



Angela G. Carlin is the Co-Chair of Weston Hurd's Estate, Trust and Probate Practice Group. She focuses her practice on estate, trust and probate administration and litigation, and tax matters. Angela is the author of the Merrick-Rippner Probate Law publication which is the recognized authority in Ohio on probate law. She received the Nettie Cronise Lutes Award from the Ohio State Bar Association in 1996 as the Outstanding Woman Lawyer and for many years, she has been named as an *Ohio Super Lawyer* by [Thomson Reuters](#) and a *Leading Lawyer* by [Inside Business Magazine](#).



Karen A. Davey focuses her practice on estates, trust and probate administration. She also handles litigation in probate related matters, such as will contests, trust contests, and power-of-attorney disputes.



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Gary W. Johnson advises clients on matters involving commercial litigation, business entities creation and maintenance, land use, construction law, zoning, estate planning and probate. Gary has been recognized as an *Ohio Super Lawyer* in the area of Business Litigation by [Thomson Reuters](#).



Eugene (Gene) A. Kratus advises individuals in the areas of tax, business and estate planning and counsels privately-owned businesses and their owners on corporate, tax, mergers, acquisitions and business succession issues. His estate planning practice includes implementing various estate planning techniques, ranging from modest By-Pass Trusts to the implementation of sophisticated planning with family limited partnerships, family limited liability companies, charitable trusts and private foundations.



Samuel J. Lauricia III focuses his practice on tax planning, at both the Federal and state level, involving corporate, partnership, individual and gift tax issues, succession planning and general corporate transactions, contracts, mergers and acquisitions. Sam has been recognized as an *Ohio Rising Star* in the area of Taxation by [Thomson Reuters](#).



Shawn W. Maestle is the Chair of Weston Hurd's Appellate section and a member of the firm's Litigation section. He focuses his practice in the areas of appellate, estate planning and probate litigation.

The U.S. Court of Appeals for the Sixth Circuit on September 22, 2016, in *Janice C. Specht and Jon Hoffheimer as Co-Fiduciaries of the Estate of Virginia L. Escher v. United States of America* No. 15-3095, CA-6, 2016 – USTC ¶60,695, upheld the decision of the U.S. District Court for the Southern District of Ohio, Western Division, Case No. 1:13-CV-705, in granting the motion for summary judgment in favor of the Internal Revenue Service by affirming that an estate fiduciary was liable for late filing and late payment of an estate tax return when the fiduciary unreasonably relied upon her attorney who committed malpractice in representing the estate.

Although in many instances the reliance of a fiduciary upon the estate attorney's professional advice may excuse the late filing of an estate tax return and late payment of estate tax, in this case the appellate court stated that the fiduciary's lack of experience or sophistication did not render her incapable of performing her fiduciary duties, when she was aware of the filing deadline and the late payment of tax penalties. The fiduciary's total reliance upon her unreliable attorney was the cause of the late filing, and not any circumstance beyond the fiduciary's control. The appellate court agreed with the district court that delegating a task by a fiduciary to the estate attorney does not constitute ordinary care and prudence, and although there was inadequate legal counsel and no evidence of purposeful delay, the duty to file the tax return and pay the tax is nondelegable. Further although the fiduciary's reliance may have been in good faith, good faith did not amount to reasonable cause to excuse the late filing of the return or the late payment of the estate tax after all of the notices and warnings received by the fiduciary such as in the instant case.

Plaintiffs Janice C. Specht ("Specht") and Jon Hoffheimer ("Hoffheimer") filed an action in U.S. District Court, Southern District of Ohio, Western Division, as co-fiduciaries of the Estate of Virginia Escher ("Decedent") to recover \$1,198,261.38 in penalties and interest, which the Internal Revenue Service ("Defendant", "IRS") imposed on the estate for failure to timely file its estate tax return and to timely pay the estate tax due. The legal question was simple: whether such Plaintiffs' failures were due to reasonable cause and not willful neglect. The district court commented that the facts were both "complex and sad." The estate paid the penalties and interest under protest and sued the IRS to recover the monies paid. Finding that the estate showed neither reasonable cause nor absence of willful neglect to excuse late filing and late payment, the district court granted the IRS's motion for summary judgment, and later upon appeal by the co-fiduciaries, the U.S. Court of Appeals for the Sixth Circuit affirmed such district court decision.

