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T&E Litigation Update: *Paine v. Sullivan* and *Austin v. Austin*

In *Paine v. Sullivan*, Case No. 10-P-289, 2011 Mass. App. LEXIS 1042 (July 22, 2011), the probate court had ruled that the testator possessed testamentary capacity when he executed his last will and testament and that his will was not the product of undue influence. The Appeals Court reversed the probate court's ruling on the testamentary capacity claim.

The Court explained that where there is evidence of lack of capacity, the presumption of sanity loses effect and the burden falls upon the proponent of the will to prove by a fair preponderance of the evidence that the testator was of sound mind when the instrument was executed. Here, the objector had offered evidence of lack of capacity, and thus the burden shifted to the proponent to prove capacity. The Court held that the proponent failed to meet this burden. The testimony of a medical expert was insufficient because, according to the Court, it was not clear that the medical expert's opinion was supported by careful review of the testator's medical records. The expert "cherry picked" portions of the medical records that could suggest the testator's dementia was mild and ignored contrary medical records. Moreover, although the Court acknowledged that the testimony of a drafting attorney can be relevant, the drafting attorney was unable to offer any relevant evidence as to the testator's capacity. He had not seen the testator in years, had spoken with him only by telephone, and was not aware that he had been diagnosed with dementia. Finally, the witnesses to the will, who were employees of the bank where the will was executed, could not recall the specifics of the execution.

In *Austin v. Austin*, Case No. 10-P-1342, Mass. App. Unpub. LEXIS 870 (July 7, 2011), a decision issued pursuant to Rule 1:28, the Appeals Court affirmed summary judgment for the defendant on the plaintiff's reformation claim and the defendant's claim to enforce the *in terrorem* clause in the settlor's will.

First, the plaintiff contended that the probate court had erred as a matter of law in granting summary judgment for the defendant on the plaintiff's reformation claim because there was a genuine issue of material fact as to whether the settlor, who was the parties' mother, intended that her assets be equally distributed between them. Because a parcel of land transferred to the plaintiff through a QPRT resulted in the plaintiff's paying more taxes than the defendant, the plaintiff claimed that the settlor's intent was frustrated. The Appeals Court disagreed, holding there was no evidence that the settlor intended to treat her sons "equally," and so reformation of the trust to conform with this alleged intent would have been inappropriate.

Second, the plaintiff contended that the *in terrorem* clause in the settlor's will should not be enforced against his reformation claim because the claim did not challenge the will or the settlor's revocable trust. He claimed that he only sought to revise the provisions of the QPRT, which was not covered by the *in terrorem* clause. Again, the Appeals Court disagreed, explaining that if the plaintiff's QPRT taxes had been paid out of the settlor's residuary estate, then reformation would have prevented Article Sixteenth of the will (the tax allocation provision) from being carried out in accordance with its terms, because that provision explicitly prohibits the residuary estate from paying the taxes of any trust other than the settlor's revocable trust. Therefore, the Court held that the probate court had properly enforced the *in terrorem* clause against the plaintiff.