THE ERNIE BANKS ESTATE CONTROVERSY

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INTRODUCTION

Few estate controversies in recent memory have drawn as much attention and interest as the probate estate of the late "Mr. Cub," Ernie Banks. The controversy has it all – a "caretaker" purportedly entitled to receive *everything* (to the exclusion of Banks' family), an estranged wife capitalizing on the fact that Banks' divorce was not yet finalized when he died, a diagnosis of dementia almost immediately preceding Banks' execution of the disputed will and trust instruments, a significant change in the law which—conveniently for the caretaker, and perhaps not coincidentally—only went into effect just *after* the disputed will and trust were signed, and, at the heart of it all, one of America's most beloved sports icons. This outline tells the cautionary tale of the Ernie Banks estate controversy, which is still ongoing as of this writing, and it uses the Banks estate controversy as a springboard to discuss and analyze related trust and estate legal issues.

I. THE LIFE AND ACCOMPLISHMENTS OF "MR. CUB"

Ernie Banks began as a ballplayer for the Kansas City Monarchs in the Negro leagues in 1950, earning just seven dollars a day, before crossing the color barrier and playing for the Chicago Cubs, with whom he spent his entire nineteen-year MLB career as shortstop and first-baseman between 1953 and 1971. Known as much for his sunny disposition as for his skill on the baseball diamond, Banks is generally considered to be the most beloved player in Cubs history. Over his lengthy career as a Cub, Banks was a repeat National League All-Star, as well as the first player in National League history to win Most Valuable Player in consecutive years. Banks also became one of only 26 MLB players to have at least 500 home runs (he made it to 512). Banks even received the Presidential Medal of Honor from Barack Obama in 2013. In spite of all of his many accomplishments, however, Banks was forever troubled by the fact that he had never played in the World Series; he even acknowledged having nightmares about it and consulting with a psychiatrist.

Off the field, Banks' private life was often tumultuous. Despite his overtly pleasant demeanor, Banks had gone through three divorces and was in the middle of yet another divorce from his fourth wife, Elizabeth Ellzey-Banks, when he passed away. Although explanations vary depending upon the source, at a minimum, it is apparently undisputed that Banks had little contact with his adult children in his later years, nor—of course—with Elizabeth, from whom he had long been separated.

Instead, in the last dozen or so years of his life, Regina Rice became Banks' longtime friend and confidante, and ultimately—when Banks' health failed—his caretaker. Curiously, in addition to being described as Banks' friend and confidante, Rice has

alternately been described as a "lounge singer" and "talent manager." As Regina eventually asserted in pleadings arising from the Banks estate dispute:

> [F]or the last 12 years of Ernie's life, [Regina] was his closest friend, his confidant and the one that he could depend upon to care for him and be there for him in good an challenging times. For instance, in 2013 when Ernie received the Medal of Freedom from President Barack Obama, it was Regina who stood by his side at the White House. When Ernie traveled for personal appearances and otherwise, it was Regina who accompanied him. And, when Ernie's health started failing and he required immediate and ongoing medical care and treatment, it was Regina who was with Ernie, who held his hand, and comforted him as he passed away.

Banks' finances in his later years—recently placed under a microscope as part of the ongoing controversy surrounding his estate—were hardly befitting a man who had famously played high-caliber major league baseball for nearly two decades, let alone one of the most instantly recognizable sports personalities in Chicago. In his entire career as a baseball player, Banks never earned more than $75,000 a year. A recent exposé on Banks' final days describes an intensely lonely man who was preoccupied with his finances, and who had neither the business acumen nor the proper advice to invest and save his money.[i]

II. EVENTS LEADING UP TO BANKS' DEATH[ii]

A. Banks' separation from fourth wife Elizabeth Ellzey-Banks.

1. In or about April of 2007, Banks separated from his fourth wife, Elizabeth Ellzey-Banks. Following the separation, Elizabeth continued to reside in the couple's Marina Del Ray, California home, while Banks resided in a rented condominium in Chicago's Trump Tower.

2. In 2009, during her separation from Banks, Elizabeth formally adopted the baby of a relative, Alyna Olivia Banks. Banks consented in writing to the adoption, but did not himself adopt Alyna.

B. Banks opens joint bank account with Regina Rice. Regina's pleadings in the Banks estate controversy reflect that, on August 28, 2010, Banks added Regina Rice as a joint owner on his bank account at Bank of America "with the express intent that any and all funds deposited in this account belonged to both of them to dispose of as they wished." According to Regina, both she and Banks deposited funds into the joint account periodically thereafter, and both paid their ongoing

travel expenses from the joint account. As eventually alleged by Elizabeth, Regina began paying Banks' bills at or about this time, and Banks gave Regina "unfettered discretion to access his earnings deposited in his Bank of America account."

C. Banks files for divorce fourth wife Elizabeth Ellzey-Banks.

1. **Petition for Divorce.** In June of 2012—more than *five years* after separating from Elizabeth—Banks finally filed for divorce. Significantly, the divorce proceedings were still ongoing when Banks eventually passed away.

2. **"Mental Cruelty".** Banks' Petition for Dissolution of Marriage states "[t]hat during the marriage, [Elizabeth] has committed extreme and repeated acts of mental cruelty upon [Banks], which occurred without provocation by [Banks]." The Petition provides no context or elaboration to clarify what "mental cruelty" Elizabeth purportedly subjected Banks to during the marriage, nor have any subsequent probate pleadings shed any light on the subject.

3. **No bifurcation sought.** Remarkably, and regrettably, notwithstanding the fact that Banks was *81 years old* when he filed for divorce from Elizabeth, it appears from the Complaint that Banks did not seek to bifurcate the divorce proceedings, such that the judgment of divorce would be expedited and related issues resolved thereafter. As such, Elizabeth remained Banks' spouse throughout the pending divorce proceedings.

D. Presumptively Void Transfers Act is signed into law. On August 26, 2014, former Illinois Governor Pat Quinn signed into law the Presumptively Void Transfers Act (755 ILCS 5/4a, *et seq.*), which created a rebuttable presumption that a transfer instrument transferring property in excess of $20,000 to a caregiver is *void*. Significantly, however, the law was not scheduled to go into effect until *January 1, 2015*. As such, the language of the law and its intended effect were known to the public in August of 2015, as was the fact that the law would soon go into effect, but a narrow window remained open during which executed estate plans would not be subject to the new law. One can only speculate as to whether these were motivating factors for Banks' estate plan, which was executed less than two months later on October 17, 2014.

E. Banks is hospitalized and diagnosed with dementia. As eventually alleged by Elizabeth, on October 8, 2014, Banks fell while alone in his condominium, and he

was eventually treated at Northwestern Memorial Hospital. Upon Banks' release on October 11, 2014, Regina took Banks to her home and arranged for a neuropsychological evaluation of Banks at University of Illinois Hospital on October 14, 2014. Testing purportedly revealed that Banks "evidenced severe global cognitive impairment" indicating a presence of dementia "of moderate to severe degree."

