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Mark Swirbalus and Marshall Senterfitt

As New Englanders wait patiently for a well-deserved spring thaw, Massachusetts state and federal courts have been busy addressing a range of probate litigation issues including shifting legal fees, the validity of spendthrift provisions, the dubious revocation of a power of attorney and whether trust property may be included as part of a probate estate.

The Appeals Court recently addressed legal fees in two separate matters. In Miller-Gray v. Charette, 2014 Mass. App. Unpub. LEXIS 250 (February 28, 2014), arising out of a case in which a probate court judge removed the defendant as trustee and administrator, the Appeals Court reinforced the well-established position that probate judges have broad discretion to shift attorney's fees pursuant G.L. c. 215, § 45 and equally broad discretion in determining the reasonableness of any fee award. While neither party was happy with the lower court's award of approximately $58,000 in fees in favor of the plaintiff, the Appeals Court found no reason to disturb the decision where there was no indication that the award was erroneous. Despite the fact that the award was substantially less than the $170,000 sought by the plaintiff, the Appeals Court comfortably upheld the reduced figure based on the lower court's reasoning that the matter was not overly complex, the trial was completed in one day and the plaintiff did not prevail on all of her claims. The Appeals Court also affirmed the defendant's personal liability for payment of the plaintiff's legal fees as a result of her "repeated, purposeful, and flagrant disregard of the [lower] court's orders necessitating the contempt proceedings."

In another matter dealing with legal fees, O'Regan v. Migell et al., 2014 Mass. App. Unpub. LEXIS 232 (February 26, 2014), the Appeals Court not only upheld a fee award granted in favor of the plaintiff pursuant to G.L. c. 215, § 45 in the underlying guardianship proceeding, but also awarded plaintiff appellate fees and double costs on the grounds that the defendants' appeal was "frivolous and wasteful." In addition to finding that there was no basis for any of defendants' arguments on appeal, the Appeals Court noted that the defendants failed to challenge the fee award at any point during the underlying matter.

In the matter of In re Behan, 12-14921-JNF, 2014 Bankr. LEXIS 732 (Bankr. D. Mass. Feb. 25, 2014), a Bankruptcy Court addressed whether creditors could access a assets placed in trust for the benefit of the debtor despite the existence of a spendthrift provision in the trust instrument where the instrument also contained a unexercised power of appointment that would have allowed the debtor to demand payment of the entirety of his share of the trust assets. The Bankruptcy Court rejected the debtor's argument that the spendthrift provision trumped the power of appointment and rendered it ineffective, and instead held the opposite, that the "power of appointment, although not exercised, defeats the spendthrift provision." The Bankruptcy Court also

held that the unexercised power of appointment was property of the bankruptcy estate and was exercisable by the trustee for the benefit of the bankruptcy estate.

In another recent Rule 1:28 decision, the Appeals Court confirmed the well settled legal implications of placing property in trust. In Ingram v. Burbine, 2014 Mass. App. Unpub. LEXIS 321 (March 13, 2014), the Appeals Court rejected the plaintiff's argument that certain trust property should have been included in her late husband's probate estate, noting that assets placed in trust are not probate assets and that "assets passing by trust constitute nonprobate transfers."

Finally, in the case of Daigle v. Daigle, 2014 Mass. App. Ct. Unpub. LEXIS 309 (March 12, 2014), the Appeals Court dealt a double blow to one of two sons fighting over the care of their father. The Appeals Court first affirmed that the defendant son had caused his father to revoke a power of attorney vested in plaintiffs despite knowing that his father was not competent to make medical or legal decisions as the time he executed the revocation. The Court also found that the defendant lacked standing to assert any claims on behalf of his father because of, among other things, the lower court's finding that the defendant was not his father's attorney-in-fact.

This update was authored by Mark Swirbalus and Marshall Senterfitt, attorneys in the firm's Probate & Fiduciary Litigation group. For questions or additional information on this topic, please contact Mark at mswirbalus@goulstonstorrs.com, Marshall at msenterfitt@goulstonstorrs.com, or any member of the Probate & Fiduciary Litigation group.