April 14, 2010

T&E Litigation Update: *Slavin v. Beckwith* and *Jones v. Ouellette*

First, in *Slavin v. Beckwith*, Case No. SJC-10418, 2010 Mass. LEXIS 189 (Apr. 9, 2010), a case that was reserved and reported from the county court, the SJC allowed the reformation of a trust to conform with the settlor's intent to minimize taxes. The SJC relied on affidavits attesting to the settlor's intent, as supported by the key provision of the trust that was found to have no purpose other than to minimize taxes, the report of a guardian ad litem, and the fact that the trust in its current form would have frustrated the settlor's intent.

Second, in *Jones v. Ouellette*, Case No. 09-P-760, 2010 Mass. App. Unpub. LEXIS 378 (Apr. 7, 2010), a decision issued pursuant to Rule 1:28, the Appeals Court reversed the probate court's disallowance of a will on the ground that it was not properly attested.

The decedent's will -- he had purchased a "will kit" from Staples -- was notarized at a credit union. The notary public, who was an employee of the credit union, testified that she confirmed with the decedent that he wished to have the will notarized, that she checked his driver's license to verify his identity, and that an unidentified woman who accompanied the decedent to the credit union said she had written the will and read it to the decedent twice. The decedent also reviewed the will himself and indicated it was what he wanted. The decedent then executed the will in front of the notary and the unidentified woman.

Two other employees of the credit union served as witnesses. They signed as witnesses under clauses entitled WITNESSED and ACKNOWLEDGMENT. The language following the WITNESSED heading reads as follows: "The testator has signed this will at the end and on each other separate page, and has declared or signified in our presence that it is his/her last will and testament, and in the presence of the testator and each other we have hereunto subscribed our names..." The language under the ACKNOWLEDGMENT heading reads as follows: "We...the testator and witnesses, respectively, whose names are signed to the attached and foregoing instrument, were sworn and declared to the undersigned that the testator signed the instrument as his/her Last Will and that each of the witnesses, in the presence of the testator and each other, signed the will as a witness."

The credible evidence showed, however, that the two credit union witnesses came into the room after the decedent had already executed the will, signing the will as witnesses without speaking with the decedent about the will. The decedent never indicated to them that it was his signature on the will, that he wanted them to witness the will, that the will was being executed voluntarily, or that he understood he was executing a will. Based on these facts, the probate court found that the will had not been properly attested pursuant to G.L. c. 191, 1.

In reversing this finding, the Appeals Court explained that witnesses need not observe a testator execute a will if the testator acknowledges his previously-placed signature or if the signature of the testator is made known to the witnesses in modes other than an express declaration to them by the testator that the signature is his. Therefore, although the attestation clause may have been lacking in that the will was not self-proving, the Court held that the probate court had erred in declining to

allow the will. The notary observed the decedent sign his name to the will and his signature was readily apparent when the witnesses signed the will. No attempt was made to conceal the writing.