

Probate & Fiduciary Litigation Newsletter - August 2023

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This newsletter is intended to keep readers informed about developments in probate and fiduciary litigation in Massachusetts and New York. Our lawyers are at the forefront of this area of the law, shaping how it is handled in the Courts. Goulston & Storrs is the go-to firm in the Northeast for litigation involving [Probate and Fiduciary](#) matters.

Subject Matter Matters in Land Court

DiNicola v. Ely, et al., No. 23 MISC 000128 (2023), Berkshire County (Land Court May 25, 2023)

Does the Massachusetts Land Court have subject matter jurisdiction over claims concerning a family trust that holds record title to nine pieces of real property where such claims do not involve a dispute over a right, title or interest in the real property owned by the Trust? The Land Court recently answered this question “no” *DiNicola v. Ely, et al., No. 23 MISC 000128, Berkshire County (Land Court May 25, 2023)* (Smith, J.).

In *DiNicola*, the plaintiff, individually and as the beneficiary of the family trust at issue (the “Trust”), filed an action in the Land Court against her father and brother, the trustees of the Trust, for alleged wrongdoing in their handling of the business of the Trust, which holds record title to and manages nine pieces of real property in Berkshire County. In particular, the plaintiff alleged that her father and brother collected rents from the properties, paid operating expenses, and took all the net income generated by the properties for their personal use, without sharing the net income with her in her capacity as a beneficiary of the Trust. The plaintiff further alleged that her brother caused the Trust to convey one of the properties to a third party without her knowledge, consent, or authorization.

Based on these allegations, the plaintiff’s complaint sought: (1) a declaration that she is a beneficiary of the Trust; (2) an order, pursuant to G. L. c. 203E, § 411, that terminates the Trust and imposes a constructive trust over all of the remaining real property owned of record by the Trust; (3) an order approving a memorandum of lis pendens on all of the remaining properties of the Trust; and (4) an accounting pursuant to G. L. c. 203E, § 813.

The father and brother moved to dismiss the plaintiff’s claims against them under Mass. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. In particular, they argued that the plaintiff’s claims should be dismissed because they only concern trust matters under the Massachusetts Uniform Trust Code, G. L. c. 203E, *et seq.* (the “MUTC”) and do not allege a controversy involving a right, title or interest in property owned by the Trust. Therefore, according to the father and brother, the plaintiff’s claims fall outside the general equity jurisdiction of the Land Court as prescribed in G. L. c. 185, § 1(k).

The plaintiff opposed the defendants' motion to dismiss, arguing that, because the business of the Trust is to own and operate real property, her claims fall within the Land Court's jurisdiction pursuant to its decision in *Perry v. Lauria*, 22 LCR 585 (2014) (Sands, J.). The Land Court disagreed and granted the defendants' motion to dismiss under Mass. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

To reach this decision, the Land Court first discussed the scope of the Land Court's general equity jurisdiction under G.L. c. 185, § 1 *et seq.* and Massachusetts decisional law, holding that "[a]bsent a controversy that implicates the special expertise of the Land Court to adjudicate disputes involving a right, title or interest in land, the court has no jurisdiction to hear the case." Citing *O'Donnell v. O'Donnell*, 74 Mass.App.Ct. 409, 411-12 (2009); *Steele v. Kelley*, 46 Mass.App.Ct. 712, 725 (1991).

The Land Court then discussed the differences between the plaintiff's claims and those asserted in *Perry v. Lauria*, 22 LCR 585 (2014) (Sands, J.). In particular, the Land Court pointed out that, unlike the claims at issue in *Perry v. Lauria*, which sought a judicial determination as to the ownership of real property, the plaintiff's claims are for breach of a fiduciary duty or violation of the MUTC. Because these claims do not involve a controversy over a right, title or interest in the real property owned by the Trust, the Land Court concluded that it did not have jurisdiction to hear the case.

