February 18, 2011

T&E Litigation Update: *Gillespie v. Gillespie* and *Cosgrove v. Hughes*

First, in *Gillespie v. Gillespie*, Case No. 09-P-2174, 2011 Mass. App. Unpub. LEXIS 156 (Feb. 7, 2011), a decision issued pursuant to Rule 1:28, the Appeals Court addressed claims for tortious interference with expectancy of a gift and wrongful death by suicide.

The decedent was survived by his second wife Peggy and his son Vincent. Vincent alleged that Peggy was liable to him for tortiously interfering with his expectancy by "hectoring" the decedent to execute a will largely in her favor, and was liable to the decedent's estate for wrongful death by forcing him to commit suicide through her cruelty. The superior court granted Peggy's motion for summary judgment with respect to both claims, and the Appeals Court affirmed.

Judgment as a matter of law was entered on the tortious interference claim because Vincent never contested the decedent's will. Vincent's allegations of tortious interference amounted to an undue influence claim, and so this claim should have been raised during the probate of the will. The Court explained that Vincent did not have the choice of either submitting evidence of undue influence in opposition to the probate of the will or consenting to the allowance of the will and then attacking it in a tort action in superior court.

Judgment as a matter of law was entered on the wrongful death claim because, even assuming that Vincent had standing to bring this claim pursuant to G.L. c. 230, 5, the decedent's suicide was an independent intervening cause between Peggy's alleged conduct and the decedent's death. Although suicide may not be treated as an independent intervening cause if the defendant inflicted an injury that caused an uncontrollable suicidal impulse, or if the decedent was in the defendant's custody and she had knowledge of the decedent's suicidal ideation, Vincent offered no such evidence.

Second, in *Cosgrove v. Hughes*, Case No. 10-P-338, 2011 Mass. App. LEXIS 211 (Feb. 15, 2011), the Appeals Court dealt with the question of what constitutes "acknowledgement" of paternity under the intestacy statute, G.L. c. 190, 7.

The facts of this case are interesting. In a very small nutshell, they are as follows:

The decedent's intestate estate was substantial. A woman named Verna who claimed to be the decedent's daughter was appointed as the administratrix, which led to a dispute as to whether Verna is indeed the decedent's daughter. A number of the decedent's nieces and nephews sought a declaratory judgment in the probate court that Verna is not the decedent's daughter, and thus that she is not an heir and may not inherit from his estate. They submitted evidence indicating that the decedent had lived in Massachusetts for most of his life and had never mentioned having a wife or child. Verna submitted competing evidence, including a certificate of marriage, indicating that the decedent was married to Verna's mother from 1944 until her death in 2006.

Although Verna was born in 1931, some thirteen years prior to her mother's marriage to the decedent, and although there was contradictory evidence as to whether the decedent regarded her as his daughter, the probate court found that there was sufficient evidence of his acknowledgement of paternity. The Appeals Court affirmed.

The Court's decision addressed two primary issues: (1) whether Verna must be the decedent's biological child in order to inherit under the intestacy statute; and (2) what constitutes a valid acknowledgement.

As to the first question, the Court held that the intestacy statute does not necessarily require biological parenthood. For example, under the statute, adopted children are treated no differently than biological children. In making this holding, the Court distinguished the statutory and case law concerning support obligations, custody and visitation, because the issues at

stake in those kinds of proceedings are dramatically different than in an intestacy proceeding. Therefore, because biological parenthood is not required, the genuine issues of fact regarding whether Verna is the decedent's biological child were rendered immaterial.

As to the second question, the Court explained that the only requirement for a valid acknowledgement is that it be unambiguous.

"[N]o formal acts are prescribed by the statute which shall constitute the acknowledgement required," and "such recognition may be shown by conduct as well as declarations. . . ." In light of this standard, the Court held that the decedent had validly acknowledged his paternity in an affidavit he signed in 1944, in which he and Verna's mother were identified as her "natural parents." The fact that the decedent thereafter did not consistently assert that Verna was his daughter, even in a sworn listing of his beneficiaries, does not change the effect of the acknowledgement in the 1944 affidavit. Once he acknowledged Verna as his daughter, she was his child and heir, just as if she had been born in wedlock.

Generally regarding the contradictory evidence as to Verna's relationship to the decedent, the Court noted that this evidence must be viewed against the backdrop of the shame and stigma for both mother and child attendant at the relevant times upon out-of-wedlock birth.