

## T&E Litigation Newsletter- 7/5/16

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Two decisions issued in June will be of interest to probate litigators and estate planning lawyers. The Massachusetts Appeals Court issued a decision in late June with an interesting twist on the burden required to overcome a motion to strike an affidavit of objections. In Fitzgerald v. Foley, 2016 Mass. App. Unpub. LEXIS 642 (June 24, 2016), the Court affirmed the striking of an affidavit of objections alleging undue influence because it lacked "specific facts and grounds upon which the objection is based" (as required by G.L. c. 190B, § 1-401(e)), and because the objector failed to timely take discovery that might have uncovered additional facts sufficient to survive the motion to strike.

In affirming the decision, the Court first recognized and reaffirmed that the standard of review for an affidavit of objections on a motion to strike is "somewhat more demanding than the highly indulgent one that applies to complaints." Although the Court could have affirmed the decision based only on the lack of sufficient facts averred in the affidavit, it went on to discuss in detail the objector's failure to adequately pursue discovery that may have allowed her to defeat the motion to strike.

The objector did obtain some documents from the attorney who drafted the disputed will, but the Court found that she subsequently failed to notice any depositions, never filed a motion to compel additional documents to which she claimed she was entitled, and did not seek a continuance of the case in order to pursue additional discovery until the day before the hearing on the motion to strike. In considering the probate court's decision to rule on the merits and not allow further discovery, the Court held that at least where a request for continuance is made on "the eve of the hearing on the motion to strike" there was no abuse of discretion on the part of the motion judge.

Although federal courts do not often issue decisions of general interest on trust law, the First Circuit found an opportunity to do so in DeCambre v. Brookline Housing Authority et al., 2016 U.S. App. LEXIS 10738 (June 14, 2016). The case concerns whether a tenant participating in a federal housing assistance program administered by a local housing authority could be considered "over-income" based on distributions from an irrevocable Supplemental Needs Trust ("SNT"). The specific question the Court addressed was whether routing lump sum liquid assets through a trust converted the assets from non-income to income.

The housing authority took the position that although lump sum payments to a tenant ordinarily are excluded from "annual income" under applicable HUD regulations, when the money is put into trust and then distributed over time, the assets becomes income. In reversing the district court's ruling that the housing authority properly calculated the SNT distributions as income, the First Circuit determined that the assets should not be treated differently simply because they were "routed through an SNT." The Court held that in analyzing whether the funds should be treated as

income, the provenance of the funds must be considered and not just the “character of the funds as they exit the trust.” The Court did note that this particular trust did not generate substantial earnings and thus the distributions were almost entirely principal, but did not address whether the holding would be different if the distributions were a mix of income and principal.

While this case concerns interpretation of specific HUD regulations, the discussion about whether placing assets in trust can convert non-income funds to income may well be relevant in other contexts.

*This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.*

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