Decedent died on December 30, 2008, 92 years of age, leaving an estate of \$12,506,462, the bulk of which was in United Parcel Service ("UPS") stock. The Federal Estate Tax return was due September 30, 2009, but which return was filed on January 26, 2011. At filing the estate paid \$3,909,951 in tax plus \$210,601.74 in interest. The estate later paid an additional \$1,189,261.38 in penalties for failure to file such return and pay estate taxes due until over 15 months after the deadline. Eight months before her death, decedent, accompanied by her cousin, co-plaintiff-appellant Specht, met attorney Mary Backsman ("Backsman") to execute decedent's Will. Backsman had over 50 years of experience in estate planning. During the meeting, Specht agreed to be the executor of decedent's estate and witnessed her cousin's Will. Specht was 73 years old at that time, had no formal education after high school graduation, had never served as an executor, and had never been in any attorney's office prior to serving as a witness on decedent's Will.

After decedent's death, Specht retained Backsman to represent the estate. Unbeknownst to Specht, Backsman suffered from brain cancer, and her competency was deteriorating. In January 2009, Backsman informed Specht that the estate tax was approximately \$6,000,000, that the estate needed to sell UPS stock to pay the tax, which tax return and tax had to be filed and paid on September 30, 2009, and also suggested that her law firm pay the tax liability on the estate's behalf and seek reimbursement later. On February 9, 2009, Specht signed two probate court forms: The Application of Authority to Administer Estate (as executor) and the Fiduciary's Acceptance, delineating her duties as executor including filing all tax documents as required by law. Specht later testified that she did not understand the "fiduciary acceptance" form, did not know the meaning of "fiduciary," and never asked Backsman to explain the meaning thereof. However, based on her experience in filing her own income taxes, Specht was aware that there might be a consequence if the estate taxes were paid late.



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Other than procuring tax releases for each of decedent's (Virginia Escher) 23 separate bank accounts, Plaintiff Janice C. Specht's actions in executing the estate was limited to calling attorney Mary Backsman inquiring about the estate status. When Backsman advised Specht that the former had obtained an extension to file a return and pay the tax, when in fact she had not, Specht did not ask for proof of the extension. This deception by Backsman eventually led to malpractice claims and voluntary relinquishment of her law license. (Backsman was later declared incompetent and put under a full guardianship.)

In addition to the above failures to perform her fiduciary duties, Specht ignored four notices from the probate court as to Backsman's failure to file probate court documents including a first account, and several notices from the Ohio Department of Taxation that the Ohio state estate tax return was not filed nor was the estate tax paid, and that tax adjustments would be made for such failures.

At each occurrence, Specht called or met with Backsman who would assure her that "things were going fine" without any assurances requested by Specht.

In July 2010, Specht received a call from friends of the decedent who had also hired Backsman as attorney for a family member's estate. The friends warned Specht that Backsman was incompetent, and the family was seeking to have the attorney as co-executor of such estate removed. Specht contacted Backsman and accepted the attorney's representation again that the Escher estate was in good order. At this meeting Backsman asked Specht to sign a "blank paper" to allow the sale of UPS stock. Backsman later told Specht that she had initiated such sale to raise funds to pay the estate tax, which statement was false. In October 2010, when Specht called UPS and learned that Backsman had not initiated the stock sale, that the return had not been filed and the taxes were unpaid, Specht fired Backsman, hired an attorney recommended by the decedent's friend to represent Specht as executor of the Escher estate. Within a month of hiring the new attorney, the estate liquidated the UPS stock for a total of \$8,251,715. The new attorney filed the federal estate tax return and paid the estate tax liability and interest on January 26, 2011.

ANALYSIS

In its analysis of this case upon appeal, the Sixth Circuit Appellate Court emphasized that "Congress has charged the executor with an unambiguous, precisely defined duty to file the return within nine months..." The appellate court cited its recent unpublished decision in *Vaughn v. United States*, 635 F. App 216 (6th Cir. 2015) where a former Major League baseball player hired a wealth-management firm and tax accountant to prepare and file his returns and make payments, and instead his financial manager embezzled the player's funds, failed to file returns, or pay the taxes due. The court reiterated its interpretation of reasonable cause to mean "something that is beyond the taxpayer's possible control and oversight, not something that occurs under his authorization and control."

CONCLUSION

What does this appellate decision teach a fiduciary and the estate attorney: that the fiduciary has the prime responsibility to ensure that his or her attorney is not committing malpractice in the administration of a decedent's estate, and that neither the good faith of the fiduciary nor reasonable reliance will excuse the nondelegable act of the fiduciary who will be held liable for the late filing of a tax return and the late payment of taxes. Of course, the attorney and the fiduciary are liable to estate beneficiaries for the losses incurred in the unnecessary payment of interest and penalties.