

## [Trust Tells Justices Beneficiary's Residency No Basis For Tax, 2019 Law360 78-127](#)

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### **Summary**

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### **Body**

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The nation's highest court is scheduled to hear oral arguments ([2019 Law360 11-168](#)) on April 16 in the North Carolina Department of Revenue's case against Kimberley Rice Kaestner's family trust. The North Carolina Supreme Court decided that the due process clause barred the department from taxing the trust, whose settlor and trustee are in New York.

In the brief filed late Monday, the trust told the justices that the North Carolina high court made the right decision and they should uphold. Containing principles far beyond the narrow issue of taxation of a trust, the case has the potential to answer broader questions about how much contact is required to satisfy due process and nexus, attorneys have told Law360. ([2019 Law360 18-86](#))

"Due process requires minimum contacts between the state and the taxpayer and a rational relationship between the tax and fiscal values connected to the state," the trust said in the brief written by counsel of record David A. O'Neil of Debevoise & Plimpton LLP. "A nonresident's relationship with a forum resident, without more, cannot establish the necessary minimum connection."

Key to the North Carolina high court's decision - that the state's taxation of the trust was unconstitutional - was that Kaestner, the beneficiary, did not receive distributions from the trust during the years at issue. The department collected \$1.3 million in taxes from the trust over four years.

The trust in its Monday brief made similar arguments. It said the out-of-state trustee controlled all assets and the beneficiary did not even have a guarantee of receiving a distribution. Meanwhile, the out-of-state trustee and settlor "had nothing to do with North Carolina," the trust said. That did not change because a beneficiary happened to live in the state, the trust said.

Contacted by Law360 Tuesday, a spokesman for the Department of Revenue repeated the tax agency's policy that it would not comment on pending legislation. But in its plea for a writ of certiorari, the tax agency told the justices that there is significant state court splitting on whether the due process clause allows states to tax a trust based on where the beneficiary lives.

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The department also said that it had been more than seven decades since the nation's highest court looked at relationships between in-state beneficiaries and out-of-state trusts, and the court should now examine this issue with a modern eye. Specifically, the department said the court should use the case as a follow-up to its June 2018 decision in *South Dakota v. Wayfair*.

The *Wayfair* decision abolished the previous requirement that a retailer must have a physical presence in a state before the state could compel it to collect and remit sales and use taxes. Now, economic nexus is a standard, and the department suggested the same could apply for beneficiaries and trusts. With technology, it is easy for a beneficiary to use an out-of-state trust, and the beneficiary should not be able to escape taxation for doing that.

The trust disagrees, according to past conversations its attorney, Thomas Myrick of Moore & Van Allen PLLC in Charlotte, had with Law360. He said technology had not affected a due process analysis of the relationship between beneficiary and trust. Moreover, he said, the facts of this particular case were too narrow for the court to use it as an examination of a broad principle.

The Department of Revenue is represented by Attorney General Joshua H. Stein, Solicitor General Matthew W. Sawchak and Deputy Solicitor General James W. Doggett of the North Carolina Department of Justice, Robert F. Orr of Robert F. Orr PLLC and Andrew H. Erteschik, Saad Gul, John M. Durnovich and Nathaniel C. Zinkow of Poyner Spruill LLP.

The Kimberley Rice Kaestner 1992 Family Trust is represented by Thomas Myrick and Neil Bloomfield of Moore & Van Allen PLLC, and David A. O'Neil, Anna A. Moody and Laura E. O'Neill of Debevoise & Plimpton LLC.

The case is *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, case number 18-457, in the U.S. Supreme Court.

--Additional reporting by Paul Williams. Editing by Vincent Sherry.