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Diana H. Psarras
Direct: 312.456.0196
dpsarras@rsplaw.com

DIGGING UP A HUMAN BODY.

In movies, the prosecutor obtains a court order to exhume a deceased body from a long-ago burial to try to get a murder conviction of a current suspect. As extreme and unlikely an event as this may seem, disinterments of corpses do happen in real life.

Actually, most disinterments occur not in criminal investigations, but rather in civil matters where a citizen seeks to dig up the body of a loved one. Usually, this is because there is no neighboring plot available for someone who wants to be buried alongside the deceased, when his or her time comes.

Requests to disinter a body in order to reunite loved ones after death are often looked upon with respect by the courts. Supreme Court Justice Benjamin Cardozo long ago stated that "removal at the instance of a wife or of kinsmen near in blood to satisfy a longing that those united during life shall not be divided after death, may seem praiseworthy and decorous when removal at the instance of distant relatives or strangers would be arbitrary or cruel."

However, courts are reluctant to allow disinterment for reasons that are not as compelling. The Illinois Appellate Court once refused a family's request to re-bury their decedent in another cemetery because the sole purpose in seeking disinterment was the family's desire to have the deceased placed in a nicer looking cemetery. The court said that the desire to place relatives in a better landscaped, better improved and more modern cemetery is not a valid reason for disturbing a resting place.

ROBBINS, SALOMON & PATT, LTD.

25 East Washington Street
10th Floor
Chicago IL 60602
Phone: (312) 782-9000
Fax: (312) 782-6690

2222 Chestnut Avenue
Suite 101
Glenview IL 60026
Phone: (847) 729-7300
Fax: (847) 729-7390

www.rsplaw.com

Illinois has a statute specifically governing the disinterment of a body. *410 ILCS 535/21(5)*. Under the law, a person must request and receive a permit from the Registrar of Vital Records (the guy who issues birth and death certificates) before there may be disinterment of a dead body. The permit allows the cemetery to open the grave, remove the body and turn it over to a funeral director for transportation and reburial.

Anyone can file an application for disinterment of the body. If the disinterment is challenged by the deceased's surviving spouse or children, the applicant must prove by strong and convincing evidence that disinterment is necessary.

Upon burial, a body is generally viewed as being in the custody of the law. However, the surviving kin have a protectable interest in the body that allows them to challenge disinterment. In light of the sanctity of a grave, permission to remove buried remains is not lightly granted. The law will give due consideration to the interests of the public, wishes of the decedent and rights and feelings of those entitled to be heard by reasons of relationship or association.

Therefore, if a person wishes to remove the body of a family member from its final resting place, the wise course is to have all the surviving direct family members on board with the plan. Otherwise, petitions to disinter the body are subject to a court battle.

The contract for purchase of a cemetery plot – something nobody ever reads – can play an important role in determining whether there is just cause to allow the disinterment of a body. In one court case, the purchaser of the burial plot had agreed in the contract to abide by the laws, rules and regulations of the corporation maintaining the cemetery. One of the corporation's bylaws was to conform to the tenets of a particular religious faith that happened to prohibit disinterment. As a result, the court did not allow the disinterment of the body. The court stated that it was not making any judgment or determination of the deceased's religious beliefs, but rather it was enforcing the contract as written, something that courts feel very comfortable doing.

✦ *Diana H. Psarras*



Larry Woodard
Direct: 312.456.0191
lwoodard@rsplaw.com

WHICH CONTROLS AFTER A REAL ESTATE CLOSING: THE CONTRACT OR THE DEED?

For 200 years, American real estate law was hampered by the English common law rule known as the merger doctrine. The merger doctrine was staunchly enforced until approximately 40 years ago. Under the doctrine of merger, if the terms of a real estate sales contract were fulfilled by the delivery of a deed of conveyance to the purchaser, the real estate sales contract was said to merge into the deed and the contract effectively ceased to exist.

As a result, if an obligation in the contract was to be enforced after the closing, that obligation had to be recited in the deed. If it was recited in the deed, it was said to survive closing and could be enforced after closing. If it was not recited in the deed (often because someone forgot about it), the obligation could not be enforced.

To strictly conform to the merger doctrine, not only did a sales contract need to recite that a specific provision

survives closing and does not merge into the deed of conveyance, but that contractual provision also needed to be stated, in its entirety, in the deed.

