

T&E Litigation Newsletter - 5/28/14

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Mark E. Swirbalus and Marshall D. Senterfitt

Two recent Appeals Court decisions address appellate issues that all probate litigators should keep in mind when trying a case. The first decision, which arose from a challenge to the allowance of an account and inventory, addresses the statutory requirements for an objection to an accounting under the recently enacted Uniform Probate Code and also emphasizes the limited review available for determinations concerning witness credibility. The second decision addresses issue preclusion and the less-frequently-asserted doctrine of judicial estoppel in a cautionary tale about the dangers of inconsistent claims in successive lawsuits.

In the matter of Guardianship of Mary E. Nickerson, 2014 Mass. App. Unpub. LEXIS 583 (May 2, 2014) (Rule 1:28), the executor of an estate appealed a judgment of the Probate Court that allowed a conservator's accounting and inventory of the estate. The executor asserted several grounds for reversal, including an argument that, on some issues, the Probate Court improperly shifted the burden of proof to the executor, in violation of the settled rule that the accountant bears the burden of proof. The Appeals Court rejected the executor's claims. In the Appeals Court's view, the Probate Court's finding that the executor failed to show "specific facts and grounds upon which [his] objections [were] based" did not amount to shifting the ultimate burden of proof to the executor, but instead constituted a finding that the executor failed to meet his burden of producing evidence in support of his objections to the accounting at issue. In support of its ruling, the Appeals Court cited a provision of the Uniform Probate Code, G.L. c. 190B, §1-401(e), which requires that a party objecting to an account must file an affidavit citing "the specific facts and grounds upon which the objection is based."

The plaintiff also argued that the judge's factual findings were clearly erroneous. However, the Appeals Court observed that with respect to those findings, the lower court credited the testimony of the conservator and discredited the testimony of the plaintiff, and in doing so, the Appeals Court offered a good reminder that findings "based on credibility assessments are uniquely the province of the trial judge and [the Appeals Court] will not disturb them on appeal."

In the matter of Mongiat v. Day, 2014 Mass. App. Unpub. LEXIS 512 (April 16, 2014) (Rule 1:28), the Appeals Court addressed the common elements that must be established to obtain dismissal based on collateral estoppel (issue preclusion), including the important element of necessity. The case concerns the ownership and multiple conveyances of subdivided real property that also had been the subject of two prior matters, including a partition proceeding and a subsequent equity case. In the third incarnation of the dispute, the parties sought a judgment as to their respective ownership interests. In vacating the decision of the Probate Court, the Appeals Court panel determined that the lower court erred by dismissing the matter based on issue preclusion because the court relied on issues addressed in the partition proceeding that were not "necessary" to the

outcome of that case. The Appeals Court specifically noted that the plaintiff in the current case, although a party to the partition proceeding, had prevailed in the partition matter on grounds unrelated to her ownership of the subject property and thus “had no impetus to challenge the finding [concerning her ownership].”

However, the Appeals Court went on to find that the parties had fully litigated the issue of their respective ownership in the equity proceeding. Although the equity case concerned allegations of a breach of fiduciary duty by the plaintiff in her capacity as trustee of a trust in possession of the subject property, the parties in that case specifically addressed whether the plaintiff had accepted a deed for part of the property. Importantly, the Appeals Court not only found that the equity matter served as a basis for issue preclusion, but also that the plaintiff had expressly testified in the equity action that she had never accepted a deed to a certain portion of the subject property (in support of her argument that she could not have breached any duty in managing the property) and thus was judicially estopped from taking a contrary position in the current case. This decision is a good reminder that counsel and parties should carefully consider whether a defense in one case could also be a damaging admission down the road.

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.

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