. "There has been an influx of people starting to practice in this area, which is a good thing. But then they run into these issues that are not so straightforward."

Sahlas sees the same phenomenon on court calls. "The judge will say, 'I'm sorry, you're going to have to amend your affidavit of heirship. It's not correct.' Or 'you're missing these magic words.' Probate seems straightforward because it's procedural and you follow the steps." But, she adds, "There are so many technicalities, and you might miss something." Missing steps, technical protocols, or procedures can lead to significant delays and adverse consequences. Sahlas says less-experienced attorneys are "just kind of walking through the land mines and hoping they don't blow up."

Sahlas and LeRose led a well-attended ISBA continuing legal education program about "Probate Pitfalls" on March 25, which was moderated by Melissa Johnson of Elmhurst-based Generation Law. The program is the kind of resource Sahlas and LeRose hope to continue providing to those getting their feet wet in probate law.

"Probate typically is straightforward until it's not," says LeRose. "When you find yourself in that complicated position, having a resource is helpful. And that's what we were trying to accomplish." (See the sidebar on page 22 to learn about another way the Trusts and Estates Section Council is engaging newer members.)

What follows are a few of the pointers offered by Sahlas and LeRose during their CLE program for avoiding common probate pitfalls. For more information about the program, visit law.isba.org/3SgLQeh.

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MISSING STEPS, TECHNICAL PROTOCOLS, OR PROCEDURES CAN LEAD TO SIGNIFICANT DELAYS AND ADVERSE CONSEQUENCES. LESS-EXPERIENCED ATTORNEYS ARE "JUST KIND OF WALKING THROUGH THE LAND MINES AND HOPING THEY DON'T BLOW UP," SAYS COLLEEN SAHLAS, 2024-25 CHAIR OF THE ISBA'S TRUSTS AND ESTATES SECTION COUNCIL.

Unclaimed funds

Depositing unclaimed funds with the Office of the Illinois State Treasurer rather than at the county level is a new wrinkle in probate law, LeRose says. "Not many people have done it, and there's a huge need for knowledge on how to do it because it's a big shift from the prior procedures," she says.

Sahlas says that she hadn't done such a deposit since the switch. "A lot of experienced attorneys know, 'Oh, you just deposit with the county treasurer.' And if you're in Cook [County], you just would walk across the street," she says. "It was very easy."

But the change has confused some trusts and estates attorneys, LeRose says. Under the new procedure, the attorney first must bring a petition for authority to deposit funds with the state treasurer; in Cook County, a general order says that if the awardee or distributee cannot be found or doesn't cooperate, their share can be deposited with the state treasurer.

"However, you have to file this petition for authority to deposit funds, and you have to give everybody notice if you are able to do so," she says. "What the order also says is that after the judge approves the motion and schedules a return date, you must notify the compliance manager." When LeRose did so, she was emailed "two huge PDFs" with next steps, and those PDFs also can be found on the Cook County Circuit Court website. Attorneys in other counties could take the forms linked therein and modify to their county's requirements.

Whichever county you're in, LeRose says attorneys need to start at the Unclaimed Property Division of the state treasurer's website (icash.illinoistreasurer.gov), click on a tab that says "Reporting Property," and then submit two reports: one that gives contact information for the person receiving the property (and their attorney), and the other covering the type of property and its value.

While the division's staff are very helpful and responsive, LeRose suggests printing whatever you've entered because you will not get an email confirmation. She also suggests making any deposits with the state treasurer through Federal Express to the physical address, including the receipt and a cover letter that says, "Enclosed please find …."

"In your cover letter, … include a line that says, 'Please kindly complete the enclosed receipt and return to me via email,'" LeRose says. "If you fail to do this, you will either not get your receipt back, which you then [must] file with the court, so that's a problem; or they just send it back to you [via] USPS, and you get it whenever you get it. Email is usually quicker, it's cheaper, and then your estate is not held up …. Once you get the receipt, file it in your case, present it to the court with the rest of your closing courtesy copies, and your estate should be closed."

Prior to court appearances

Petitioners in testate proceedings for wills have considerably greater options than those in intestate proceedings, where assets are distributed based on state inheritance laws. Sahlas says that prior to the initial court appointment, clients are often frustrated because they can't access the decedent's funds to start paying bills for the funeral, managing real estate, or resolving other expenses.

But in testate proceedings, "a nominated executor can make provisions for anatomical gifts [organ donations] and the burial of the decedent, pay necessary funeral charges, [and] preserve and protect assets," she says. The latter includes "keeping vehicles sheltered and protected, insured, [and] undriven, [which] is a very important thing to say to your client. And they can also advance funds to preserve those estate assets and get in line as a first-class creditor of the estate—once funds are accessible—after probate is opened."

The trusts and estates attorney can draft an affidavit for their client if they believe that a will or burial instructions are inside a safe deposit box, as long as they believe they are named as an executor in that will, Sahlas says. "Also, they need to take provision for making sure that the real estate is safe and secure, [and] prevent it from damage," she says. "Keeping the gas bill paid so we don't get frozen pipes bursting during the winter, maintaining that hazard and homeowner's insurance, securing the property, and changing the locks is important. We don't know who else has keys out there. But they can't take possession without leave of court."

Intestate petitioners have fewer options, Sahlas says. "They [must] give 30-day notice to other persons who may be eligible to serve, of equal or greater preference," she says. "But they can advance funds to try to preserve and protect estate property and get … reimbursed as a first-class creditor."

Preserving real estate assets

LeRose says the real estate piece of probate is "the bane of my existence" because of how messy it can get. "Sometimes you have tenants. Sometimes you have back taxes. We have redemption periods. All of these things," she says.