F. Banks executes the disputed estate plan just days after his diagnosis.

1. **Execution of Will and Trust.** On October 17, 2014, just *three days* after being diagnosed with dementia, Banks executed: (a) his Last Will and Testament ("Will"); and (b) his Declaration of Trust ("Trust"). As eventually alleged by Elizabeth on information and belief, Regina arranged for Banks to meet with the estate planning attorney who prepared the Will and Trust.

2. **Relevant Will Terms.** The Will provided that Regina was to be executor of Banks' probate estate, and it contained standard "pour over" provisions stating that the probate estate assets were to pass to the trustee of the Trust. Notably, the Will stated that Banks was "in the process of finalizing a divorce" from Elizabeth, and further stated that Banks made no provision for his wife or children, "not for a lack of love and affection for them and for reasons best known by them." *See id*.

3. **Relevant Trust Terms.** The Trust—only disclosed relatively recently in the probate proceedings—provided that all Trusts assets were to be distributed to Regina upon Banks' death, and it appointed Regina as successor trustee after Banks. Like the Will, the Trust noted that Banks was disinheriting his wife and children, "not for a lack of love and affection for them and for reasons best known by them."

4. **Healthcare Power of Attorney.** Additionally, also on October 17, 2014, Banks executed a Power of Attorney for Health Care ("Healthcare POA"). The Healthcare POA named Regina as Banks' agent and included language purporting to authorize Banks' agent to dispose of Banks' remains. However, the Acceptance of Office for the Healthcare POA was never signed by Regina, and by its terms the Healthcare POA expired *upon Banks' death*.

G. Presumptively Void Transfers Act goes into effect on January 2, 2015.

Perhaps not coincidentally, less than three months after Banks executed his disputed estate plan, the Presumptively Void Transfers Act went into effect. Significantly, the Act applies only to estate plans executed *on or after January 1, 2015*. 755 ILCS 5/4a-35. Again, one can only speculate as to whether the timing of Banks' estate plan execution—which allowed Regina to evade the application of the Act—was coincidental or deliberate.

H. Banks dies on January 23, 2015. Banks passed away on January 23, 2015, about three months after executing the Will and Trust. According to pleadings filed by Regina, neither Banks' estranged wife nor his adult children (from a prior marriage) were with him when he passed away. Rather, it was Regina who was there, and who contacted Elizabeth to let her know that Banks had died. Regina asked Elizabeth, in turn, to notify Banks' adult children of his death. Banks' adult children initially lauded Rice as a dear friend of Banks, though they quickly about-faced upon learning of Banks' estate plan. News reports indicate that they vowed to go to court to prevent the estate plan from being effectuated, and they asserted through the media that, prior to Banks' death, Regina had deliberately capitalized upon Banks' weakened condition and prevented them from speaking with Banks by phone. Tellingly, however, Banks' adult children appear to have ultimately taken no court action.

III. THE RESULTING CONTROVERSY.

A. Elizabeth initially appointed as administrator of Banks' "intestate" estate.

1. **Elizabeth's Petition for Probate**: Within days of Banks' death, on January 28, 2015, Elizabeth filed with the Cook County Probate Court her *Petition for Letters of Administration*, seeking appointment as representative of Banks' probate estate based upon her status as Banks' surviving spouse. In her Petition, Elizabeth asserts that Banks died *intestate* (though subsequent pleadings by Regina suggest that Elizabeth may have been well aware that an adverse will and trust existed when she filed her Petition).

2. **Elizabeth's Affidavit of Heirship:** Elizabeth's Affidavit of Heirship includes, among other heirs, purported adopted heir Alyna Banks.

3. **Elizabeth appointed as administrator:** The Probate Court (Judge Riley) thereafter appointed Elizabeth as administrator of Banks' purportedly intestate estate on January 29, 2015.

B. Rice files disputed Will and Motion to Vacate.

1. Apparently unaware that Elizabeth had taken any action with regard to Banks' probate estate, on January 30, 2015, Regina filed Banks' purported Last Will and Testament with the Clerk of Court. In doing so, Regina discovered that Elizabeth had already opened a probate estate for Banks, wherein Elizabeth stated that Banks died intestate.

2. According to pleadings filed by Regina, counsel for Regina thereafter contacted counsel for Elizabeth, who, in turn, purportedly acknowledged that Elizabeth was aware of Banks' Will, but asserted that "a Will does not exist until it is filed."

3. On February 2, 2015, Regina filed with the Probate Court her *Motion to Vacate Order Appointing Representative of Decedent's Estate-Intestate and All Other Related Orders* ("Motion to Vacate"). Regina's Motion to Vacate clarified that Banks not only had a purported Will, but also that the Affidavit of Heirship submitted by Elizabeth—which included Elizabeth's adopted child, Alyna, whom Banks had never adopted—was defective. One can only speculate as to whether Elizabeth's improper inclusion of Alyna in the Affidavit of Heirship was deliberate.

4. Relying Banks' Will, Regina asked that the Court "acknowledge and respect [Banks'] stated and documented wishes" by issuing an order vacating: (1) the Court's Order appointing Elizabeth as estate representative; (2) the Letters of Office issued to Regina; (3) the Court's Order Declaring Heirship; and (4) "any other related" order.

C. Regina files "Emergency Motion to Enter Last Will and Testament" of Banks. A few days later, on February 6, 2015, Regina filed with the Court an Emergency Motion to "Enter" Banks' Will, in which Regina requested that the Court admit Banks' Will to probate.

D. Dispute over disposition of Banks' remains.

1. Burial vs. Cremation. Also brewing at this time was an ugly dispute between Elizabeth and Regina as to the appropriate disposition of Banks' remains. Elizabeth contended that Banks should be buried in Graceland Cemetery in Chicago, while Regina contended that Banks had long wished to be cremated so that his ashes could be spread at Wrigley Field.

2. **Elizabeth's Petition to Dispose of Remains.** The same day Regina filed her Motion to Vacate—February 2, 2015—Elizabeth filed with the Court her *Verified Petition for Order to Grant Authority to Dispose of Remains* ("Petition to Dispose"). In her Petition to Dispose, Elizabeth acknowledged that she was aware of Banks' Will and Healthcare POA as of at least January 30, 2015, but that she nonetheless had been appointed by the Court as Banks' estate representative by order of January 29, 2015—an order which had not yet been vacated—and that she therefore had "priority" to determine the appropriate disposition of Banks' remains pursuant to Section 50 of the Illinois Disposition of Remains Act. 755 ILCS 65/50. As asserted by Elizabeth, if she were to "successfully challenge the validity" of the Healthcare POA and the Will, Regina's authority to direct the disposition of Banks' remains "would not exist." Again, one can only speculate as to whether Elizabeth knowingly and deliberately obtained an unwarranted order appointing her as estate representative so as to seize control and authority over Banks' remains and dispose of them as she wished.

