September 27, 2011

T&E Litigation Update: *Rose v. Rose*

In *Rose v. Rose*, Case No. 10-P-1889 (Sept. 26, 2011), the Appeals Court addressed whether a specific bequest of real property was adeemed. The testator owned two abutting lots in Wellesley, shown as Lot 7 and Lot 8. In her will dated September 22, 1962, the testator bequeathed Lot 8 to her son. After executing her will, however, the testator recorded a new plan with the town planning board to subdivide her two lots. Under the new plan, Lot 7 was designated as Lot A, and Lot 8 was effectively split in two and designated as Lots 1 and 2. Thereafter, Lot A and Lot 2 were assessed as one lot for tax purposes, and the testator sold Lot 1 to third parties. The testator died in 1983 without having changed her will. The heirs of the testator's son, who had been bequeathed Lot 8, filed a petition for partition in the probate court, claiming ownership of the portion of Lot 8 that still remained under the new plan. The probate court held on a motion for summary judgment that the specific bequest to the son was adeemed because Lot 8 no longer existed. The Appeals Court affirmed the probate court judgment. The Court recognized the general rule that where only part of real property owned by a testator is conveyed during the testator's life, a partial ademption results and the bequest is not adeemed as to the remaining part. Nevertheless, the Court held that the specific bequest of Lot 8 was adeemed because the merger of Lot 8 with Lot 7 arose from the "affirmative acts" of the testator. This merger was not the product of the common-law doctrine of merger or a local bylaw that caused the lots to merge.