March 23, 2012

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

In *Berkowitz v. Berkowitz*, Civil Action No. 11-10483-DJC, 2012 U.S. Dist. LEXIS 31487 (D. Mass. March 9, 2012), the U.S. District Court denied a motion to dismiss a complaint alleging breach of an oral trust.

In 1998, Samuel Berkowitz gave a general power of attorney to his daughter Bonnie. One year later, he conveyed certain real estate to Bonnie, allegedly instructing her that if he were to die, then she was to use the value of the real estate to take care of his wife Barbara for her lifetime, and thereafter that Bonnie was to share the remaining value with her brother. Samuel characterized this as an "express oral trust" for the benefit of his wife for life, with the remainder for Bonnie's brother and Bonnie herself.

Over the next two or three years, there were a series of transfers by Bonnie involving accounts in Samuel's name, to which he acquiesced after-the-fact because he allegedly believed the transfers were initiated by Bonnie in furtherance of his wishes as expressed in the oral trust agreement.

In June 2008, Samuel asked Bonnie for an accounting of the oral trust assets. Bonnie repudiated holding any assets in trust for Samuel. He filed suit in March 2011, claiming breach of fiduciary duty and requesting an accounting. Bonnie filed a motion to dismiss the complaint on three grounds: (1) that the complaint fails to state a claim upon which relief can be granted; (2) that the breach of fiduciary duty claim is barred by the three-year statute of limitations; and (3) that this claim is also barred by the statute of frauds. The Court denied the motion.

The Court held that the complaint states an actionable claim for breach of fiduciary duty under the alleged oral trust. Quoting *Cooney v. Montana*, 347 Mass. 29, 34-35 (1964), the Court explained that "[t]o create an oral trust sufficient to impose a fiduciary duty on a would-be trustee, '[n]o particular form of words is necessary but the words employed must unequivocally show an intention that the legal estate be vested in one person to be held in some manner or for some purpose on behalf of another.'"

Regarding the statute of limitations defense, the Court took as true Samuel's allegation that Bonnie did not repudiate the trust until June 2008, and noted that a cause of action for breach of fiduciary duty does not accrue until the trustee repudiates the trust and the beneficiary has actual knowledge of the repudiation.

Finally, as to Bonnie's argument under the statute of frauds that agreements concerning the conveyance, sale or lease of property, and agreements establishing a legacy trust, must be in writing to be legally enforceable, the Court explained that the question of whether the statute of frauds applies is best answered at summary judgment or at trial on the basis of discovered facts.