

# Probate & Fiduciary Litigation Newsletter - October 2019

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The *Probate & Fiduciary Litigation Newsletter* compiles recent Trust & Estate cases. Our lawyers are at the forefront of this area of the law, shaping how it is handled in the Probate and Family Court. Goulston & Storrs is the go-to firm in the Northeast for litigation involving [Probate and Fiduciary](#) matters.

## **Executor Held Liable for Failure to Diversify Out of GE Stock**

Can an executor be liable for failing to diversify out of what was once a “blue chip” stock? In *Matter of Kenney*, 64 Misc.3d 1232(A) (Albany Sur. July 19, 2019), the Surrogate’s Court answered that question in the affirmative, resulting in a substantial liability for the fiduciary. The decedent died testate in 2007 and left the majority of her multimillion-dollar estate to a charitable trust established in remembrance of her daughter. The executor was the decedent’s longtime attorney, also named as a trustee of the charitable trust. The executor acted slowly in settling the estate, and in 2014 the Charities Bureau of the New York Attorney General’s Office sought to compel the executor to settle the account.

The estate’s largest single asset (comprising 69% of the value of the estate and 86% of the value of its equity portfolio) was stock of General Electric that had been in the family for decades. While petitioner eventually sold that stock in 2015 and 2016, after the Charities Bureau commenced its proceeding, the court found that the executor “did not act prudently in retaining the GE stock, which accounted for the vast majority of the estate assets, for approximately eight years after decedent’s death.” While the executor relied on “decedent’s sentimental attitude towards the GE stock” and its dividend of 3.3%, the court pointed to the prudent investor standard in New York’s Estates, Powers and Trusts Law, and in particular EPTL § 11-2.3(b)(3)(C), which requires a fiduciary “to diversify assets” absent a reasonable determination that “it is in the interests of the beneficiaries not to diversify.” Following New York case law that where a fiduciary negligently retains assets “the measure of damages is the value of the lost capital,” the court surcharged the executor approximately \$3.5 million.

**THE TAKEAWAY:** The case is a cautionary tale of the need for executors and trustees to act diligently in both settling estate accounts and reviewing estate assets objectively and without sentiment when it comes to the requirement of diversification of assets.

## **Time Limit for Substitution Under Mass. R. Civ. P. 25(a) May be Extended**

In *Rougeau v. Phillip Morris USA, Inc.*, No. SUCA20170018BLS1, 2019 WL 3548829 (Mass. Super. June 19, 2019), the Business Litigation Session of the Superior Court considered whether the deadline to file a motion to substitute a personal representative for a decedent as the plaintiff in a tort action accrued from the date of informal appointment as personal representative, or from the date of a subsequent formal appointment of the same individual. The court concluded that the deadline could be measured from the second appointment.

The decedent filed a tobacco products liability action against Phillip Morris USA, Inc. and died intestate shortly thereafter. In January 2018, the decedent's son was informally appointed personal representative of the decedent's estate.

Around the time of the son's appointment, another tobacco case pending in the same session of the Superior Court was dismissed because the personal representative in that matter was appointed more than three years after the date of death with limited authority and lacked standing to bring a wrongful death claim. The court in *Rougeau* explained that at a hearing in the other matter, the "parties and the court . . . loosely used terms like formal and informal probate, neither of which was actually germane to the issue then in dispute." Reviewing this history, the *Rougeau* judge determined that the inexact use of the terms formal and informal in the other tobacco case "apparently prompted [the son] to refile his petition for appointment as personal representative . . . as a formal proceeding."

On January 29, 2019, the son was appointed as personal representative again, this time in a formal proceeding. In April 2019, more than one year after the son's original informal appointment, Phillip Morris moved to dismiss the underlying complaint pursuant to Mass. R. Civ. P. 25(a), which requires the personal representative to file a motion for substitution within one year of appointment. Just days later, the son filed a motion to be substituted as the plaintiff in the case based on his formal appointment in January 2019.

The court held that the son's motion to substitute, though filed more than a year after his initial informal appointment, was timely for either of two independent reasons. First, the court found that in the circumstances of the formal appointment "within months" of a prior informal appointment, "the one-year date may be measured from the date of the second appointment." The court also held that in the alternative, the son's failure to file a motion to substitute within one year of his initial appointment was "excusable neglect" under Mass. R. Civ. P. 6(b) because the son might have been misled by the argument and decision in the other tobacco case into believing that his initial appointment was inadequate for the purposes of being substituted as a plaintiff in his deceased father's place.

**THE TAKEAWAY:** Although the court in *Rougeau* states that the unique circumstances of the matter limits its precedential value, the holding appears to leave open the possibility that even in the absence of excusable neglect, the time limit for substitution under Mass. R. Civ. P. 25(a) may be extended beyond one year from an initial appointment of a personal representative if a later appointment (even of the same person) occurs.

## **Claims Pursuant to G.L. c. 93A re: A Failure to Provide Medical Records**

In *Montanez v. Lowell Street Operating Company, LLC*, 95 Mass. App. Ct. 699 (2019), the Appeals Court considered three questions: (1) whether a nursing home's failure to provide complete and certified medical records in response to a guardian's repeated requests violated G.L. c. 93A; (2) whether the patient's guardian (also her daughter) had standing to continue to pursue c. 93A claims after the patient's death as the appointed personal representative of the decedent's estate; and (3) whether any of the legal fees incurred by Plaintiff may be recovered as damages under c. 93A.

After Plaintiff's repeated requests to a nursing home for a certified copy of her mother's complete medical records were either ignored or only partially complied with, she initiated an action pursuant to c. 93A against the nursing home. Immediately following service of the complaint, the nursing home made the requested medical records available to Plaintiff. The nursing home then moved to dismiss the case and its motion was allowed.

The Appeals Court reversed the lower court's decision and held that: (1) Plaintiff's claim survived her mother's death because the c. 93A claims were contractual in nature; (2) Plaintiff had standing to pursue the appeal as personal representative of her mother's estate; and (3) although legal fees incurred solely in vindicating one's rights under c. 93A are not cognizable as an injury, legal fees incurred in connection with efforts to enforce other underlying rights (i.e. fees incurred in connection with counsel's efforts to obtain copies of medical records under applicable federal regulations and fees incurred in seeking injunctive relief) may be treated as actual damages under a c. 93A claim.

**THE TAKEAWAY:** Individuals, their guardians, and/or a personal representative may bring a claim pursuant to G.L. c. 93A against a care provider for failing to provide requested medical records pursuant to applicable statutes and regulations, and such an action may be maintained after death in certain circumstances.

*If you have a probate and fiduciary litigation question or other business concern, we invite you to reach out directly to any member of our [Probate and Fiduciary Litigation](#) group.*

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