

## T&E Litigation Newsletter- 5/5/15

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In *Lesanto v. Lesanto*, Case No. 12-P-1111, 2015 Mass. App. Unpub. LEXIS 318 (April 21, 2015), the Appeals Court reversed a judgment of the Probate Court reforming a trust.

The facts, in nutshell, are as follows:

Paul Lesanto executed a pour-over will and a revocable trust in 2005, pursuant to which his assets would pass to his wife Donna during her lifetime and then to his two children from a prior marriage. Following a dispute with his ex-wife Theresa in 2010, in which his two children sided with his ex-wife, Paul decided that he wanted to disinherit them. Therefore, working with a new lawyer, a second will and a second revocable trust were drafted, pursuant to which the first will would be revoked, the first trust would be revoked, and Paul's assets would pass to his wife Donna and *her* children. This new estate plan would make no provision for Paul's own children.

Paul executed the second trust in October 5, 2010, but he never executed the second will because he was admitted to the hospital and died before he could do so. (There were no attesting witnesses available when Paul executed the second trust, and so his plan was to come back to the lawyer's office another day when attesting witnesses would be available to execute the second will.) Because Paul never executed the second will, his first will had not been revoked at the time of his death.

Following Paul's death, his son filed a petition seeking allowance of the first will and his appointment as personal representative. He also filed an equity action seeking a declaration as to whether the residuary of Paul's estate should pour over into the first trust, the second trust, or pass under the laws of intestacy because the residuary bequest under the first will had lapsed. The lapse argument was based on the fact that the second trust had expressly "revoked" rather than amended the first trust, and that G.L. c. 203, § 3B, which was in effect at the time of Paul's death but has since been replaced by Section 2-511 of the MUPC, provided that the residue under a will cannot pour over into a trust created after the execution of the will. (Section 2-5111 of the MUPC allows the residue of a will to pour over into a trust created after the execution of the will.)

The Probate Court found that Paul intended to disinherit his children. The Probate Court also found that Paul's lawyer was unaware of the prohibition under G.L. c. 203, § 3B, and committed a drafting error by including language in the second trust that revoked rather than amended the first trust. Based on these findings, the Probate Court reformed the second trust by striking the clause that revoked all prior trusts and replacing it with a clause stating that the first trust was thereby amended. The Appeals Court reversed.

Although a trust may be reformed in Massachusetts if the trust does not reflect the settlor's intent due a mistake or scrivener's error, the Appeals Court found no mistake or scrivener's error

here. The second trust is what Paul intended, and it contains no drafting errors – the Court found that Paul’s lawyer did not err in revoking the first trust, because that is what Paul wanted to be done. The problem arose because Paul died before he could execute the second will, which was to work in conjunction with the second trust as part of a comprehensive estate plan to effectuate his intent. The Court held that reformation of a trust is not a remedy for failing to complete an estate plan. As the Court explained: “It is true that the seemingly simple reformation of the second trust to label it an amendment of the first trust would render it unnecessary for Paul to execute a second will. We cannot say on this record, however, that it was Paul’s intention by executing the second trust alone, to complete his estate plan. Where he anticipated executing a new will and thereby complete his estate plan, it is not for the courts to step in and render that additional step unnecessary and even less to anticipate the form his will ultimately would have taken when he signed.”

Therefore, the judgment of the Probate Court reforming the second trust was reversed, the residuary clause of the first will was determined to have lapsed under G.L. c. 203, § 3B, and the residue of the estate was ordered to be distributed pursuant to the laws of intestacy.