3. **The Court grants Elizabeth authority to dispose of Banks' Remains.**

    a. **Elizabeth wins.** By order of February 6, 2015, the Court granted Elizabeth's Petition and empowered her to dispose of Banks' remains ". . . under the Illinois Disposition of Remains Act."

    b. **Regina lacks standing.** For reasons that aren't entirely clear, the Court's order reflects that the Court did not recognize Regina as having any standing in the estate. This may possibly be due to the fact that Banks' Will—the instrument through which Regina becomes both estate representative and interested party—had not yet been admitted.

    c. **Healthcare POA does not help Regina.** The Court also noted in the same order that the Healthcare POA naming Regina as agent and empowering Regina to dispose of Banks' remains "terminated at the death of the Decedent" and was not actually signed by Regina. That is, presumably, notwithstanding the fact that the Healthcare POA purported to empower Regina to dispose of Banks' remains, the fact that it terminated upon Banks' death, rather than upon the disposition of his remains, rendered that power a nullity.

d. **No ashes at Wrigley.** In the end, and as Elizabeth preferred, Banks was buried rather than having his ashes spread at Wrigley Field.

E. Regina supplants Elizabeth as estate representative, and Elizabeth goes on the offensive.

1. **Regina appointed as executor.** By order of February 9, 2015, just three days after finding that Regina lacked any standing and denying Regina authority to dispose of Banks' remains, the Court vacated Elizabeth's appointment as estate representative, admitted Banks' Will to probate and appointed Regina as executor of Banks' estate.

2. **Regina amends Affidavit of Heirship.** That same date, Regina filed *instanter* with the Court an Amended Affidavit of Heirship which excluded Elizabeth's adopted daughter, Alyna.

3. **Elizabeth petitions for formal proof of Will.** Also on February 9, 2015, Elizabeth—as an heir of Banks' estate—filed a Petition for Formal Proof of Will, which the Court immediately granted and scheduled for March 31, 2015.

4. **Elizabeth Petitions for Supervised Administration.** Staying on the attack after being removed as estate representative, on February 11, 2015, Elizabeth also filed a *Petition to Terminate Independent Administration* with the Court, which the Court granted, converting Banks' estate into supervised administration.

5. **Inventory ordered.** In the same order converting Banks' estate to supervised administration, the Court ordered Regina to file an inventory of Banks' estate by April 27, 2015.

6. **Subpoena to medical provider.** Elizabeth also began laying the groundwork for a will and trust contest, subpoenaing Banks' medical records.

F. Citations to Discover on both sides and resulting battle.

1. **Elizabeth seeks leave to issue Citation to Discover against Regina.** On February 11, 2015, just two days after Regina was appointed as estate representative, and before any inventory was even filed with the Court, Elizabeth sought leave of Court to issue a Citation to Discover against Regina. By order of February 24, 2015, the Court ordered that the Citation be issued.

2. **Assets and information sought by Elizabeth.** Among other assets and information, the proposed Citation sought documents and communications relating to life insurance policies, joint accounts, asset transfers from Banks to Regina or any business entity owned or controlled by Regina, and asset transfers to any trust, including Banks' Trust.

3. **Regina responds with her own Citation to Discover.** On March 23, 2015, Regina, in turn fired back with her own Petition to Issue a Citation to Discover against Elizabeth. The Court thereafter granted and issued the citation.

4. **Regina's Citation Response.**

   a. **Trust and Joint Account revealed.** In response to the Citation issued against her, Regina disclosed, among other assets, the existence of an Associated Bank account in the name of Banks' Trust, as well as the joint account which had been owned by Banks and Regina at the time of Banks' death. However, Regina refused to produce any bank statements for the Trust or joint account, asserting that they were not probate assets and thus were beyond the scope of a citation to discover. In Regina's words: "There are no bank accounts in the estate."

   b. **Transfers of memorabilia revealed.** Regina asserted in her Citation Response that Banks periodically provided autographed items for sale on www.erniebanks.net, which Regina described as being "administered" by her. A subsequent letter from Regina's counsel noted that the domain name and website "belong to" Regina. Regina asserted, however, that proceeds from the online sale of the memorabilia went to charity (though she acknowledged by separate pleading that this was true as to only some of the sales). No sales figures were disclosed by Regina, again on the purported basis that the information sought did not pertain to assets of Banks' probate estate. Regina asserted in a subsequent pleading only that the sales were "modest."

   c. **Name and likeness rights.** News outlets predicted that the most valuable assets of Banks were his name and likeness rights. Regina asserted in her Citation Response that Banks had transferred those rights to his Trust.

d. **No life insurance policies.** Regina's citation response also revealed that no known life insurance policies existed on Banks' life.

e. **No investments or retirement accounts.** No investments or retirement accounts at all were disclosed in the Citation Response.

f. **Back taxes.** Regina's citation response also revealed that Banks had been working through an installment agreement with the IRS to pay $75,000 in back taxes for the years 2009 and 2011.

G. **Motion to Compel against Regina.** Elizabeth eventually filed with the Court a *Motion to Compel*, seeking—among other information—monthly bank statements for the Trust account and any joint account, as well as sale records for www.erniebanks.net. Elizabeth argued that Regina's bare assertions that particular assets were not part of Banks' probate estate should not set the scope of the Citation to Discover, given that the purpose of a citation included discovering allegedly non-probate assets which, in reality, belong in the probate estate. Regina countered by asserting that the information sought regarding Trust and jointly-owned assets, by definition, extended beyond probate assets, and thus beyond the appropriate scope of a Citation to Discover. The Judge ultimately sided with Elizabeth, demanding by order of May 29, 2015 that Regina produce bank statements for the Trust and joint accounts and sale records for property sold on www.erniebanks.net. The Court file contains no further information regarding any subsequent disclosure of this information.

H. **The claims start coming.** As the proceedings carried on, several claimants began filing claims against Banks' estate. Most were attorneys seeking fees incurred in Banks' divorce proceedings. Claims included:

1. **Dussias Law Group:** $2,205.22 (legal fees from divorce proceedings). *Ultimately dismissed for want of prosecution.*

2. **Donnellan Family Funeral Services, Inc.:** $35,418.03 (nice funeral!), including legal fees relating to dispute over disposition of Banks' remains. *Ultimately dismissed for want of prosecution.* News reports indicate that funeral was paid for by Cubs organization.