If the decedent leaves a house, LeRose first asks for a copy of the homeowner's insurance policy, which often states that if no one is living in the property for a period of time—sometimes three months, sometimes six—the policy is null and

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void. "So then, you have to get what's called vacant insurance," she says. "Why do we have to do that? Well, if the house burns down, [or] a pipe breaks and [the house] floods, it's damaged. Your client, the estate representative, is going to be held liable."

If the property has tenants, the estate representative must notify them that their landlord has passed away and that they have to send rent to a new person, LeRose says. If there's a mortgage, the attorney should check to see whether it contains an "acceleration clause" that requires the balance to be paid off after a certain period upon the decedent's death. "It speeds up the time," she says. "They don't always enforce it, but I think it's something to be aware of … in the event that it becomes an issue."

Attorneys should go to the county assessor's website to check whether real estate taxes have been paid, or whether they've been sold or are going to sale to a third party, LeRose says. "You want to be able to prep your client instead of saying, 'Oh, it's totally fine, we'll take care of it when the estate's open,'" she says. "It's good to manage expectations. … It's really important to look into all of these things to make sure that you're setting your client up for success throughout the estate."

If the decedent had a power of attorney for property or a guardianship proceeding prior to their death, that's also critical to follow up on, LeRose says. "It's really important to know if this exists, and to try to get copies of the accountings of whatever assets they were handling, to not only make sure they were handled properly, but also to see what is there," she says. "This is a step that usually gets overlooked, but it's something that can save you quite a headache later on."

Deviating from the will

During testate proceedings, your clients cannot suddenly change who inherits what and how much, Sahlas says. "I get this question a lot from my clients," she says. Bottom line, "There is a will, and we have to follow what it says. These are the last wishes of the testator. Or if there's intestacy laws at the end of probate, we need to have receipts from the proper people saying they received what they were supposed to get."

Family members and any others named in a will can do whatever they want after the proceedings have been distributed in accordance with the decedent's wishes, Sahlas says. "The easiest thing is, just give everybody the shares they're supposed to get, and distribute, get a receipt, [and] close probate," she says. "If they want to gift [a portion] to somebody else, they can. They'll have to figure out if there's a gift-tax consequence."

It's possible for one heir to get the house in a situation where the value of the house would be roughly equal to the share he is supposed to get, Sahlas says. "You're left with a $300,000 house and a $300,000 investment account, and Bob and Anne were supposed to get equal shares," she says. "They can each take what's called an in-kind distribution. If Bob wants the house, he can take the $300,000 house, and Anne can take the $300,000 in cash."

Drawing in More and Younger Members

The ISBA Trusts and Estates Section Council is increasing engagement by hosting regular, well-planned question-and-answer sessions.

To boost section membership and attendance of newer practitioners, Colleen Sahlas and Sarah LeRose, the 2024-25 chair and vice-chair, respectively, of the Trusts and Estates Section Council, established a subcommittee aimed at doing so.

Mary Vanek, partner with the Northbrook-based Matlin Law Group, P.C., and Amina Saeed, director at Wheaton-based Huck Bouma, P.C., cochairs of the subcommittee, brainstormed how to reach newer attorneys and help them quickly gain practical knowledge, Vanek says, adding that Saeed came up with a Zoom question-and-answer format.

"We have been drawing between 75 to 100 people each month," Vanek says. "Some months, we have a specific topic, and other months, we take random questions. We always have three or four panelists on the call to answer the questions and facilitate conversations about various topics. I think this format really exposes the new practitioners to a variety of viewpoints and solutions to common issues."

LeRose says this approach has become very popular. "A lot of newer attorneys have been attending, asking great questions, and getting involved," she says. "It's been really well-received, not only by the new attorneys but by current members of the section council volunteering their time to be mentors and speak at these Zoom sessions. It's just more personable on Zoom than on ISBA Central. You can see the person and talk to the person. It brings another dimension."

The success of these question-and-answer Zoom sessions, which are free, may be proof that the section council is on to something, as the sessions are drawing large crowds. "We were shocked," Sahlas says. "It shows the need."

If the values of assets are not comparable, you must properly calculate and equalize the shares. "I do encourage you to memorialize this in a family settlement agreement, for in-kind distributions," Sahlas adds. "The Illinois Supreme Court encourages family settlement agreements. You can do a nonjudicial settlement agreement if everybody agrees and … [signs] off as to what the terms are."

Family dynamics

Family dynamics can be a driving force in probate cases, and attorneys may never entirely understand the history behind them, LeRose says. "Many times, clients focus on what the other party is doing wrong, why they're a bad person," she says. "However, we all have to keep in mind, as practitioners, that we bring an objective view to this, notwithstanding the fact that we have clients to represent. And we really need to figure out where the lack of information is, where there are holes, and how we get this done for our clients without getting too emotionally involved."

When the decedent has one or two children, the dynamics tend to be relatively simple, LeRose says. But once you reach three or more, "we're probably going to get some break-off [in alliances]—three here, two there," she says. If there are children from a prior marriage—a second, third, or fourth spouse, "usually, there's a lot of bad blood. You don't really know what happened."

Another red flag is when an heir has been disinherited, LeRose says. When there has been a disinheritance, keep in mind who prepared the estate plan, when it was prepared, and whether it's likely an heir will contest the terms. "If you are the estate planning attorney, … you're probably going to [have a conflict of interest] because you might be a witness," she says. "If you're not the estate planning attorney, you … need to manage your client's expectations and say, 'This could get expensive.'" IBJ