

T&E Litigation Newsletter – 8/22/14

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In *Lowell v. Talcott et al.*, Case No. 13-p-1053, 2014 Mass. App. LEXIS 98 (August 18, 2014), the Appeals Court considered whether a child born in the 1960s while her mother was married to a man who is not the child's father is an "issue" of the mother as the term is used in the wills of the mother's grandparents. Based on the facts presented, the Court found that the child is an "issue" under the wills (and a beneficiary of the trusts created thereunder).

A brief factual summary is helpful. In 1951, Francis and Mary Oakes executed reciprocal wills leaving most of their property in trust for the benefit of one another and their issue (three daughters). Upon the respective deaths of Francis and Mary, separate trusts were established for each of their daughters and their respective "issue." The term "issue" was not defined in the 1951 wills. One of the daughters, Juliana, was married to a man named David for eight years, during which time she gave birth to three daughters. Her youngest daughter, Maria, was born in 1963, after David filed for divorce, but before a divorce decree issued. David was listed as Maria's father on her birth certificate. Although David maintained from the time of Maria's birth that he was not her father and never acted as her parent, he did not contest the birth certificate until nearly 50 years later when genetic testing confirmed his claim (consistent with his denial of sexual relations with Juliana for the year prior to Maria's birth).

Following Juliana's death in 2012, Maria presented her birth certificate to the trustee of the Oakes testamentary trusts as an issue of Juliana. The trustee of the trusts filed suit in probate court seeking instruction as to whether Maria is a beneficiary of the trusts and she counterclaimed seeking, among other things, an order establishing her status as a beneficiary. The probate court ruled in favor of the trustee on summary judgment finding that because David was not Maria's biological father, she could not be an "issue" as the term was understood in 1951. The judge also awarded the trustee attorney's fees based on his finding Maria's suit was frivolous in view of the genetic testing that proved David was not her father.

The Appeals Court focused its review of the matter on two areas of inquiry: (1) the testamentary intent of Francis and Mary; and (2) the meaning of the term "issue" in 1951. The Court resolved the second question easily. Acknowledging that Massachusetts case law that reformed the definition of "issue" to mean "all biological descendants" applies only to testamentary instruments executed after April 16, 1987 (citing *Powers v. Wilkinson*, 399 Mass. 650 (1987)), the Appeals Court, like the probate court, determined that the term "issue" in 1951 referred only to "legitimate" descendants.

The Court then considered whether Juliana was "legitimate" despite the results of the recent genetic testing. In reversing the probate court's ruling and holding that Maria is an issue of Juliana, the Appeals Court focused on the question of testamentary intent. The Court first established

context for that intent, beginning with its recognition that in 1951 there was a “strong legal presumption” that a child born in wedlock was “legitimate.” The Court also noted that overcoming the presumption of legitimacy at that time was difficult because it was not until 1957 that the SJC first recognized that blood tests could exclude a husband as the father of a child born in wedlock. As of 1951, the only way to overcome the presumption of legitimacy was by proving beyond a reasonable doubt that the husband had no access to the wife or was impotent during the period of possible conception, which was particularly challenging given that husbands and wives were incompetent to testify as to the husbands lack of access to the wife.

With this legal background in place, the Court determined that when Maria’s maternal great-grandparents (Francis and Mary) created their wills, they understood the terms “issue” and “legitimate” to mean biological descendants and that a child born in wedlock was presumed “legitimate.” In support of its holding, the Court noted that because rebutting the presumption of legitimacy at the time of drafting would have turned on witness testimony and not medical testing, Maria’s great-grandparents would have anticipated that any challenge to the legitimacy of a child born to their issue would have been pursued within a reasonable amount of time after the birth – not almost 50 years later. The Court added that nothing in the original wills indicated that Maria’s great-grandparents desired to resort to legal proceedings to rebut the presumption of legitimacy that they knew would apply to children born to their married biological descendants.

Ultimately the Court found that the genetic testing “does not alter Maria’s legitimacy status both at birth and for the forty-eight years prior to the [testing]” and found “no impediment to Maria’s status as a beneficiary of the Oakes testamentary trust.” The Court reversed the probate court’s judgment with respect to her status as a beneficiary, vacated the award of attorney’s fees to the trustee and remanded the case for further proceedings as to other matters, including Maria’s claim of breach of fiduciary duty against the trustee.

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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