3. **Law Offices of Jeffrey M. Leving:** $27,552.55 (although not included in court file documents obtained, presumably for attorneys' fees). *Allowed in full.*

4. **Grund & Leavitt, PC:** $27,472.33 (legal fees from divorce proceedings). *Allowed in full.*

5. **Law Firm of Barry H. Greenburg:** $11,950.00 (contribution for legal fees incurred by Elizabeth in divorce proceedings, based purported fact that Elizabeth "lacks sufficient income and means" to pay herself). *Reduced to $1,950 by agreement and allowed.*

6. **Kipnis Rosen & Bloom, Ltd.:** $5,100 (accounting and income tax fees). *Allowed in full by agreed order*.

7. **Shirley Marx:** $80,000.00+ (longtime friend who repeatedly made purported loans to Banks to assist him with covering his personal expenses). *Voluntarily dismissed by agreement.*

8. **Little pushback against claims by Regina:** Notably, the Court's order of May 26, 2015 reflects that Regina "[did] not contest" more than $50,000 in claims allowed against Banks' estate. One can only speculate as to whether Regina's refusal to contest the claims was due to their clear validity, or rather a means to disincentivize any effort on the part of Banks' family to draw assets away from Regina and into Banks' probate estate.

I. Banks' Will is confirmed. On March 31, 2015, following a hearing on formal proof of Will, the Court confirmed Banks' Will. News outlets erupted with overstated reports stating that Banks' Will had been definitively deemed valid by the Court, while in reality no will contest had even been filed yet, let alone adjudicated.

J. The "reveal" – a modest inventory of estate assets.

1. **The inventory.** In April of 2015, Regina filed with the Court an inventory of Banks' probate assets, followed thereafter by an Amended Inventory on May 7, 2015.

2. **The bottom line – it's not much.** The Amended Inventory listed the value of Banks' probate estate assets at only $16,000, with no listed Illinois real estate. No accounts were listed on the Amended Inventory.

3. **Some of the more interesting assets:** Although the Inventory, comprised almost entirely of personal property, skewed towards the mundane, there were some gems. Among them: (1) Banks' hall of fame ring; (2) a presidential medal of freedom; (3) a letter from President Obama; (4) a baseball autographed by the Clintons; (5) Banks' original Negro League contract; and (6) an unspecified "limited partnership interest" in Harry Caray's Tavern Navy Pier LP.

4. **"Burning money."** Perhaps most appropriately of all, given the purportedly minimal value of Banks' estate and the ever-increasing number of claims filed against it, was a "Portrait of Burning Money" listed among Banks' probate assets.

K. The "estranged wife" gets a spouse's award.

1. **Elizabeth's Petition.** On May 20, 2015, Elizabeth filed with the Court a simple form "Affidavit for Award," seeking the $20,000 minimum surviving spouse's award pursuant to 755 ILCS 5/15-1.

2. **Regina's Response.** Regina filed her Response on June 22, 2015, asserting that Elizabeth was not entitled to any spouse's award. In support of this assertion, among other arguments, Regina pointed to Elizabeth's estrangement from Banks, the pending divorce (including allegations of "extreme and repeated acts of mental cruelty" by Elizabeth), and Elizabeth's lack of any financial reliance upon Banks.

3. **Elizabeth's Reply.** Elizabeth responded, in turn, by asserting that, regardless of all other circumstances, Elizabeth was Banks' legal spouse at the time of his death, and that 755 ILCS 5/15-1 directs a *mandatory minimum spousal award* of $20,000.

4. **Elizabeth wins.** The judge ultimately sided with Elizabeth, approving her spouse's award in the amount of $20,000.

L. Regina asks for a Settlement Conference. With the Will and Trust contest deadline fast-approaching, and with all of the makings of an insolvent estate, on

July 14, 2015, Regina filed with the Court her *Motion for Settlement Conference*. In her Motion, Regina noted that "[c]laims continue to accrue against the Estate, including attorneys' fees relating to its administration." Regina thus requested a settlement conference "[i]n the interest of closing the administration of the Estate efficiently and without expending resources unnecessarily . . . ." In her Motion, Regina asked that "any heirs and legatees be present in person" for the conference.

M. Elizabeth finally files her Will and Trust Contest. On July 21, 2015, about a week before the expiration of the limitations period, Elizabeth filed her *Verified Petition to Contest the Validity of the Will and Trust of Ernest Banks, Deceased*, in which Elizabeth sought to set aside the Will and Trust based upon Banks' purported lack of testamentary capacity and Regina's purported exercise of undue influence over Banks.

N. No contest from Banks' children. Neither Banks' children, nor any other interested party, filed any will or trust contest within the limitations period.

O. Time to renounce Will extended by Court order. Additionally, on Elizabeth's oral motion, the Court extended Elizabeth's deadline to renounce the Will "until further order of Court."

P. Settlement discussions. Pretrial was held on September 25, 2015. No record exists as to what was discussed, and all that is clear from the resulting order is that the matter was not resolved at that time. Instead, the Court ordered the parties to return for a status and issuance of a discovery scheduled on November 4, 2015.

Q. And here we are. Presently, the controversy surrounding the Banks estate is still ongoing, but with the apparent knowledge of all involved that the amount at stake may not be as much as hoped and is shrinking daily.

IV. LAW IMPLICATED IN THE ERNIE BANKS ESTATE CONTROVERSY.

A. Bifurcation of divorce proceedings.

1. If only Elizabeth hadn't been legally married to Banks at the time of this death. As is apparent from all of the above, much of the litigation and controversy surrounding Ernie Banks' probate estate was fueled by his estranged wife, Elizabeth. Had Banks simply taken basic steps to ensure that he did not die with Elizabeth still legally recognized as his wife, it stands to

reason that just about all of the legal proceedings described above could have been avoided.

2. **The concept of bifurcation.** Illinois law actually allows married parties in a divorce proceeding to "bifurcate" their divorce, thereby placing the divorce proceedings on two separate tracks, namely: (1) the dissolution of the marriage; and (2) other issues such as the division of marital property, child custody, child support and spousal maintenance. *See* 750 ILCS 5/401(b). Doing so allows the parties to legally divorce from one another in short order, without having to wait until a full resolution of all issues in the divorce proceedings.