The rationale behind the merger doctrine was that the sanctity of land titles was paramount. The deed was considered a much more important document than the sales contract. If there was anything important enough in the contract to enforce after the delivery of the deed, it should be included in the deed. Also, the courts wanted finality to real estate transfers.

To get around this technical nonsense, courts have steadily reduced the effect of the merger doctrine so that the exceptions now overshadow the rule. The diluted version of the merger doctrine now provides that any obligations in the contract that are incidental to the main purpose of the deed, which is to transfer good and marketable title, all survive closing, even without

an outright expression of intent by the parties to do so in the contract. Recent court decisions suggests that a deed need not specifically state that the following obligations survive closing to be enforceable after the delivery of the deed:

- *Deliver a building in a neat and workmanlike manner.*
- *Deliver an implied warranty of habitability to a new home.*
- *Enforce an oral offer to repurchase the same property in three years.*
- *Provide a habitable dwelling.*
- *Complete an unfinished building on the premises.*
- *Convey an easement to access a landlocked parcel.*
- *When the parties manifest an implied intent to have a term survive the closing.*

- *Where one party misrepresents a material fact or commits fraud.*
- *When the obligation relates to something that can only be done after the delivery of the deed.*
- *Ambiguous terms within the deed that require clarification through the contract.*
- *Matters relating to warranties or the condition of the property purchased.*
- *Where there is a mutual mistake of a material fact to the transaction.*

Notwithstanding all these exceptions to the merger doctrine, the best way to ensure that contractual obligations survive the closing and not merge into the deed of conveyance (and to avoid costly litigation on the issue) is to expressly state such intent in the contract or in the deed.

✪ *Larry Woodard*



Marshall K. Brown
Direct: 312.456.0181
mbrown@rsplaw.com

ILLINOIS ESTATE PLANNING IN 2009

A unique estate planning problem exists for wealthy Illinois residents in 2009.

In 2001, the exemptions from the federal estate tax were increased over a 9 year period, culminating in a repeal of the federal estate tax in 2010. The credit for state death taxes was eliminated and replaced with a deduction against the federal taxable estate. Illinois now imposes its own estate tax, but unlike the federal government, Illinois has no gift tax.

From 1983 through 2001, there was no Illinois inheritance tax and the only Illinois estate tax was the credit for state death taxes allowable on the federal estate tax return. The total federal estate tax and Illinois estate tax was the same for an Illinois decedent regardless of the composition of the federal tax base consisting of the taxable estate and the adjusted taxable gifts during the decedent's life time.

The state death tax credit was reduced in 2001 for the years 2002 to 2004, and was replaced by a deduction for subsequent years. To protect its revenue, Illinois decoupled its tax from the federal system. Beginning in

2003, the Illinois estate tax is the entire credit for state death taxes as it stood in 2001, matching future increases in the federal exemption up to a \$2 million maximum.

Since 2005, computing the Illinois estate tax has necessitated either a complicated algebraic calculation or use of a computer program which calculates the tax by trial and error.

A new problem for estate tax planning will occur in 2009 only. In that year, the federal credit will exempt \$3,500,000 of taxable estate and adjusted taxable gifts from federal tax, while Illinois will max out its exemption at the \$2,000,000 rate of 2006 through 2008. For estates with a marital deduction this creates a strategic planning problem: if the entire federal credit is utilized, Illinois tax will be paid on the death of the first spouse, whereas if the estate exceeds \$4,000,000 and no tax is paid to Illinois on the death of the first spouse, a very substantial federal tax could then become due on the death of the second spouse. The fact that Illinois does not impose a gift tax allows for avoidance of the Illinois tax by making lifetime gifts.

The federal credit against the gift tax only exempts \$1,000,000 (not the \$2,000,000 exempted from estate and generation-skipping tax). Therefore, any gifts in excess of this amount could subject the donor to gift taxes prior to death. If death is likely to occur before the end of the calendar year, this is not a problem, and is quite limited if it occurs soon afterward since any gift tax paid will reduce the estate tax.

Looking at the \$3,500,000 taxable estate in 2009, the Illinois estate tax would be \$209,124. If \$1,000,000 in gifts were made, perhaps by lifetime funding of a family trust, the Illinois tax is \$128,518. If the taxable estate had been reduced to \$2,000,000, the Illinois tax is \$92,910, or zero if everything had been given away.

For larger estates, the effect of lifetime gifts is more dramatic. The Illinois tax for a 10 million dollar estate this year is \$926,914. Using the \$1,000,000 gift tax credit reduces this to \$801,049. A seven million dollar gift results in a reduced Illinois estate tax of \$167,279, a savings of over \$750,000.

