By Rebecca L. Smitherman

As we start a new NCBA year, I am very grateful to be serving as the chair of the Section for the 2018-2019 year. We are fresh off the Annual Meeting in Kiawah, South Carolina. The program and speakers this year were excellent, and I appreciated the range of topics from high-level tax presentations to nuts and bolts of North Carolina practice. It makes me think of the wide breadth of clients we serve. We care for clients who have significant wealth as well as clients of modest means. One of the clerk speakers touted the value of attorneys in helping with insolvent estates, and it brought home for me the wide variety of things that our Section members do. I think that every attorney reaches a time when he or she says, “Why on earth did I sign up for this?” The answer to that question, in my mind, is that we do good for people. We help people, because we have knowledge and experience with a challenging system. We provide value to our clients. I want our Section to support our members in the work we do.

In line with the goals of the NCBA, it is my hope that our Section will provide great value to our members and that our Section Council will represent the interests of our members in the greater Bar Association. My goals for the year are to improve relations with the NCBA, to ensure that our corner of the legal profession is protected through advocacy for the profession and continued excellent education.

Our Section is particularly effective in providing top-quality CLE programs and networking opportunities. We have historically also been effective in up-

Kaestner’s Impact on NC Fiduciary Income Taxation

By Carl L. King

On June 8, 2018, the North Carolina Supreme Court affirmed lower court decisions that held North Carolina’s state fiduciary income tax unconstitutional as imposed upon the income earned and accumulated by a nonresident trust. Kimberly Rice Kaestner 1992 Family Trust v. N.C. Dept of Rev., No. 307PA15-2, 2018 WL 2937823 (N.C. 2018) (“Kaestner”). This article, which serves as an update to a previously-published article following the initial Superior Court proceeding in the Kaestner case, explores the questions trustees and their tax advisors should ask and the steps they should consider now that the North Carolina Supreme Court has rendered its decision. See Carl L. King, “Kaestner and the Future of North Carolina Fiduciary Income Taxation”, The Will & The Way, June 2015, at 1. This update focuses on the appellate opinions, the range of trusts that may qualify for refund treatment, how practitioners responded to the original Kaestner decision, and issues of trust taxation that remain unanswered.


Kimberly Rice Kaestner was a beneficiary of a family trust established under New York law in 1992. Kaestner relocated to North Carolina in 1997. The Connecticut trustee separated Kaestner’s share of the family trust from the primary trust in 2006, forming the Kimberly Rice Kaestner 1992 Family Trust (the “Kaestner Trust”) for the benefit of Kaestner and her three children. The trustee of the Kaestner Trust had sole discretion for all decisions regarding investments and distributions, and at no time during the years at issue did the trustee reside in North Carolina, hold or maintain trust property in North Carolina, or make distributions to any beneficiary in North Carolina. In tax years 2005–2008, the North Carolina Department of Revenue (“NCDOR”) assessed income tax on the income accumulated in the Kaestner Trust based on N.C.G.S. Section 105-160.2, Imposition of Tax in the Income Tax Act for Estates, Trusts, and Beneficiaries. N.C.G.S. Section 105-160.2 provides that a tax may be imposed on the taxable income of estates and trusts that are “for the benefit of a resident of this State.” The Kaestner Trust challenged this statutory clause under the Due Process and Commerce Clauses of the United States Constitution, as well as Article I, Section 19 of the North Carolina Constitution. The Kaestner Trust argued that the statute was unconstitutional because it subjected an out-of-state trust to taxation by the state of North Carolina based solely on the residence of its beneficiaries within the state. The state did not dispute the facts,
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dating North Carolina law to provide the best law for North Carolina citizens.

As we start the year, I want to look back and thank those who have done exemplary work over the past year. In particular, Linda Johnson worked tirelessly to represent our Section during her year as chair of the Section. Linda went the extra mile, attending Board of Governors meetings and working with NCBA leadership, to ensure that the issues specific to our practice area were appreciated and addressed. Thank you, Linda.

At our annual meeting in July at Kiawah Island, South Carolina, we recognized our council members whose terms expired in 2018: Andrea Chomakos, Janice Davies, Tanya Oesterreich, Parrish Peddrick and Heidi Royal. Our membership elected Andrea, Janice, Larry Moye, Adam Shealy and Mark Hale as council members, to serve a three-year term. Our membership also elected Jessica Hardin as treasurer of the Section, and David Lewis as secretary.

The work of our Section is carried out by our very active committees. I urge anyone interested in being more involved with the Section to sign up for a committee.

Our committees are:

Ad Hoc Committee. This committee handles the non-program logistics of our annual meeting, including working with our sponsors to make our annual meeting truly excellent. Our next annual meeting will be July 25-27, 2019, again at Kiawah Island, South Carolina. You can book your accommodations now, using the group code 12355. Our Ad Hoc Committee is chaired by Linda Johnson and Tanya Oesterreich.

CLE Committee. This committee has a long history of presenting truly outstanding programs on behalf of our Section. This year, the committee is chaired by Beth Wood and Caitlin Horne.

Communications/The Will & The Way. This newsletter is a valuable resource for our members, providing timely information and in-depth articles. It also gives members a great opportunity to publish articles. This year, Lucy Siler is the chair of The Will & The Way, and I am sure she would be glad for more article submissions, as well as editing help.

Estate Administration Manual. This committee is led by Anna Winger and Zac Lamb. It provides an excellent resource for North Carolina practitioners, and our Section members volunteer as editors and chapter authors.

Ethics Committee. Our Ethics Committee keeps abreast of relevant ethics opinions and provides feedback to our Council and the North Carolina State Bar on the issues. Bill Kratt and John Kelso co-chair this committee.

Fiduciary Litigation Committee. Our Fiduciary Litigation Committee has been furiously working on a new Fiduciary Litigation Manual, to be released later this year, in conjunction with a fiduciary litigation CLE. Christian Perrin and Michael Anderson co-chair this committee.

Legislative Committee. Our Legislative Committee works hard on proposing improvements and corrections to North Carolina’s statutes, while responding to actions that come up during our General Assembly’s sessions. Janice Davies is chair, and Kemp Mosley is vice chair.

Membership Committee. Ansley Cella is the chair of our Membership Committee, and she works hard to keep our membership growing.

Pro Bono Committee. Brooks Jaffa is stepping onto the Pro Bono Committee, which promotes projects where our skills can be used for the greater good. Of note, our Section has strong participation in Lawyer on the Line, and we have a new opportunity to provide pro bono services through the Free Legal Answers program – you just sign up online and give answers to people who qualify for free legal help. It is touted as “pro bono in your PJs.”

Technology Committee. Carter Webb heads up our Technology Committee, and he keeps the Council abreast of new opportunities to serve our members through technology improvements.

I believe that our Section is set up for another great year. I want to thank everyone involved, and encourage anyone who is not yet involved to sign up for a committee and get started.