3. **Law governing bifurcation.** In Illinois, the issue of whether divorce proceedings may be bifurcated is governed primarily by Section 401(b) of the Illinois Marriage and Dissolution of Marriage Act ("IMDA").

   a. **Section 401(b) of the IMDA.** Section 401(b) of the IMDA sets the general rule that bifurcation is *not* permitted, and that a judgment for dissolution of marriage may not be entered unless and until the issues of child custody, child support, spousal maintenance and property disposition are adjudicated or otherwise resolved. 750 ILCS 5/401(b). However, exceptions to this general rule exist. Specifically, bifurcation is allowable where: (1) the parties agree to bifurcated divorce proceedings; or (2) upon motion filed by either of the parties, and a finding by the Court that appropriate circumstances exist warranting bifurcation. *Id.* Significantly, if divorce proceedings are bifurcated, "[t]he death of a party subsequent to entry of a judgment for dissolution but before judgment on reserved issues shall not abate the proceedings." *Id.*

      i. **"Appropriate circumstances."** Among the "appropriate circumstances" warranting bifurcation of divorce proceedings are: (1) where the court lacks jurisdiction over the respondent; (2) where a party is unable to pay child support or maintenance; (3) where the court has set aside an adequate fund for child support; or (4) where no children reside with either of the parties. *In re Marriage of Cohn*, 93 Ill.2d 190, 443 N.E.2d 541 (1982). Several cases have emphasized that no exhaustive list of "appropriate circumstances" exists. *See Cohn*, 93 Ill.2d at 199; *see also In re Marriage of Bogan*, 116 Ill.2d 72, 81, 506 N.E.2d 1243 (1986).

ii. **Impending death.** Significantly, among other "appropriate circumstances" warranting bifurcation, where one of the parties to the divorce action may be near death, bifurcation is permissible. *See Copeland v. McLean*, 327 Ill.App.3d 855, 863,

iii. **Abuse of discretion.** A trial court's decision to bifurcate divorce proceedings is subject to a deferential abuse of discretion standard of review. *Copeland v. McLean*, 327 Ill.App.3d 855, 865, 763 N.E.2d 941 (4th Dist. 2002).

b. **Sidenote regarding 735 ILCS 5/2-1007.1(a).** Although not directly applicable to bifurcation proceedings, Section 2-1007.1(a) of the Code of Civil Procedure provides that "[a] party who is an individual and has reached the age of 70 years shall, upon motion by that party, be entitled to preference in setting for trial . . . ." 735 ILCS 5/2-1007.1(a). This section of the Code reflects a recognition on the part of the Illinois legislature that expedited proceedings for elderly parties may be necessary and warranted.

4. **What if Banks had sought bifurcation?** It stands to reason that Banks may have been able to avoid the entire legal controversy surrounding his estate, if only he had sought to bifurcate his divorce proceedings with Elizabeth. Elizabeth was neither a legatee of any Will executed by Banks nor a beneficiary of any Trust executed by Banks. Again and again, in the controversy surrounding Banks' estate, Elizabeth's sole basis for asserting standing was the fact that she was, and remained, Banks' wife. Had Banks simply sought bifurcation, given his advanced age at the time at the time he filed for divorce—he was *81 years old*—it seems likely that the court would have permitted Banks to expedite the divorce judgment, with remaining property issues to be addressed thereafter. Doing so would have meant that Elizabeth would *not* have been Banks' wife when Banks passed away, thereby undermining Elizabeth's ability to interfere with Banks' estate administration (and, not insignificantly, the disposition of Banks' remains).

B. The minimum mandatory statutory spouse's award *really is the minimum*, and it *really is mandatory*.

1. **Banks' "wife" in name only still gets her share.** Notwithstanding the fact that Elizabeth had been living separately and estranged from Banks for *years* before Banks' death, the reality remained that, in the eyes of the law, Elizabeth was still Banks' wife when Banks died. Among many other opportunities that status afforded Elizabeth in Banks' estate proceedings, it

gave her a "freebie" $20,000 claim off the top of Banks' probate estate as a spouse's award.

2. **Spouse's Award under Section 15-1 of the Probate Act.** Spouse's awards against probate estates are governed by Section 15-1 of the Illinois Probate Act, which provides, in relevant part, that "[t]he surviving spouse of a deceased resident of this State whose estate, whether testate or intestate, is administered in this State, shall be allowed . . . a sum of money that the court deems reasonable for the proper support of the surviving spouse for the period of 9 months after the death of the decedent in a manner suited to the condition in life of the surviving spouse and to the condition of the estate . . . ." 755 ILCS 5/15-1. The statute goes on to state that "[t]he award may in no case be less than $20,000 . . . ." *Id*. "The purpose of the statutory spouse's award is to 'help alleviate the widow's problems by removing as many of her financial worries as possible during this difficult period." *In re Meyer's Estate*, 113 Ill.App.3d 886, 889, 446 N.E.2d 892 (2nd Dist. 1983).

3. **High priority.** Significantly, spouse's awards are high-priority, *second class claims* against a decedent's estate, superior not only to bequests and inheritances, but also to nearly all other claims. 755 ILCS 5/18-10. Allowed spouse's awards are second in priority only to funeral and burial expenses, expenses of estate administration, and statutory custodial claims. *Id*.

4. **Mandatory minimum.** As is reflected in the very language of Section 15-1 of the Probate Act, the sole predicate for the allowance of a spouse's award is the claimant's status as spouse at the time of the decedent's death. *See* 755 ILCS 5/15-1. Although the statute draws in other considerations for awards in excess of the statutory minimum—such as "proper support," the "condition of life" of the surviving spouse, and the "condition of the estate"—the statute unequivocally states that "[t]he award may *in no case be less than $20,000* . . . ." *Id*. (emphasis provided). Illinois case law is likewise clear that ". . . the minimum [spouse's] award under the Probate Act is automatic and non-discretionary . . . ." *In re Buehnemann's Estate*, 25 Ill.App.3d 1003, 1006, 324 N.E.2d 97 (5th Dist. 1975); *see also In re Meyer's Estate*, 113 Ill.App.3d 886, 889, 446 N.E.2d 892 (2nd Dist. 1983).

5. **Sorry, Regina.** Regina's counsel made every effort to assert that, because Elizabeth was estranged from Banks and in no way reliant upon Banks' finances, Elizabeth was not entitled to a spouse's award, in the minimum amount or otherwise. Tellingly, however, Regina's counsel cited to no on-

point cases in support of that proposition, nor is the author here aware of any such authority. To the contrary, the language of the governing statute *mandates* payment of the minimum award. *See* 755 ILCS 5/15-1. Along these lines, in *In re O'Neill's Estate*, a surviving spouse was awarded the minimum spouse's award notwithstanding the fact that she had been living separately from the decedent at the time of his death and had received no financial support from him. *In re O'Neill's Estate*, 104 Ill.App.3d 488, 432 N.E.2d 1111 (1st Dist. 1982). In keeping with the above, Judge Riley is reported to have said "I'll tell you exactly what the appeals court would say if I denied it—they'd say: 'Hey, what's wrong with Riley?"[iii]

C. Illinois Disposition of Remains Act ("IDRA").

1. **Banks' wife wins the battle.** Recall that, in the end, Banks' wife, Elizabeth, won the battle over who could dispose of Banks' remains. In its order authorizing Elizabeth to dispose of Banks' remains, the Court noted that the authority was granted to Elizabeth "under the Illinois Disposition of Remains Act." Looking to the Act itself, it's difficult to see how the Court reached this decision.

