June 30, 2010

T&E Litigation Update: *Savage v. Oliszczak*

In *Savage v. Oliszczak,* Case No. 09-P-513 (June 29, 2010), the Appeals Courts again addressed the enforceability of an in terrorem clause.

The decedent executed a will and trust, with the will designating the trust as the sole devisee of the decedent's estate.? The will did not include an in terrorem clause, but the trust did include such a clause, reading as follows:? "If any person, including a beneficiary, other than me, shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this agreement, including any amendments thereto, or commences or prosecutes any legal proceedings to set this instruments aside, then in such event such person shall forfeit his or her share, cease to have any right or interest in the trust property, and shall be deemed to have predeceased me."

The named executors filed a petition to probate the will.? The defendants objected to the allowance of the will on capacity and undue influence grounds, and then withdrew their objection.? The plaintiff trustees subsequently brought the present action, seeking instruction on whether the defendants' challenge to the will triggered the in terrorem clause of the trust.? The probate court held that it did not, and the Appeals Court affirmed.? While the Appeals Court acknowledged that in terrorem clauses in wills are valid, it reasoned that the in terrorem clause of the trust was not triggered by the challenge to the decedent's will.? The Court rejected the plaintiffs' argument that the will and trust should be read together as inextricably intertwined elements of the decedent's estate plan.? Although the Court acknowledged that it will generally review separate components of an estate plan as parts of an interrelated whole, it was not persuaded to conclude that the challenge to the will operated to implicate the trust's in terrorem clause. The Court pointed out that the trust could have been funded during the decedent's lifetime from any number of sources wholly independent of the will.? The Court also pointed out that the purpose of an in terrorem clause is to deter challenges to a will, with potential challengers being put on notice of the in terrorem clause upon the filing of the will for probate, whereas there can be no similar deterrent value to an in terrorem clause in a trust that is not made public.? On this point the Court explained that "it would be draconian to invoke a forfeiture clause against beneficiaries who challenge a will that does not contain an in terrorem clause, based on the inclusion of such a provision in a separate but undisclosed instrument."? In this context the Court also observed that in terrorem clauses have been construed narrowly because equity does not favor forfeitures.