Probate and Fiduciary Litigation Newsletter June 28, 2017

June 28, 2017

In *Roth v. Newpol et al*., 91 Mass. App. Ct. 699 (May 31, 2017), the Appeals Court considered whether a residuary clause in a decedent's last will and testament disposing of "any monies remaining in [her] estate" encompassed her one-half interest in a house in Boston where her brother lived before his death. The issue before the Court was whether to interpret the term "monies" as including real property, or to apply a more narrow definition. The plaintiff, representing the decedent's brother's estate, contended that "monies" did not include real property, that the will did not devise the property interest, and therefore that the interest passed by intestate succession to the brother. On the other hand, the defendants—the executor and the decedent's life partner—argued that "monies" did include the real property because it was used in a residual bequest intended to address all property not otherwise specifically dealt with in the will. Thus, according to the defendants, the interest passed through the residuary clause to decedent's life partner.

In affirming a decision of the probate court, the Appeals Court held that the residual bequest of "monies" did not include the decedent's interest in real property that was not otherwise addressed in the will. The will expressly addressed other real property, thereby demonstrating that the decedent could have also addressed the property she owned with her brother if it was her intent to do so. Further, although the Court acknowledged the presumption against intestacy, it found that a testator's estate will pass by intestacy "when the plain language of the will requires such a result." The Court explained that Massachusetts law is clear that "[t]he popular and well understood meaning should be given to the word 'money,' when used in a will, unless from a consideration of the entire instrument, it appears that it was intended by the testator to have a broader meaning." The Court noted that its "firm conviction" in the decision was only strengthened by the placement of the residual clause at issue within a paragraph that dealt specifically with cash assets and bequests.

In addition to other arguments, the defendants averred that the caption of the residuary clause, "Residuary estate," supported a broader interpretation because the decedent and her life partner (who helped draft the will) were English professors and, defendants argued, would have selected a title that accurately described the subject matter of the article in question. This argument backfired on the defendants, as the Court did not believe the caption changed the plain meaning of the words in the "monies" provision, and also noted that "[o]ne might equally expect English professors and writers to be precise in their choice of words, and not to have written "monies" if they meant "anything else."

In another recent matter, *Skye v. Hession et a*l., 2017 Mass. App. Ct. LEXIS 50 (April 28, 2017), the Appeals Court issued a decision concerning the validity of a provision in a quitclaim deed that

reserved to the grantor a special power of appointment over her home (the property). Prior to her death, the grantor deeded the property, in equal shares, to her three daughters and others, reserving for herself a life estate and the special power of appointment. The grantor exercised her power of appointment in her will to reduce the interest provided to one of her daughters to the advantage of her other daughters. The partially disinherited daughter objected and brought an action seeking a declaration that the deed's special power of appointment was invalid.

In affirming the lower court's decision that the power of appointment was valid, the Appeals Court acknowledged the "apparent tension between the grant of the remainder interests and the reservation of the power" because the former granted a present ownership interest and the latter allowed for the termination or alteration of that grant. The plaintiff daughter challenging the power of appointment argued that the provisions were not "merely in tension, but irreconcilably repugnant to one another."

Although the Court agreed that provisions truly repugnant to one another will not be upheld, it also held that in this particular situation the grantor did not convey a fee simple absolute interest in property via the original deed, but instead, by reserving a special power of appointment, the grantor had deeded remainder interests "in the nature of fees simple defeasible" that were always subject to change if the grantor exercised her power of appointment. Because the grantor did not convey fee simple absolute interests, the reservation of the power of appointment was not repugnant to the original conveyance and the provision was held to be valid.