2. **Explanation of the IDRA.**

   a. **Priorities.** The IDRA sets priorities for who may direct the disposition of a decedent's remains. Significantly, among the first in line are designated agents under powers of attorney empowering the agent to dispose of the decedent's remains. The priority then goes as follows: (1) the person designated in a written instrument satisfying the provisions of the IDRA; (2) any person serving as executor or legal representative of the decedent's estate and acting according to the decedent's written instructions contained in the decedent's will; (3) the spouse of the decedent at the time of the decedent's death; and (4) various other family members with their own sub-priorities. Priority descends thereafter to other persons and organizations not relevant here, finally ending with "any other person or organization that is willing to assume legal and financial responsibility." 755 ILCS 65/5.

   b. **Disputes.** The IDRA also specifically provides that "[a]ny dispute among any of the persons listed in Section 5 concerning their right to control the disposition, including cremation, of a decedent's remains shall be resolved by a court of competent jurisdiction." 755 ILCS 65/50. It goes on to

shield cemeteries and funereal organizations from liability for refusing to dispose of remains until a resolution of the dispute or court order. *Id*.

3. **What authority did Elizabeth have to dispose of Banks' remains?** Looking to the Banks case, it seems clear that Elizabeth was relying upon her status as Banks' spouse at the time of his death, which put her *third* in line in the above priorities. Elizabeth could not have relied upon her status as the acting estate representative at the time, because the IDRA is clear that higher priority is given only to an estate representative "acting according to the decedent's written instructions contained in the decedent's will," and, at least as originally asserted by Elizabeth, Banks had no will and was intestate.

4. **What authority did Regina have to dispose of Banks' remains?** Regina was both the nominated executor in Banks' Will, as well as Banks' agent under a power of attorney that specifically empowered Regina to dispose of Banks' remains. As agent, in theory, Regina should have had the very highest priority to dispose of Banks' remains. Even as the executor, as a fallback, Regina would have been *second* on the priority list, still ahead of Elizabeth at *third*.

5. **So why didn't Regina win the battle over Banks' remains?** Although not perfectly clear from the record, it looks like Regina lost out to Elizabeth in the battle over Banks' remains for two reasons:

    a. **Power of Attorney not effective.** As to Regina's status as Banks' agent under a power of attorney, the Court's order specifically reflects that ". . . the Illinois Statutory Power of Attorney dated October 17, 2014 and allegedly signed by the Decedent *terminated at the death of the decedent.*" That is, apparently, notwithstanding the fact that Banks' power of attorney nominated Regina as agent and empowered her to dispose of his remains, the fact that the power of attorney listed its termination as occurring *upon Banks' death*, rather than *upon the disposition of Banks' remains*, rendered Regina's purported power to dispose of Banks' remains a nullity, given that her agency terminated when Banks died.

    b. **Regina lacks standing as executor.** The Court's order also makes a somewhat cryptic reference to Regina lacking any standing at the time the decision was being made. Although not entirely clear, it stands to reason that the Court looked to the IDRA and concluded that, given

that Regina was not yet "*serving*" as executor, but instead had merely been *nominated* as executor in a will not yet admitted to probate, Regina lacked any standing to assert that she was entitled to priority over Elizabeth under the IDRA. Even under this line of reasoning, however it is difficult to understand how the Court reached its conclusion; after all, among the persons listed in the Act's line of priority are "any other person or organization that is willing to assume legal and financial responsibility" for Banks' remains. 755 ILCS 65/5(9). It would be one thing for the Court to say that Regina's argument failed, but it's another to say that she lacks any standing whatsoever to dispose of Banks' remains.

6. **The bottom line – the Court just got it done.** The likeliest explanation for the Court's order is simply that, with the media spotlight trained on the Banks estate, and with Banks' remains awaiting a final disposition, the Court took advantage of a narrow window in which to enter a plausible order directing the disposition of Banks' remains before the conflict between Elizabeth and Regina escalated any further.

D. Presumptively Void Transfers Act ("PVTA").

1. **Coincidentally or not, Banks *just missed it*.** As has been noted, Banks executed his estate plan just *after* the Presumptively Void Transfers Act was signed into law, and just *before* the law went into effect. The timing of Banks' execution of his estate plan—particularly given the adverse impact of the law upon Banks' bequests to Regina—certainly raises some red flags. Regardless, it's clear by the very terms of the Presumptively Void Transfers Act that the law is inapplicable to Banks' estate plan. *See* 755 ILCS 5/4a-35. Still, the question is worth asking: what if the law had applied to Banks' Will and Trust?

2. **Explanation of the PVTA.**

   a. **Challenged "transfer instruments" to "caregivers" presumed void.** The IDRA provides that, where a "transfer instrument" is challenged in a civil action, and where that "transfer instrument" conveys to a "caregiver" property in excess of $20,000, the instrument is presumed to be void. 755 ILCS 5/4a-10.

b. **"Transfer instrument" defined.** As defined by the PVTA, a "transfer instrument" means ". . . the legal document intended to effectuate a transfer effective on or after the transferor's death and includes, without limitation, a *will*, *trust*, deed, form designated as payable on death, contract, or other beneficiary designation form. 755 ILCS 5/4a-5(3). In other words, the PVTA applies to transfers *on or after death*, but does not apply to *inter vivos* transfers.

c. **"Caregiver" defined.** As defined by the PVTA, a "caregiver" means ". . . a person who voluntarily, or in exchange for compensation, has assumed responsibility for all or a portion of the care of another person who needs assistance with activities of daily living." 755 ILCS 5/4a-5(1). "Family members" (*i.e.* a spouse, child, grandchild, sibling, aunt, uncle, niece, nephew, first cousin or parent of the person receiving assistance) are excluded from the definition of "caregiver." 755 ILCS 5/4a-5(1) & (2).

d. **Overcoming the presumption.** A defending caregiver may overcome the presumption that a transfer instrument is void only by: (1) proving by a preponderance of the evidence that the caregiver's share under the transfer instrument is equal to or less than the share the caregiver was entitled to under the transferor's transfer instrument in effect before the caregiver became a "caregiver," as defined by the PVTA; or (2) proving *by clear and convincing evidence* that the transfer was *not* the product of fraud, duress, or undue influence. 755 ILCS 5/4a-15.

e. **Harsh consequences.** Where a caregiver fails to rebut the presumption, not only is the contested transfer deemed void, but also ". . . the caregiver *shall bear the costs of the proceedings, including, without limitation, reasonable attorney's fees*." 755 ILCS 5/4a-25 (emphasis added). That is, the PVTA *requires* that the losing caregiver pay for *both sides of the litigation*. This is an extraordinarily harsh result for the caregiver.

f. **What if it had applied to Banks' estate?** The fact that the PVTA does not apply to Banks' estate plan shows that Regina was either very lucky or very savvy. Had the Act applied, it stands to reason that both Banks' Will and Banks' Trust, to the extent that they purported to convey assets to Regina in excess of $20,000, would have been presumptively void, and Regina would face not only a daunting standard of proof to overcome that

presumption, but also the extreme risk of personally bearing the attorneys' fees and costs on *both sides of the dispute*.