Court of Appeals Deems Transfer of Residential Property to Be Compensation for Caregiving, Not a Gift

Matter of Estate of Maika, 39 N.Y.3d 1137 (April 25, 2023)

A divided Court of Appeals (New York's highest court) affirmed a divided Appellate Division on the question of whether the transfer of decedent's residential property to two of his children, pursuant to power of attorney given to five of his children, was compensation for caregiving by the two children, rather than a gift (which would have been beyond the scope of the power of attorney).

Matter of Estate of Maika, 39 N.Y.3d 1137 (April 25, 2023).

In 2010, decedent, who suffered from severe disabilities, executed a power of attorney authorizing five of his children to act on his behalf with respect to various transactions, including real estate transactions, if a majority of the appointed children agreed on a transaction. The power of attorney did not authorize making gifts on decedent's behalf. In March 2017, three of the children (including Philip), acting in their capacities as decedent's attorneys-in-fact, conveyed decedent's residential property to Philip and one of his siblings as joint tenants, with decedent retaining a life estate in the property. Following decedent's death in July 2017, the administrator of decedent's estate commenced a proceeding alleging that the property had been improperly transferred and should be returned to decedent's estate.

The lower court concluded that the transfer was an improper gift, relying on the presumption that "where parties are related, ... services were rendered in consideration of love and affection, without

expectation of payment.” The Appellate Division reversed (with two judges dissenting), finding that respondents had rebutted that presumption with “clear, convincing and satisfactory evidence” that there was an agreement that the services of the two children who received the property “would be compensated” for having been the caregivers for their father for many years prior to his death. The “respondents established that the attorneys-in-fact acted within the authority delegated to them by decedent to transfer real property for his benefit, i.e., as compensation for the services that permitted him to remain in the home in accordance with his expressed wishes.” The Court of Appeals affirmed on the same grounds.

However, two Court of Appeals judges dissented on the ground that Philip’s status as one of the recipients of the property required a higher showing from respondents: that the decedent himself intended the conveyance and that it was in his best interest. The dissenters would have remanded for further evidentiary proceedings on those points.

Prospective Beneficiaries of Will Lack Privity to Sue Trusts and Estates Lawyer for Negligence

Phillips v. Murtha, 215 A.D.3d 408 (1st Dep’t April 4, 2023)

Can disappointed prospective beneficiaries of a will sue the decedent’s trusts and estates lawyer for alleged negligence in preparation of the decedent’s will? In *Phillips v. Murtha*, 215 A.D.3d 408 (1st Dep’t April 4, 2023), New York’s Appellate Division answered that question in the negative. In *Phillips*, the plaintiffs were cousins of the decedent and therefore potentially distributees of the decedent’s estate, estimated at \$7 million. The defendants were the lawyer and law firm who prepared the decedent’s will, which accordingly to the complaint left 98% of decedent’s estate to decedent’s caretaker. Plaintiffs alleged that the lawyer was negligent in failing to see that the caretaker was exercising undue influence over the decedent.

The trial court dismissed the complaint, and the Appellate Division affirmed, stating: “In the context of estate planning malpractice actions, strict privity applies to preclude a third party, such as beneficiaries or prospective beneficiaries like plaintiffs, from asserting a claim against an attorney for professional negligence in the planning of an estate, absent fraud, collusion, malicious acts or other special circumstances.” Noting that plaintiffs had pled their claim as one for negligence rather than legal malpractice, the court found that nonetheless “plaintiffs have not pleaded facts to show that defendant attorneys owed plaintiffs a duty of care in the drafting of their client’s will and trust agreement. The strict privity requirement here protects estate planning attorneys against uncertainty and limitless liability in their practice.” As to the exception for fraud or other special circumstances, the court held that plaintiffs had not pled any such claim with sufficient specificity, including as to fiduciary duty. “The relationship between an estate planning attorney and a prospective beneficiary under a will and/or trust does not in and of itself give rise to a fiduciary duty owed by the attorney to the prospective beneficiary.”

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