goulston&storrs

Probate & Fiduciary Litigation Newsletter - February 2021

February 5, 2021

Testamentary Capacity at Moment of Execution of Will Is Crucial; Testator's General "Cognitive Decline" Does Not Invalidate Will

Haddad v. Haddad, 19-P-1378 (January 12, 2021)

Where the maker of a will has entered "a period of cognitive decline," does that overcome the presumption of his capacity to make the will? In *Haddad v. Haddad*, 19-P-1378 (January 12, 2021), the Massachusetts Supreme Judicial Court answered in the negative, reversing the trial court's finding that the testator lacked capacity to make the will.

In *Haddad*, the father (Antoine) executed a will in July 2011 leaving all his assets to one son (Marcel) who had been caring for him daily. Antoine's previous will, from 2004, left his assets to Marcel and his two brothers (Joseph and Alain) equally. Joseph and Alain challenged the new will on the grounds of undue influence and lack of capacity. The trial judge found there was no undue influence, but found that Antoine, then age 82, lacked capacity to make the will in July 2011 as Antoine's health had started declining in 2010, including his mental abilities in certain respects. In 2013, Antoine was diagnosed with dementia, of which he died in 2017.

The Supreme Judicial Court reversed the trial court's finding that Antoine lacked testamentary capacity at the time of making the July 2011 will. "Although it is clear that Antoine experienced a period of cognitive decline beginning around 2010 …, the critical question is whether he had testamentary capacity on July 12, 2011," when he executed the will. At that time, the testator need only "be free from delusion and understand the purpose of the will, the nature of h[is] property, and the persons who could claim it."

Further, there is "a presumption of testamentary capacity" on the date of execution. The court found that Joseph and Alain failed to rebut that presumption, as there "was no direct evidence" of lack of capacity on the day Antoine executed the new will. Antoine was not diagnosed with dementia until 2013; and medical reports on Antoine from 2010 did not refer to dementia. The SJC concluded, "The trial judge … looked to the evidence showing that – over time – Antoine's mental faculties declined. We have found no case endorsing such an approach; the relevant focus always remains on the moment of execution…."

The Takeaway: While the will survived the brothers' challenge in *Haddad*, it was a close case. In situations involving one whose mental ability has started to slip, care should be taken at the time of execution of the will to memorialize that the testator has sufficient mental capacity to understand the purpose of the will, and the property and persons affected by it.

"Excessive" Probate Litigation Leads to Assessment of Fees against Share of Estate

Matter of Hudis, 187 A.D.3d 910 (2nd Dep't October 14, 2020)

In a cautionary note to parties or attorneys inclined to litigate more than necessary in a probate proceeding, New York's Appellate Division affirmed a Surrogate's allocation of 75% of counsel's fees to one legatee's share of the estate. In *Matter of Hudis*, 187 A.D.3d 910 (2nd Dep't October 14, 2020), the decedent left a will that bequeathed her entire estate in equal shares to her two daughters and one son, and appointed the two daughters (June and Nancy) as co-executors of the estate. After Nancy petitioned the Surrogate to remove June as a co-executor, the court removed both of them as co-executors "due to their inability to cooperate and administer the estate." The parties then settled, and agreed that their respective attorneys would make fee applications. The Surrogate determined the amounts of the fees, but as to June's attorneys' fees determined that 75% of those fees should come from June's share of the estate, and only 25% from Nancy's share. June appealed.

The Appellate Division affirmed, noting that under New York SCPA § 2110 the Surrogate has "discretion to apportion … legal fees between the beneficiaries of the estate." The court further found that "[t]he record demonstrates that [June's] interference with the administration of the estate created more litigation and more work for her attorneys, thus leading to excessive attorneys' fees." The court also found to be excessive the legal work "necessitated by [June's] multiple substitutions of counsel, and other fruitless services that only benefited [June] individually and did not benefit the estate."

The Takeaway: Even though New York SCPA § 2110 contemplates applications by counsel to receive fees from an estate "for services rendered to a fiduciary or to a … legatee," parties who litigate in a way that interferes with the administration of the estate or is otherwise excessive may find their attorneys' fees coming disproportionately from their share of the estate.

MassHealth May Not Seek Recovery Against Estate More than Three Years After Death

Matter of Estate of Kendall, 159 N.E.3d 1023 (December 28, 2020)

Can MassHealth seek recovery against an estate more than three years after the decedent's death? In *Matter of Estate of Kendall*, 159 N.E.3d 1023 (December 28, 2020), the Massachusetts Supreme Judicial Court answered that question in the negative.

The *Kendall* case involved a claim by MassHealth for reimbursement of $104,738.23 it had paid for the care of decedent before she died on August 7, 2014. At the time of her death, decedent owned a half interest in a home in Gloucester. In May of 2018, one of her heirs filed for late and limited administration of her estate to clear title to the property and MassHealth filed a claim for reimbursement pursuant to M.G.L. c. 190B, sec. 3-108 (4). The attorney for the personal representative rejected MassHealth's claim and MassHealth filed an objection. At issue was whether certain unique rights MassHealth has in the probate court apply after a three-year "ultimate time limit" on commencing probate matters has passed.

The Supreme Judicial Court rejected MassHealth's claim on two principal grounds. First, the three-year time limit on bringing actions for probate is strict and meant to provide closure and certainty. Second, where the Massachusetts legislature expanded MassHealth's rights as an estate creditor, it was quite explicit: "Where the Legislature advantaged MassHealth over other creditors, it did so carefully and expressly."

The Takeaway: The *Kendall* decision may, as MassHealth argued, incentivize heirs to delay initiating the probates of decedents who were MassHealth beneficiaries. But it may also incentivize MassHealth to do a better job of tracking assets, in particular real estate, of its beneficiaries, and timely referring cases to public administrators. In any event, practitioners should be aware that the three-year limit applies to MassHealth like any other claimant.

If you have a probate and fiduciary litigation question or business concern, we invite you to reach out directly to any member of our Probate & Fiduciary Litigation Group.