T&E Litigation Newsletter- 1/5/16

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The last quarter of 2015 produced two interesting decisions from the Appeals Court. In *Brady v. Citizens Union Savings Bank*, 88 Mass. App. Ct. 416 (2015), the Court addressed whether legal fees and costs already paid to trustees pursuant to an insurance policy can nevertheless by recovered by the trustees in a trust dispute with beneficiaries. In *Needham v. Director of the Office of Medicaid*, 88 Mass. App. Ct. 558 (2015), the Court addressed whether, in making a determination of eligibility for Medicaid benefits, MassHealth was required to recognize a trust reformation that occurred after the application for benefits had been filed.

In *Brady*, a petition was filed for payment for professional services rendered by the trustees, and for legal fees and costs incurred by the trustees in connection with their successful defense of a lawsuit that had been filed against them by two beneficiaries. After a non-evidentiary hearing, in a single-page decree, the probate court judge awarded the professional fees and the litigation fees and costs in the full amount of approximately $450,000, which constituted nearly 60% of the trust assets. One of the beneficiaries appealed.

Three issues were raised on appeal—the timeliness of the petition for fees; the reasonableness of the fees award; and whether insurance coverage bars the recovery of fees incurred in the underlying litigation. The Court quickly disposed of the first two issues. First, the Court held that there was no merit to the argument that the petition was too late because it was not filed until after judgment entered in the underlying litigation. Second, the Court held that although a probate court judge has wide discretion in awarding fees, here the judge had made no findings in the single-page decree to allow the Court to determine whether the relevant factors had been properly considered, and for this reason the award was vacated and the case remanded.

The third issue regarding insurance coverage received the most attention from the Court. The specific question was whether the recovery could include fees and costs that had already been paid by the trustees' insurers. The Court's answer was maybe.

According to the Court, there are two rationales for holding that insurance coverage does not bar the recovery of fees and costs. Under the "benefit of the bargain" rationale, a party who contracts for insurance coverage with his or her own funds should receive that benefit without the other party's using it to offset a claim for expenses. The second rationale relies on a broad interpretation of what it means to "incur" expenses, and draws a distinction between fees and costs that were incurred by a party on the one hand, and fees and costs that were actually paid by the party on the other hand. Based on these rationales, the Court held that the recovery of fees and costs that were already paid by the insurers is not necessarily barred, but instead the insurance coverage is another factor that the probate court judge must consider in determining the reasonableness of the award. "On remand," the Court instructed, "the [probate court] judge should take the trustees'

insurance coverage into account, giving it as much or as little weight as the judge deems appropriate, in arriving at a just and equitable award."

In *Needham*, the plaintiff was the settlor and beneficiary of an irrevocable trust, the only asset of which was the family home valued at $412,000. When the plaintiff applied for Medicaid benefits from MassHealth, his application was denied. The value of the trust was deemed to be "countable," and thus the plaintiff was ineligible for benefits, because a provision of the trust instructed the trustees to accumulate and use the principal for the plaintiff's future needs without regard to the interests of the remaindermen.

During the course of the plaintiff's administrative appeal of MassHealth's denial of benefits, the trustees and the plaintiff filed a stipulation in probate court to reform the trust ab initio to remove the provisions that had rendered the plaintiff ineligible for benefits. Following the probate court's approval of the stipulation, thereby reforming the trust ab initio, the plaintiff argued that he was now eligible for benefits. The hearing officer disagreed, finding that although the reformation of the trust rendered its assets noncountable, the reformation was itself a "disqualifying transfer" of assets into a trust that fell within the prescribed look-back period. On appeal, a superior court judge reversed the hearing officer's denial, holding that MassHealth is bound by the reformation ab initio approved by the probate court, and thus the original trust must be deemed never to have existed.

On further appeal, the Appeals Court reversed the superior court judge's decision, siding with the hearing officer as follows:

"The issue before us is not whether the trust was reformed as a matter of State law. The issue is whether MassHealth is required to recognize a reformation as a matter of Federal law when determining whether there has been a disqualifying transfer. The answer to that question is no. Were the answer different, persons of means would be permitted to enjoy otherwise countable assets held in trust throughout their lives, transfer those assets for less than fair market value by reforming the trust ab initio when their health declines, and thereby obtain Medicaid payment for long-term nursing care without complying with the waiting period imposed by Federal law."