

# Probate and Fiduciary Litigation Newsletter

## August 31, 2017

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In *Passero v. Fitzsimmons et al.*, No. 16-P-1314, 2017 WL 3567496, (August 17, 2017), the Appeals Court affirmed the lower court's finding that the defendant trustees committed a breach of trust, as well as the lower court's order that the trustees be removed and repay sums to the trust. The Appeals Court vacated the lower court's decision, however, to appoint the plaintiff's children as successor trustees and to require monthly distributions to the plaintiff.

The settlor established the trust in 1999. Upon the settlor's death in 2001, the trust divided the settlor's estate into four equal shares. One share was to be placed in a discretionary trust for the benefit of the plaintiff and two of her children, and upon her death, any remaining balance would be distributed to the two children equally. The remaining shares were to be distributed to the other beneficiaries.

By October 2008, distributions had been made to the other beneficiaries, and the plaintiff and her children were the sole beneficiaries. The trustees made no distributions to the plaintiff until May 2016, however, when the lower court ordered them to give the plaintiff a cash advance for her medical bills and housing. Meanwhile, the trustees had been paying storage fees for the plaintiff's personal property and property left to her by the settlor's will. These fees were paid from the plaintiff's interest in the trust. When the plaintiff inquired about the storage facility, the trustees' attorney refused to give her the location. The trustees also failed to provide the plaintiff or her children with all of the prepared accounts of the trust, which were being providing to the other beneficiaries.

The Court upheld the lower court's finding that the trustees had violated their duties pursuant to M.G.L. c. 203E, § 804. The Court reasoned that the trustees had "imprudently wasted [t]rust assets" by paying storage fees out of the plaintiff's interest in the trust without authorization, failing to provide the plaintiff with accounts of the trust, and refusing to communicate about the storage facility. The Court also rejected the trustees' arguments that the lower court's decision nullified their prescribed discretion in managing the trust, and that the trust's exculpatory clause protected the trustees from liability.

Moreover, the Court upheld the lower court's decision to remove the trustees pursuant to M.G.L. c. 203E, § 706(b)(3), but vacated the lower court's decision to appoint the plaintiff's children as the successor trustees, because the trust required that certain powers, such as making distributions, be exercised by "disinterested trustees only." The children were considered "interested" per the trust because they were eligible to receive income or principal.

Finally, the Court also vacated the order that the successor trustees make monthly distributions to the plaintiff, because that would have modified the terms of the trust, which gives the trustees discretion to make distributions. The Court remanded to appoint an independent trustee who would have discretion to make distributions in accordance with the trust.

In another recent matter, *Larsen v. Von Haller*, No. 16-P-730, 92 Mass. App. Ct. 1102 (August 3, 2017), the Appeals Court considered whether a primary beneficiary and trustee of a nominee trust had the authority to amend the trust without the consent of all the beneficiaries, to revoke a gift to a contingent beneficiary, and to convey to themselves the only asset in the trust.

The settlor established the trust in 1998, named herself as the trustee, and incorporated by reference a schedule of beneficiaries. The settlor's interest in the trust was "100% for life with power to use and occupy the property and power to withdraw or consume principal if converted into cash during her lifetime." Upon the settlor's death, any remaining assets were to be divided in equal shares to the beneficiaries, provided they did not predecease her. The settlor, as the trustee, also had the power to amend the trust with the consent of all the beneficiaries.

In 1999, the settlor, as trustee and primary beneficiary, amended the trust's schedule to remove a beneficiary, and amended the trust to remove that beneficiary as a successor trustee. In 2002, property was conveyed out of the trust to the settlor individually, and the corresponding trustee's certificate stated that the trustee had been "directed by the Beneficiaries of said Trust to convey the premises . . . to [the settlor], individually for the consideration of One and 00/100 (\$1.00) Dollar." In 2008, the settlor conveyed the property to a revocable trust.

Plaintiff argued that the settlor did not have the authority to amend the trust to eliminate a beneficiary's interest because permission was not obtained from all the named beneficiaries, the settlor had only a life estate in the property and could not revoke or amend the Trust without permission from the beneficiaries, and the settlor breached her fiduciary duty because she fraudulently stated in the trustee's certificate that she had permission to convey the property.

The Court held that the settlor was the sole beneficiary at the time she amended the trust; therefore, the settlor had authority as the primary beneficiary and trustee to remove a contingent beneficiary. The Court reasoned that the removed beneficiary was a contingent beneficiary, not a vested beneficiary, because the schedule required survivorship. The Court also determined that the settlor did not breach her fiduciary duty as trustee because she did not need the consent of the contingent beneficiaries to convey property to herself.

*This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.*