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T&E Litigation Newsletter – 4/15/14

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The past few weeks have brought us three decisions – two from the Appeals Court and one from the U.S. District Court – that serve as good reminders of some settled principles of T&E litigation.

In *Lais v. Ecklund*, Case No. 12-P-1752, 2014 Mass. App. Unpub. LEXIS 493 (April 11, 2014) (Rule 1:28), the Appeals Court affirmed a probate court judgment rejecting plaintiffs' request to reform a will or for an interpretation that would allow the children of the testator's pre-deceased daughter to take under the will. The question in dispute was whether the testator had intentionally omitted her grandchildren from the will.

The Appeals Court held that the probate court was not plainly wrong in finding that the testator's omission of the grandchildren was intentional. Under the omitted child statute, it must appear, either from the wording of the will or from extrinsic evidence, that the omission was not accidental, and under the anti-lapse statute, the issue of a deceased child take the deceased child's share by right of representation unless a different disposition is made or required by the will. Here, the evidence showed that the testator intended to omit her grandchildren when she devised her estate to her children "if they survive me." The "if they survive me" language was found to be ambiguous, and so the trial judge properly admitted extrinsic evidence in the form of the drafting attorney's testimony. According to the drafting attorney, he would have discussed with the testator that the phrase "if they survive me" would omit any gift to children of a predeceased beneficiary. As the Court explained, this type of "business habit" evidence, as distinguished from "individual habit" evidence, is admissible to prove action in conformity with the habit.

Although plaintiffs testified that the testator orally stated many times in 2008, shortly before she died, that she wanted her property to remain in the family, the trial judge's finding that those 2008 statements were not relevant to the testator's intent when she executed the will in 1994 was not clearly erroneous. The Court also noted that the Statute of Frauds bars will modifications based on oral statements.

In *Zabarsky v. Zabarsky*, 85 Mass. App. Ct. 1108 (March 24, 2014) (Rule 1:28), the Appeals Court affirmed the granting of a motion to strike an affidavit objecting to the allowance of a will. In doing so, the Court recited the standard that an affidavit of objections must be made under oath, must be based on personal knowledge, and must state specific facts and grounds supporting the objections. Bald contentions and nonspecific averments are not enough.

In *Jonzun v. The Estate of Michael Jackson*, Civil Action No. 12-12019-DJC, 2014 U.S. Dist. LEXIS 39284 (D. Mass. March 24, 2014), the U.S. District Court for the District of Massachusetts dismissed copyright infringement and various other claims against "The Estate of Michael Jackson"

based on the settled principle that an estate is not a legal entity subject to suit. Claims against an estate can be asserted only against the person or persons administering the estate.

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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