May 11, 2010

T&E Litigation Update: *Elloian v. Elloian*, *Hiller v. Hiller* and *Harootian v. Douvadjian*

In *Elloian v. Elloian*, Case No. 09-P-711, 2010 Mass. App. Unpub., LEXIS 479 (May 4, 2010), a decision issued pursuant to Rule 1:28, the Appeals Court addressed issues of testamentary capacity and undue influence.

The decedent's son filed a petition to probate the decedent's will in probate court. The decedent's daughter objected and filed a complaint in superior court against the son and his wife claiming interference with inheritance and unjust enrichment. After a consolidated trial in superior court, the court allowed the petition for probate and ruled against the daughter on her claims. The Appeals Court affirmed.

On the topic of testamentary capacity, the Appeals Court did not overturn the trial court's finding, despite the expert testimony offered by the daughter. The Appeals Court noted that the trial court was not bound to accept this expert testimony, but was instead within its discretion in concluding that the decedent intended to disinherit the daughter after reflecting on the deterioration of family relations and what he had already provided to the daughter. The Appeals Court also noted that the decedent had his own, independent estate planning lawyer, and that the lawyer had no reason to suspect undue influence.

On the topic of undue influence, the Appeals Court explained that the burden did not shift to the son to prove a lack of undue influence because the evidence did not establish a dependency by the decedent on the son. Although the daughter argued that the son stood in a fiduciary relationship with the decedent by virtue of his being named as an executor in the will, the Appeals Court did not address this argument because it was not raised below or in the daughter's brief.

In *Hiller v. Hiller*, Case No. 09-P-656, 2010 Mass. App. Unpub. LEXIS 455 (Apr. 28, 2010), another decision issued pursuant to Rule 1:28, the description of the underlying facts is scant, but two legal propositions relied upon by the Appeals Court are worth repeating.

First, the Statute of Frauds applies to a purported promise to devise real property in a will. Therefore, such a promise must be in writing. Although an exception exists where there has been partial performance in reliance on the promise, the summary judgment record in this case did not support the existence of such a promise. Second, although an oral agreement involving a promise to make a will also is unenforceable under the Statute of Frauds, a plaintiff nonetheless may recover the fair value of services rendered under equitable principles, such as unjust enrichment or quantum meruit, which could result in a constructive trust against the real property at issue.

In *Harootian v. Douvadjian*, Case No. 05-1510, 2010 Mass. Super. LEXIS 78 (Apr. 15, 2010), the Worcester Superior Court discussed the bounds of a trustee's discretion to invade the principal of a trust.

In 2001, Arthur Ansbigian settled a trust naming himself and his wife Beatrice as co-trustees, naming Beatrice as a lifetime beneficiary, and naming the plaintiff as a remainder beneficiary. After Arthur's death in 2003, Beatrice became the sole trustee and the lifetime beneficiary of the trust. Over the next two years, she spent the trust principal on personal expenses to the point where the principal had been substantially depleted by the time of her death in 2005, thereby diminishing the plaintiff's remainder interest.

The plaintiff challenged three transactions in particular. Specifically, he challenged Beatrice's spending of approximately $58,000 of principal to pay taxes assessed against the trust and her personally. He challenged Beatrice's payment of approximately $8,000 to the defendant (the executor) as compensation for various services he provided to her personally in her final months. And he challenged Beatrice's borrowing of $150,000 on behalf of the trust, from herself personally, to avoid having to sell the trust's real property when its liquid assets were running low. Upon Beatrice's death, the loan was repaid.

The Court granted summary judgment for the defendant and against the plaintiff, holding that Beatrice did not abuse her discretion as trustee in depleting the principal. The Court explained that where a trustee's discretion is not limited to making expenditures of principal for "necessary" payments only, the general rule is that the trustee need not consider a beneficiary's personal assets in exercising such discretion to invade principal to make support payments. Therefore, Beatrice's exercise of her discretion to use trust principal to satisfy her tax liabilities and to pay the defendant for personal services to her was not inconsistent with the instructions of the trust.

The Court further explained that Beatrice's loan to the trust presented a "closer question," but held that the loan was not improper because its purpose was to avoid the need to sell the trust's real property and thus was appropriate to provide for Beatrice's comfort and maintenance. Although the trust instrument did not expressly authorize Beatrice to borrow money on behalf of the trust, the authority to dispose of assets includes by implication the authority to borrow against or mortgage those assets.