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Probate & Fiduciary Litigation Newsletter - September & October 2021

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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 Probate and Family Court. Goulston & Storrs is the go-to firm in the Northeast for litigation involving Probate and Fiduciary matters.

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Decedent's New York Residence at Time of Death Does Not Create Jurisdiction in New York Surrogate's Court Over Out-of-State Trustee

Matter of Murad Irrevocable Trust, 2021 WL 3782848 (August 26, 2021)

If the decedent trust beneficiary is a New York resident at the time of death, does the New York Surrogate's Court have jurisdiction over the trustee? In *Matter of Murad Irrevocable Trust*, the Appellate Division applied traditional due process analysis to answer that question in the negative.

In the petition, the executor of the beneficiary of the trust (decedent) sought an accounting and removal of respondent, a Virginia resident, as trustee. At the time the trust was created in 1996, decedent was a resident of Illinois and the trustee was a resident of Georgia. The trustee administered the trust from Georgia until he relocated to Virginia, and he administered the trust from Virginia thereafter. Decedent relocated to New York in 2016. The trustee sent her in New York occasional trust-related correspondence, including "five or six" checks disbursing trust assets. The trustee moved to dismiss the petition for lack of personal jurisdiction; the Surrogate denied the motion, finding personal jurisdiction.

The Appellate Division reversed, applying familiar Supreme Court due process precedents such as *International Shoe Co. v. Washington* and *Shaffer v. Heitner*. The court concluded that "respondent lacks the requisite minimum contacts with the New York forum. He does not live, own property, or conduct business in New York. The first and only relationship that New York had to the subject trust was 20 years after its creation, when decedent became domiciled in New York and respondent disbursed trust assets to her in New York…."

Takeaway: Lawyers representing either trustees or beneficiaries should not assume that the death of a New York resident beneficiary automatically creates personal jurisdiction over the trustee in New York Surrogate's Court. The personal jurisdiction issue should be analyzed using traditional due process principles.

T&E Attorney's Supervision of Will and Deed Preparation and Signing Is Crucial Again in Defeating "Undue Influence" Claim

Matter of Varrone, 72 Misc.3d 1201(A) (June 17, 2021)

How important is the role of a T&E attorney in personally supervising the preparation and execution of wills and related documents when a would-be beneficiary later raises an "undue influence" claim? In *Matter of Varrone*, 72 Misc.3d 1201(A) (Queens Sur. June 17, 2021), as in other cases reported in this newsletter, it proved critical in defeating the claim.

The decedent mother had five children, and in her will left her entire estate to one of them (John). Decedent also executed a deed of the family home to John. Disappointed siblings challenged the will and deed as the product of undue influence by John, who lived with their mother, noting the mother's diagnosis of "mild dementia" around the time in question. In dismissing the claim on summary judgment, the Surrogate gave great weight to the deposition of the T&E lawyer who prepared the will and the deed. The lawyer "testified that he prepared the deeds and accompanying transfer documents at decedent's behest; that he discussed the transactions with the decedent; [and] that he personally supervised their execution on the days in question …. [He] testified repeatedly that decedent's main objective was to ensure that [John]-- who lived with her, assisted her, and was without a spouse and children of his own--had a place to live, and would not be thrown out of the house."

Noting that mild dementia "is not incompatible with capacity," the Surrogate again pointed to the T&E lawyer's deposition testimony. "Adequate evidence of decedent's mental capacity at the relevant times was demonstrated by the disinterested witness testimony of [the attorney] who oversaw the execution of the [documents] and stated "there was nothing … that gave me any inclination that [decedent] didn't know what she was signing or doing."

Takeaway: Undue influence claims relating to actions of a decedent who suffered from some level of dementia are on the rise based on the reported decisions. The best way to combat them is for the responsible T&E attorney to personally supervise the preparation and execution of the relevant documents and maintain notes of discussions with the client.

Trust Principal is not "Countable" Against Medicaid-Benefits Eligibility, When an Irrevocable Trust Settlor's Limited Power of Appointment Does not Provide for Appointing Trust Principal to the Settlor's Benefit

Fournier v. Sec'y of Exec. Office of Health & Human Servs., 488 Mass. 43 (July 23, 2021)

In *Fournier v. Sec'y of Exec. Office of Health & Human Servs.*, 488 Mass. 43 (July 23, 2021), the Massachusetts Supreme Judicial Court answered a question first raised in *Daley v. Sec'y of the Exec. Office of Health & Human Servs.*, 477 Mass. 188, 203 (2017)): Where an irrevocable trust's terms grant the settlor a limited power of appointment but do not allow for the settlor to appoint the trust principal to her benefit, the trust principal is not "countable" for purposes of determining the settlor's eligibility for Medicaid long-term care benefits. At issue in *Fournier* was whether the plaintiff-settlor's house, which had been deeded to an irrevocable trust on the same day the trust

was established by the plaintiff-settlor and her then-living husband, should be "countable" for purposes of determining the plaintiff-settlor's eligibility for MassHealth benefits. In the context of an irrevocable trust under Massachusetts law, "for trust principal to be considered countable … the terms of the trust must give the [Medicaid] applicant a direct path to reach or benefit from the trust principal."

