October 27, 2010

T&E Litigation Update: *Shepard v. Barrell*

In *Shepard v. Barrell,* Case No. 09-P-1658, 2010 Mass. App. Unpub. LEXIS 1146 (Oct. 22, 2010), a decision issued pursuant to Rule 1:28, the Appeals Court affirmed the denial of a motion for summary judgment seeking the partial termination of certain trusts.

The settlors established six trusts between 1923 and 1931. The trusts provide that one half of the principal is to be held for the benefit of the settlors' daughter and her descendants, and the other half for the benefit of the settlors' son and his descendants. The trusts are to terminate twenty years after the death of the last of the named beneficiaries, and upon termination the principal vests and is to be distributed to the settlors' then-living issue.

One of the settlors' great-grandchildren ("Shepard") and his daughters filed an equity action for the termination and distribution of what they claimed was Shepard's twelve percent interest in the principal. The plaintiffs argued that termination was proper because (1) the trusts have no remaining purpose, (2) Shepard's interest vested, (3) his interest is severable from the other interests, (4) all of the beneficiaries consented to termination of Shepard's portion of the trusts, and (5) if Shepard's portion were not terminated in 2010, there is a risk that his share of the principal would be subject to the federal GST tax.

Although the court acknowledged that it has the discretion to order early termination of a trust "where all of its objects and purposes have been accomplished, where the interests under it have all vested, and where all parties beneficially interested desire its termination[,]" the court denied the plaintiffs' request for early termination, holding as follows.

First, the purpose of the trusts, to provide financial support and long-term financial stability for the settlors' descendants, as evidenced by the structure of the trusts and the inclusion of spendthrift provisions, would be ongoing until the stated time for termination.

Second, the settlors did not intend to create severable beneficial interests in the trusts. Rather, the trusts provide the opposite, expressly prohibiting the division of the principal into separate shares.

Third, Shepard's interest had not vested because the trusts are not to terminate until twenty years after the death of the last named beneficiary, and several named beneficiaries are still alive. Therefore, the termination date remained more than twenty years away.

Fourth, not all of the beneficiaries had consented to early termination. Shepard's argument that he alone needs to consent to the termination of his separate share was unavailing. Moreover, at least three beneficiaries had expressly denied their consent, and consent was not provided on behalf of unborn and unascertained beneficiaries.

Finally, the trusts were exempt from the GST tax because they were irrevocable prior to September 25, 1985, and there had been no disqualifying additions to the trusts since that date. On this point, the court noted that appreciation in the value of a trust and undistributed income added to the trust are not considered additions to the principal for GST purposes.