

T&E Litigation Newsletter- 4/27/16

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On March 25, the First Circuit Court of Appeals issued a ruling in a breach of fiduciary duty case that turns, in part, on an analysis of the Supreme Judicial Court's 2014 decision on damages in the widely-discussed matter of *The Woodward School for Girls, Inc. v. City of Quincy*, 469 Mass. 151 (2014).

In *Berkowitz v. Berkowitz*, 2016 U.S. App. LEXIS 5624 (March 25, 2016), the Court addressed cross appeals from a jury trial in which a plaintiff-father prevailed against a defendant-daughter in an intra-family dispute (in federal court on diversity grounds) concerning allegedly improper asset transfers. The Court had little trouble in upholding the award for the father based on several grounds, including its refusal to re-assess determinations of witness credibility at trial.

More interesting for fiduciary litigators is the analysis of the father's cross appeal concerning the award of pre-judgment interest. The District Court awarded the father interest on damages of approximately \$541,000 at the Massachusetts statutory rate of 12%, calculated from the date of filing suit. Although satisfied with the 12% interest rate, the father challenged the decision to apply interest from the date of suit rather than the date of the breach of fiduciary duty. Relying on the SJC's decision in *The Woodward School for Girls, Inc.*, the father claimed that Massachusetts law now requires that interest be calculated from the date of injury in breach of fiduciary duty cases.

In rejecting the father's appeal, the Court cited footnote 37 of the Woodward opinion for the proposition that awarding interest from the date of the breach was not required in every breach of fiduciary case. Quoting the SJC, the First Circuit recognized that where "the award of prejudgment interest is part and parcel of the award of damages itself, and is not compensation for the delay of litigation" using the date of injury to calculate interest may be appropriate. In the Woodward case, however, the measure of damages was based on the value of unrealized investment gains during a long period of imprudent investment oversight by trustees and the interest rate used in calculating the damage award was much lower than the statutory rate of 12%. The father failed to present a compelling argument for expanding the ruling in Woodward to all breach of fiduciary duty cases or for using the statutory rate of 12% in all such cases. Accordingly, the First Circuit affirmed the decision with respect to prejudgment interest.

On March 31, the Appeals Court addressed a matter that highlights the authority of probate court judges to limit fees of a personal representative and to shift attorney's fees. The case, *In the Matter of the Estate of Elizabeth F. Lawry*, 2016 Mass. App. Unpub. LEXIS 356 (March 31, 2016) addressed the probate court's ruling on an objection by beneficiaries to the final account filed by an executor, who the beneficiaries also sought (successfully) to remove.

In affirming the lower court decision ordering the former executor to return \$20,000 of his original \$30,000 fee to the estate, the Appeals Court upheld the finding that the former executor acted in

bad faith, and therefore was not entitled to costs or reasonable attorney's fees pursuant to G.L. c. 190B, § 3-720. Among other things, the probate court found that the former executor was dilatory in his administration of the estate (taking seven months to file an accounting after being ordered to do so), failed to record his time in a detailed manner, charged a higher fee because there was acrimony among the beneficiaries, improperly billed on the basis of a percentage of the value of the estate, made several mistakes, and "otherwise breached" his fiduciary duties.

The Appeals Court also affirmed the lower court's order that the former executory pay \$7,500 in attorney's fees to the beneficiaries pursuant to G.L. c. 215, § 45, and also noted that the trial court judge "expressly warned both parties at the outset of the trial that the losing party likely would have to pay the other's attorney's fees."

On March 2, the Appeals Court upheld a probate court order striking affidavits of objection filed by two siblings in opposition to the probate of their father's will, which left his estate to the daughter of his second wife. Although the affidavits contained allegations that the father was susceptible to undue influence and offered evidence that his will provided for an unnatural disposition of his assets, the siblings failed to offer evidence of facts "surrounding the actual execution of the will." In the Matter of the Estate of William E. Weaver, 2016 Mass. App. Unpub. LEXIS 222 (March 2, 2016).

The Appeals Court pointed out that although the siblings claimed their father had substance abuse issues, they did not allege he was under the influence of any substances when he signed his will, or that he did not understand the contents of the will. The Court further held that even if "badgering" by the testator's second wife was a "dominant force behind the terms" of his will, the wife predeceased him and he was free from her influence and the influence of the beneficiary of the will for twenty months prior to his death, during which time he was free to make changes to his will had he wanted to do so.

This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.