E. Mere "diagnosis of dementia" is insufficient to set aside will.

1. **Banks diagnosed with dementia just days before executing estate plan.** As previously noted, Banks was diagnosed with dementia "of moderate to severe degree" just days before executing his disputed Will and Trust.

2. **The media reaction.** Immediately following the revelation of Banks' dementia diagnosis, media outlets erupted with reports that Banks was mentally impaired when he signed the disputed estate plan.

3. **The reality: dementia doesn't necessarily equate to lack of testamentary capacity.** As estates and trust practitioners know well, the mere fact that a testator or grantor suffers from dementia does not, in-and-of itself, render a will or trust invalid. To the contrary, the governing "lack of testamentary capacity" standard for invalidating a Will or Trust sets a very low standard for the executing party and, conversely, a high bar for those seeking to set aside a will or trust.

4. **The standard for lack of testamentary capacity.** To prove lack of testamentary capacity necessary to set aside a will or trust, the complaining party must establish that the testator lacked sufficient mental ability to: (1) know the natural objects of his bounty; (2) comprehend the kind and character of his property; and (3) make a disposition of his or her property according to some plan formed in the testator's mind. *In re Estate of Sutera*, 199 Ill.App.3d 531, 536, 557 N.E.2d 371 (1st Dist. 1990). In other words, a testator need only be able to know who would naturally receive his assets (such as family) and the general nature of those assets. *See id.*

F. Admission of will is a *prerequisite* to will contest, not an adjudication of the will's validity.

1. **Banks' Will confirmed and admitted.** As described above, upon Elizabeth's motion, the Court held a hearing on formal proof of Banks' Will and ultimately confirmed the Will.

2. **The media reaction.** Again, media outlets responded with overblown declarations that Banks' Will was irrefutably valid and that Banks possessed the requisite testamentary capacity at the time the Will was executed.

3. **The reality: formal proof of the will is only the start, not the finish.** The less exciting reality is that the prove-up of Banks' Will and its admission to probate were, in reality, a necessary *prerequisite* to a will contest, and not an adjudication of validity.

4. **Prove-up.** Section 6-4(a) of the Probate Act sets the (minimal) governing standards which must be satisfied in order for a will to be admitted to probate, namely, two attesting witnesses each stating that: (1) he was present and saw the testator or some person in his presence and by his direction sign the will in the presence of the witness or the testator acknowledged it to the witness as his act; (2) the will was attested by the witness in the presence of the testator; and (3) he believed the testator to be of sound mind and memory at the time of signing or acknowledging the will. 755 ILCS 5/6-4. If these elements are proved, then the will *must* be admitted to probate. *Matter of Estate of Nicola*, 275 Ill.App.3d 860, 862, 356 N.E.2d 967 (1st Dist. 1976) (emphasis provided).

5. **Admission of a will is not an adjudication of validity, but a *prerequisite* to an adjudication of validity.** Significantly, "[t]he proponent of a will need not prove that the will is valid in all respects in order to have the will admitted to probate." *Nicola*, 275 Ill.App.3d at 499; *See also Jackson's Estate*, 56 Ill.App.3d 915, 919, 372 N.E.2d 711 (4th Dist. 1978). To the contrary, ". . . matters relating to the *procurement of the will* are not properly cognizable but . . . must be shown through a *will contest*." *Jackson's Estate*, 56 Ill.App.3d at 919; *see also Weaver's Estate*, 50 Ill.App.3d 223, 231, 365 N.E.2d 1038 (5th Dist. 1977). Section 8-1(a) of the Probate Act likewise provides that "[w]ithin 6 months *after the admission to probate of a domestic will* . . . any interested person may file a petition . . . to contest the validity of the will." 755 ILCS 5/8-1(a) (emphasis provided). All of this is to say that, far from constituting a final adjudication of the validity of a will, the initial admission of a will must occur *before* a will contest can be even be filed and adjudicated.

G. Trust contest limitations period, unlike will contest limitations period, *might not be jurisdictional in nature* – watch out.

1. **No action from Banks' children or other interested parties.** As has been noted, although Banks' adult children initially expressed their outrage over Banks' estate plan to the media, it appears that they have taken no legal action to date, and they have failed to file any will or trust contest of their own within the six-month limitations period set by 755 ILCS 5/8-1(a) & (f) and 735 ILCS 5/13-223. Settlement discussions are apparently ongoing, and—in light of the bar set by the limitations period—counsel for Regina and Elizabeth may be tempted to limit those negotiations to Elizabeth and Regina, the only timely-acting complainant and the estate representative, respectively. **Doing so would be a mistake.**

2. **Will contest limitations period is jurisdictional.** Section 8-1(a) of the Probate Act provides that "[w]ithin *6 months* after the admission to probate of a domestic will . . . any interested person may file a petition in the proceeding . . . to contest the validity of the will." 755 ILCS 5/8-1(a). That is, Section 8-1(a) sets an incredibly brief limitations period for will contests, requiring them to be filed within just six months of the admission of the disputed will to probate. Illinois law is clear that "[t]his six-month limitation period is *jurisdictional* and *not subject to tolling* by fraudulent concealment or any other fact not expressly provided for by the Probate Act." *In re Estate of Ellis*, 236 Ill.2d 45, 50, 923 N.E.2d 237 (2009) (emphasis added). *Put simply, if you blow the deadline, there's no saving you – your will contest isn't happening.*

3. **Trust contest limitations period MIGHT NOT BE jurisdictional.**

   a. **Section 5/8-1(f) of the Probate Act.** As for trust contests, Section 5/8-1(f) of the Probate Act provides that "[a]n action to set aside or contest the validity of a revocable inter vivos trust agreement or declaration of trust to which a legacy is provided by a settlor's will which is admitted to probate shall be commenced within and not after the time to contest the validity of a will as provided in subsection (a) of this Section and Section 13-223 of the Code of Civil Procedure.

   b. **Section 13-223 of the Code of Civil Procedure.** Section 13-223 of the Code, in turn, states that "[a]n action to set aside or contest the validity of a revocable inter vivos trust agreement or declaration of trust to which a legacy is provided by the settlor's will which is admitted to probate, shall be commenced within and not after the time to contest the validity of a will as provided in the Probate Act of 1975 as amended.

c. **So it's the same 6-month window.** So it's clear from the above statutes that an action to contest a trust which receives a legacy from a will is subject to the same 6-month limitations period as a will contest.