Making a lifetime gift has always been an effective way of reducing subsequent estate taxes. Since the 2001 federal tax change, most people have been reluctant to incur a gift tax to save on the estate tax due to the possibility that the federal estate tax may be permanently repealed after 2011. That has limited taxable gifts for most to the \$1,000,000 exemption and \$12,000 annual exclusions per donee and donor.

Various techniques could be utilized to make a taxable gift which would be effective for federal gift tax purposes and consequently reduce the taxable estate upon which the Illinois tax is based. The simplest way would be for the donor to make an absolute gift of cash or property. Assuming that the donor already has an estate plan in place, he could make a living trust irrevocable. It would be better though, if the gift property were placed in a separate irrevocable trust.

✦ *Marshall K. Brown*



Michael J. Hriljac
Direct: 312.456.0192
mhriljac@rsplaw.com

NEW REGULATIONS IN THE PHYSICIAN SELF-REFERRAL LAW

Are doctors allowed to refer patients to themselves? Sounds improper, but it is often done.

So, in 1991 the federal government enacted the Physician Self-Referral Law, known as the Stark Law. *42 U.S.C. sec. 1395nn*. It is one of the most complicated regulations ever imposed on health care practitioners. The law was enacted in response to studies showing – not surprisingly – a much higher utilization of medical services occurs when a referring physician has a financial interest in the entity to whom he referred the patient.

The Stark Law address this narrow area of fraud and abuse: self-referral. The Stark Law is enforced entirely through the civil justice system, with no criminal penalties. Under this law, no proof of evil intent is required. Penalties for violations of the Stark Law are monetary fines up to \$15,000 per violation.

The Stark Law is directed at something called “Designated Health Services.” Everything in the federal government

has an acronym or an abbreviation. Designated health services are called DHS’s. The following are DHS’s: clinical laboratory services, physical therapy, occupational therapy, radiology services, radiation therapy, durable medical equipment, nutrients, prosthetics, orthotics, home health services, outpatient prescription drugs, and inpatient and outpatient hospital services.

Plain and simply, when a physician has an ownership interest in a free standing, off site DHS provider, the physician may not make referrals to that entity.

To prevent efforts to circumvent the rule, the law prohibits renting space or equipment using payment formula based on per-unit of service where such charges reflect services provided to patients referred between the parties. The law also prohibits rentals based on percentage of receipts that include referrals between the parties. This is effective October 1, 2009. Existing arrangements will not be grandfathered.

One way that might still be used to circumvent the rule is the percentage-based payment in non-rental arrangements. Percentage-based pay for personally performed physician services is expressly approved. Block-time leases, if properly structured, under space and lease rental, are also allowed.

Under the new rule effective October 1, 2009, a physician with ownership or investment interest in a physician organization is deemed to stand in the shoes of that physician organization. *42 C.F.R. sec. 411.350-389*. The one exception is a physician with only titular ownership interest in the physician organization who does not have the ability or right to receive the financial benefits of ownership or investment. The rule provides the flexibility to continue using the indirect compensation exception for non-owner physician employees (including titular owners) of physician organizations. By excluding titular owners from the stand-in-the-shoes analysis, the rule accommodates the “friendly PC” structure used in states where physician groups may not be employed by hospitals or other than physician-owned entities due to so-called corporate practice doctrines.

Some physicians may be using retirement plans to purchase or invest in entities to which they refer patients as an end-run around the Stark rules. The new rule clarifies the retirement plan exemption. The sole interest in a retirement plan that is exempted from the definition of

“ownership and investment interests” is an “interest in an entity that arises from a retirement plan offered by that entity to the physician (or a member of his or her immediate family) through the physician’s (or immediate family member’s) employment with that entity.”

The Stark regulations have contained reporting requirements since their initial adoption in 1991. The government has announced that a form called the Disclosure of Financial Relationships Report (DFRR) will initially be sent to 500 hospitals to identify arrangements that potentially may not be in compliance with Stark.

What about physician-owned hospitals? Those are hospitals in which a physician or an immediate family member has an ownership or investment interest. The rules now require such hospitals to furnish, upon a patient’s request, a list of physicians or immediate family members who own or invest in the hospital, unless no physician owners or members of their immediate families refer patients to the hospital. In addition, a physician-owned hospital must require all physician owners or investors who are also active members of the hospital’s medical staff to agree, as a condition of continued medical membership, to disclose in writing their ownership or investment interests in the hospital to all patients they refer to the hospital.

