

## T&E Litigation Newsletter- 9/16/15

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In a decision in a case entitled In the Matter of the Estate of Charles P. Galatis, Case No. 14-P-579 (September 9, 2015), the Appeals Court addressed what happens when there is a will contest involving two possible wills, but only one of them has been presented for probate.

By way of background, the decedent died on February 25, 2000. While admitted to the hospital, the decedent communicated his testamentary wishes (*i.e.*, who would get what) to a friend, who transcribed the information onto a will template he found on the Internet. The decedent signed the resulting document on February 1, 2000. The friend then gave the February 1<sup>st</sup> document to a lawyer to use as a starting point for drafting a "proper will." The lawyer did so, and the decedent signed the lawyer-drafted will on February 9, 2000. In many respects the February 1<sup>st</sup> document and the February 9<sup>th</sup> will are similar.

The litigation involved the validity of the February 9<sup>th</sup> will, the allowance of which was sought through a petition for probate. After a 10-day trial, the Probate Court disallowed the February 9<sup>th</sup> will, finding that the decedent lacked testamentary capacity. The Appeals Court affirmed (in a majority opinion, with one justice dissenting), holding that the evidence of incapacity was sufficient to shift the burden of proof to the will proponents, and that there was no clear error in the trial judge's finding that the proponents failed to carry their burden. "Although there is a presumption that the testator had testamentary capacity, once the contestants produce 'some evidence of lack of testamentary capacity, the presumption of [capacity] loses effect' and the burden shifts to the proponents." Quoting Palmer v. Palmer, 23 Mass. App. Ct. 245, 250 (1986).

The proponents also argued on appeal that the trial judge erred in not ruling whether the February 1<sup>st</sup> document constituted a valid will. The trial judge had explained that the question of the validity of the February 1<sup>st</sup> document was not before her, and so although she specifically found that the contestants did not submit sufficient evidence to overcome the presumption that the decedent had capacity on February 1<sup>st</sup>, thus raising the possibility that the February 1<sup>st</sup> document could be a valid will, the trial judge did not rule on the question because the proponents never formally presented the February 1<sup>st</sup> document for probate. The Appeals Court agreed that the validity of the February 1<sup>st</sup> documents was not properly before the trial judge.

The decision is a good reminder to will proponents of their "obligation to follow proper procedures." Although the proponents in this case had sought instruction from the Probate Court on whether they should file a petition to probate the February 1<sup>st</sup> document, the response they received from the Probate Court was unclear, and so "it was incumbent on the proponents to seek further clarification from the court." They apparently did not do so.