Under the *Fournier* trust's terms, the plaintiff-settlor retained during her lifetime a limited "power to appoint from time to time…all or any part of the trust property then on hand to any one or more charitable or non-profit organizations over which she has no controlling interests." When the plaintiff-settlor was admitted to a non-profit skilled nursing facility, MassHealth denied her application for long-term care benefits, reasoning that this provision meant the plaintiff-settlor could appoint the house to pay for her long-term care—and thus that the house was "countable" against her Medicaid eligibility.

The SJC affirmed the Superior Court's judgment in favor of the plaintiff-settlor. First, it reasoned that a limited power of appointment "does not include by implication the donee of the limited power," and so the plaintiff-settlor could not exercise her limited power to appoint a portion of the trust's principal directly to herself. Second, the SJC pointed to its holding in an earlier case that "the donee of a limited power of appointment may not circumvent the constraints on the power by appointing trust principal to a permissible appointee for the purpose of benefitting" herself. The SJC further reasoned that because the plaintiff-settlor no longer held legal rights to the house, the trustee would "literally and figuratively…need to write the check to facilitate the appointment," and that doing so would violate the trustee's duty to administer the trust solely in the interest of the trust's ultimate beneficiaries—here, the plaintiff-settlor's children.

Takeaway: T&E attorneys should be aware of (and prepared to advise about) the impact of any express limited power of appointment reserved to the settlor of an irrevocable trust, especially where Medicaid eligibility is a consideration.

Massachusetts SJC Holds that Court-Appointed Conservators Acting within the Authorized Scope of their Duties are Entitled to Absolute Immunity as Quasi-Judicial Officers

Hornibrook v. Richard, 488 Mass. 74 (August 2, 2021)

When acting within the authorized scope of one's duties, is a probate-court-appointed conservator a quasi-judicial officer entitled to absolute immunity? In *Hornibrook v. Richard*, 488 Mass. 74 (August 2, 2021), the Massachusetts Supreme Judicial Court answered that question in the affirmative. In *Hornibrook*, a son, in his capacity as guardian and next of friend for his mother, alleged that his mother's court-appointed conservator had breached her fiduciary duty to his mother and committed malpractice, conversion, and fraud. The conservator-defendant had been appointed by the probate court after an elder-services organization learned that the mother, who was suffering from dementia, was being neglected and financially exploited by another son, purportedly her live-in caretaker.

The mother was moved from the house she owned to a nursing-care facility, but the live-in son refused to leave the house. Over the next several years, the plaintiff-son and conservator-defendant coordinated on renovations to the house, and the plaintiff-son developed a plan to remove the live-in son from the house, move his mother back into the house, and rent out two units within the house to cover care expenses for his mother. In the meantime, however, the conservator-defendant filed a motion in the probate court seeking permission to sell the house. The motion was granted and the conservator-defendant successfully evicted the live-in son from the house, which sold; later, after the mother's death, the plaintiff-son filed his complaint against the conservator-defendant.

The Superior Court granted the conservator-defendant's motion to dismiss as to the claims of malpractice and fraud, but denied the motion as to the breach of fiduciary duty and conversion claims. The conservator-defendant appealed, and the Supreme Judicial Court reversed the probate court and dismissed those claims as well.

The SJC first decided that a court-appointed conservator "functions as an arm of the court," and therefore receives "absolute immunity for activities that are integrally related to the judicial process." Noting that protected activities are those that are completed in the conservator's role as an "agent of the probate court," rather than those on behalf of the conservatee, the Court then found that the activities at issue were subject to quasi-judicial immunity. The conservator-defendant argued that her actions at issue—evicting the live-in son, cleaning and preparing to sell the house, and ultimately selling the house—were actions authorized by the probate court. The SJC agreed, noting that the plaintiff-son had not objected to the motion as to the sale at the time the conservator-defendant made it, and that he had failed to set forth "factual allegations plausibly suggesting that the defendant acted outside her jurisdiction."

Takeaway: A court-appointed conservator should take care to make requests to the court for authorization sufficiently explicit and broad to provide for immunity in the subsequent performance of those quasi-judicial actions.