d. **BUT, it's possible that the trust contest limitations period *CAN BE TOLLED*.** Interestingly, however, unlike an action to contest a will, a trust contest limitations period *might not be jurisdictional* and *could potentially be tolled*. As reasoned in *Anderson v. Marquette Nat. Bank*: "[T]he reference to the six-month [trust contest] limitation period of the Probate Act in section 13-223 does not carry with it the jurisdictional aspect of the Probate Act." *Anderson v. Marquette Nat. Bank*, 164 Ill.App.3d 626, 635, 518 N.E.2d 196 (1st Dist. 1987). Rather, ". . . the six-month limitation period is *subject to enlargement*." *Id*. (emphasis provided). The logic behind the *Anderson* decision was that the trust contest limitations period, at that time, was included in the Code of Civil Procedure, and not within the Probate Act itself. However, since *Anderson* subsection (f) was added to Section 8-1 of the Probate Act specifically referencing trust contests. The effect of this addition on the nature of the trust contest limitations period is unclear, but at least one case after *Anderson* has noted that ". . . the analysis underlying our holding in *Anderson* must be revisited to reflect the change that the legislature made to include testamentary trust contests with in the statutory organization of the [Probate] Act," and that ". . . because subsection (f) [of Section 8-1] is part of the [Probate] Act, it must be construed as a jurisdictional limitation, as subsection (a) has long been construed. *In re Estate of Luccio*, 2012 IL App (1st) 121153, 982 N.E.2d 927, 932 (1st Dist. 2012).

4. **Back to the Banks estate.** What this means, for the controversy surrounding the Banks estate, is that Regina and Elizabeth cannot simply rely upon the limitations period as a total bar to a trust contest from other interested persons, including Banks' children. For good cause, Banks' children may be procedurally empowered to toll that trust contest limitations periods, and their rights therefore may not yet be extinguished. This means that any settlement negotiations, and certainly any resulting settlement agreement, should include Banks' children.

H. Claimants potentially reaching beyond estate property to satisfy claims—*Rush v. Sessions*.

1. **Claimants in Banks' estate—go after Banks' Trust?** As has been explained, several claimants filed and were awarded claims against Banks' probate estate. However, all signs point to an insolvent probate estate entirely unable to satisfy the many claims allowed against it. That said, Banks does have a trust. If that Trust were to hold sufficient assets to satisfy the claimants' claims—and that's a big and unlikely if, given the known facts—the relatively recent *Rush v. Sessions* case may offer an outlet for the claimants to satisfy their claims from Banks' Trust assets.

2. ***Rush University Medical Center v. Sessions*, 2012 IL 112906, 980 N.E.2d 45 (2012).**

   a. **Background.** In *Sessions*, Rush University filed a claim against the estate of the late Roger Sessions, seeking to recover on Sessions' pledge to include a provision in his will for Rush to receive $1.5 million dollars from his estate. After being diagnosed with terminal cancer (and blaming Rush for not diagnosing him sooner), Sessions reneged on the pledge, making no such provision in his will, and transferring the bulk of his assets into a living trust. Rush ultimately sought and was awarded summary judgment on its claim against Sessions' probate estate.

   b. **Enforcing Rush's claim against Sessions' Trust.** After winning summary judgment on its claim against Sessions' probate estate, Rush pursued a supplemental proceeding, seeking to enforce its claim judgment against the assets of Sessions' Trust. In doing so, Rush sought to extend the rights afforded to it as a claimant under the Illinois Probate Act to *non-probate, trust property*.

   c. **Apparently, you can do that.** Ultimately, the Illinois Supreme Court concluded that Rush could, in fact, satisfy its claim judgment against Sessions' Trust assets. In doing so, the Court reasoned that "[t]raditional law is that if a settlor creates a trust for the settlor's own benefit and inserts a spendthrift clause, the clause is void as to the then-existing and future creditors, and the creditors can reach the settlor's interest under the trust." *Rush*, 980 N.E.2d at 52.

   d. **The legal framework.**

i. **Probate vs. non-probate assets not determinative.** The *Sessions* decision appears to establish that a creditor of a decedent's probate estate can enforce a probate claim against non-probate assets, such as the assets of a decedent's self-settled trust.

ii. **Right of recovery unaffected by death of settlor.** The *Sessions* decision also reasons that the mere fact that a trust settlor has died does not render a creditor's right to recover against the settlor's trust inactionable. To the contrary, the Court concluded that ". . . if the settlor's interest in a self-settled trust is 'void' as to the settlor's creditors, there is not sound reason to treat the creditors' rights as suddenly defeated the moment the settlor dies . . . ." *Id*. at 56.

iii. **Post-death judgment still enforceable.** Additionally, the *Sessions* decision provides that where a creditor obtains a judgment only after an obligor has died, that fact does not render the judgment inactionable against a settlor's trust. Again, to the contrary, the Court reasoned that ". . . the placement of funds into the trust is void against existing *and future creditors*, and it is as if placement into the trust never occurred." *Id*. at 57.

iv. **Claims which do not accrue until settlor's death still enforceable.** Finally, the *Sessions* Court reasoned that the mere fact that a settlor's claim is not ripe until the death of a trust settlor does not render that claim inactionable against the settlor's trust. Rather, all that is required for such a claim to remain viable is that ". . . the facts precipitating [the claim] occurred during [the parties'] lifetimes." *Id*. at 57-58.

3. **Applying *Rush v. Sessions* to the Banks Estate.** Looking to the facts of the Banks Estate controversy and applying the legal principles in *Rush v. Sessions*, it stands to reason that, to the extent the assets of Banks' probate estate are insufficient to satisfy the claims allowed against the estate, the allowed claimants of Banks' estate, *including Elizabeth as a second-class claimant*, could file supplemental proceedings in Banks' probate estate seeking to enforce their allowed claims against the assets of Banks' Trust. Under the *Sessions* framework, the facts that: (1) the claims are against Banks' probate estate; (2) Banks has died; and (3) the claims may not have been viable before Banks' death, do not preclude Banks' estate creditors from

enforcing their claims against the assets of Banks' Trust (assuming, of course, that there are assets worth pursing in that Trust).

[i] *See The Last Years of Ernie Banks*, Chicago Magazine, Ron Rapaport, October 2015.
[ii] The primary source for this information is the Court file for *Estate of Ernie Banks*, Cook County, 15 P 594. Additional sources include news articles, including but not limited to *Estate of Ernie Banks in Turmoil as Caregiver Claims to Be Sole Heir*, Forbes, Danielle and Andy Mayoras, 2/19/15 and *One Last Time Ernie Banks Swung and Missed*, Lake Forester, Richard Sugar, 3/2/15.
[iii] *Ernie Banks Case: Two Sides to Try to Settle Dispute about Cub Great's Will*, Jason Meisner, Chicago Tribune, 8/6/15.