✦ *Michael J. Hriljac*



Richard Lee Stavins
Direct: 312.456.0371
rstavins@rsplaw.com

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Einstein’s theory of general relativity:
Generally speaking, time slows down when you have to spend it with some of your relatives.

GREAT URBAN LEGENDS OF THE LAW
Fact or Fiction?

Testifying in court in question-and-answer form, popularly shown in the movies, is done only in the movies. In real courtrooms, they let you just tell your story without a lot of legal mumbo-jumbo.

A: Mostly fiction.

The overwhelmingly preferred method of testimony in American and English courtrooms is the question and answer method (called testifying by oral interrogatory). The lawyer asks questions and the witness gives answers under oath. If an answer is not truthful, the witness is potentially subject to indictment for perjury, although that seldom happens. Unlike the answers, the questions are not under oath. Therefore, no matter how false the question, there is no possibility of perjury being committed by the attorney asking the question.

The reason for the oral interrogatory system is to allow the opposing attorney an opportunity to object before the witness says something that the jury should not hear under the rules of evidence. Testimony by oral interrogatory is always used when both sides are represented by lawyers, as is the fact in over 99% of all trials outside of traffic court.

The other method of testimony in court is called testifying in narrative form. Under that system, the witness is sworn to tell the truth and then gets on the witness stand and just tells his story, with no questions being asked of him on direct examination. (The opposing attorney may then ask questions on cross examination.) Testimony in narrative form is the overwhelmingly preferred method in continental European courtrooms. It is looked upon with great disfavor in American courtrooms, except in traffic court.

Testimony in narrative form is generally used in American courtrooms only when the litigant is acting as his own attorney (called pro se, meaning "for himself"). Even then, a judge will occasionally require a pro se litigant to testify in oral interrogatory form, because of the law's extreme preference for this method. That presents the rather bizarre spectacle of the litigant sitting on the witness stand and asking himself questions and then answering his own questions, rather than just telling his story in narrative form to the jury. The questions are not considered to be under oath, but the answers are. Therefore, if the witness asks himself something that is not true, the penalty of perjury does not attach, but if the witness' answer to his own question is not true, there is the potential of a perjury charge. Is this bizarre, or what!

An excellent recent movie, *Flash of Genius*, had a wonderful courtroom scene showing this very kind of testimony. The pro se plaintiff, the hero of the story, was suing an auto manufacturer for patent infringement of the intermittent windshield wiper invention. When it was the hero's turn to testify, the judge made him testify in oral interrogatory form. So, he took the stand and sat there asking himself questions and answering his own questions. The scene was strange for the movies, but it was very accurate of what occurs in a real courtroom when the judge requires a litigant not represented by an attorney to testify in oral interrogatory form.

Asking yourself questions and then answering your own questions is extremely difficult, especially under the pressure of a trial. (Try it for an hour if you think it's easy.) For this reason, a wise opposing attorney will always try to force a pro se opponent to testify in oral interrogatory form.

Recognizing the difficulty, judges will often be sympathetic to the pro se litigant and will allow him to just tell his story in narrative form, but sometimes the objection to testifying in narrative form will be sustained.

One of the attorneys at Robbins Salomon & Patt had an experience many years ago where the following happened. The opposing party, who was acting as his own attorney, took the witness stand to testify. The judge would not allow him to testify in narrative form and required him to testify in question and answer form. The litigant sat there on the witness stand asking himself questions and answering his own questions. After about five minutes of this, the witness asked himself a very important question. The witness then looked up and said to himself, "Would you repeat the question, please."

RECENT ANNOUNCEMENTS

All the news you can use...

RECENT ARRIVALS

Alan Wolf is the new grandfather of a bouncing, bubbly, baby boy; **Tucker James Perkins**, 8 lbs., 8 oz.

ACHIEVEMENTS OF NOTE

Paul Saharack and **Caroline Smith** wrote an article for the Illinois Society of Certified Public Accountants on tax penalties on estate and gift tax returns.

Jeffrey Randall, **Eric Patt** and **Scott Spears** co-authored a chapter on home rule cities in the municipal law handbook for attorneys, published by the Illinois Institute for Continuing Legal Education.

Andrés Gallegos and **Dr. Michael Hriljac** presented a seminar on convenient care health clinics at the 26th annual symposium of the Illinois Association of Healthcare Attorneys.

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