

## T&E Litigation Newsletter - 1/9/15

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As 2014 came to a close, Massachusetts state and federal courts issued decisions concerning a number of issues of interest to estate planning attorneys and probate litigation attorneys, including testamentary capacity, attorney's fee awards in probate litigation, and whether estate planning attorneys owe fiduciary duties to non-client prospective heirs.

The Appeals Court, in the case of *In the Matter of the Estate of Fred S. Rosen*, Case No. 13-P-221, 2014 Mass. App. LEXIS 170 (December 30, 2014), affirmed a decision by the probate court holding that a testator had testamentary capacity to make significant changes to his estate plan during the final days of his life. The Court also upheld a ruling concerning a challenged power of appointment and an award of approximately \$140,000 in attorney's fees.

The primary issue on appeal concerned whether evidence of mental impairment around the time the testator executed new estate documents was sufficient to establish that the testator lacked testamentary capacity. While acknowledging that medical records evidenced that the testator had instances of confusion and suffered from suspected "delirium" just hours after making changes to his estate papers, the probate court determined that other records showed that the testator was alert and oriented at the precise time he executed the challenged documents.

The Appeals Court noted that the determination of testamentary capacity focuses on the narrow timeframe in which a challenged act occurred. Massachusetts courts have long recognized that a person may "possess testamentary capacity at any given time and lack it at all other times." Ultimately, the Court affirmed the probate court's decision and ruled that the "contestant's evidence is insufficient to defeat the presumption that the testator had the requisite testamentary capacity..." In support of its holding, the Appeals Court found that despite the testator's alleged confusion hours after making changes to his estate documents, medical records and credible witness testimony confirmed that the testator was of sound mind during the morning when he actually executed the documents in question. The Appeals Court also highlighted the fact that the revised estate plan did not result in an unnatural disposition of the testator's assets, which were left to people with whom he had close relationships.

The Appeals Court went on to affirm the probate court's ruling that the tangible remainder provision in the will permitting the executrices to give the testator's tangible personal property to "one of more of [his] friends" was a valid power of appointment. Although the Court agreed that the provision failed as a valid trust because it did not provide for sufficiently ascertainable beneficiaries, the Court agreed that the provision was a valid power of appointment because it clearly demonstrated the intent of the testator to allow the executrices to make decisions about the distribution of tangible property. The Court added that the probate court's interpretation of the

provision as a power of appointment preserved the testator's intent and "effectively harmonize[d] the provisions of the entire instrument."

Finally, the Appeals Court upheld an award of attorney's fees in the amount of \$140,015 (as reduced by the probate court). In support of its holding, the Appeals Court found that the fee award was well supported by the trial court's analysis of the underlying matter and the work involved in litigating the case. The Appeals Court also noted that a probate court's discretion in determining fees is well established.

In *Spinnato v. Goldman*, Civil Action No. 14-12443-PBS, 2014 U.S. Dist. LEXIS 175464 (December 19, 2014), the Federal District Court addressed breach of fiduciary duty claims asserted by a purported heir of an estate against the planning attorney who prepared the estate documents at issue in the case and later served as a co-executor of the decedent's estate. Applying the well-established law of Massachusetts that an attorney preparing an estate plan "can have only one client to whom they owe a duty of undivided loyalty," the Court dismissed the claims alleging that the estate planning attorney failed to disclose information to the plaintiff during the attorney's preparation of the descendant's estate papers on the basis that the plaintiff was only a prospective heir during the events in question to whom the attorney owed no duty.

The Court did not, however, dismiss claims based on the alleged failure of the attorney to disclose material information to the plaintiff at the time the attorney was serving as co-executor of the estate, because, the Court held, executors do owe fiduciary duties to beneficiaries and thus the plaintiff had stated a plausible cause of action. The Court also declined to dismiss a claim of fraudulent misrepresentation against the attorney based on allegations that he deliberately misled the plaintiff about the validity of the will prior to the testator's death to the plaintiff's detriment. Although the Court agreed that the attorney owed no duty of care to the plaintiff prior to the testator's death, the Court pointed out that the misrepresentation claim was based on intentional misconduct, not on negligence, and that no Massachusetts decision prohibits a claim for fraudulent misrepresentation by a prospective beneficiary against a decedent's attorney.

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](mailto:mswirbalus@goulstonstorrs.com), Marshall at [msenterfitt@goulstonstorrs.com](mailto:msenterfitt@goulstonstorrs.com), or any member of the [Probate & Fiduciary Litigation](#) group.

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