Legacy Advisors Alert

First Quarter 2014

Boston Legacy Planning LLC is happy to provide summaries of recent legal decisions that may impact your clients' planning.

Arbitration Agreement by Health Care Proxy. The Supreme Judicial Court decided two cases involving whether a healthcare agent is authorized to sign an agreement with a health care facility requiring arbitration of disputes. The court found that a health care agent does not have authority to agree to arbitration because that is not a health care decision within the scope of chapter 201D. The court also found that the health care proxy in question was not effective until the physician made a determination of incapacity, which did not occur until more than two weeks after admission to the facility. Johnson v. Kindred Healthcare Inc.; Licata v. GG NSC Malden Dexter LLC.

> **Legacy Lesson.** The cases do not establish that agreements to arbitrate nursing home disputes will be unenforceable. Rather they show that the agreements to arbitrate must be executed by someone with financial authority, rather than the person with authority over healthcare decisions.

Ineffective assistance in guardianship. The Massachusetts Appeals Court rejected a claim of ineffective assistance of counsel in a case involving forced administration of antipsychotic drugs. The majority opinion did not reach the issue of ineffective assistance, finding that the evidence was sufficient to support the judge's order for antipsychotic drugs. In a stinging dissent, Judge Peter Agnes noted that the patient had asserted that the medication felt like torture and that she would rather be dead than take it. Nonetheless, her counsel at the hearing argued that the medication should be administered. Judge Agnes argued that the attorney did not really represent the patient's interests, and that the decision rested upon testimony and argument arising from the deficient representation. Guardianship of L.H.

> **Legacy Lesson:** It is distressing to note that part of the rationale for the majority opinion was that it would unduly burden the court system if there were a new trial every time an appointed counsel rendered ineffective assistance. This is far from a ringing endorsement of the quality of counsel

appointed in Rodgers guardianships. This case underscores the need for individuals and their families to engage in effective disability planning to avoid guardianships if at all possible.

Suing lawyer when client failed to make a will. The Massachusetts Appeals Court upheld summary judgment against a woman who sued her stepfather's lawyer because the stepfather's will failed to include a provision for the woman and her children. The woman asserted that the stepfather had agreed to provide for her in his will to compensate her for the many services that she and her family had performed for him. The woman also sued the estate for the value of those services.

The Appeals Court held that the woman had no attorney-client relationship with the lawyer, so that the lawyer could not be sued. It also found that there was no express agreement that services would be provided in exchange for a will or other compensation. Therefore, recovery against the estate was denied. Cheney v. Flood.

Legacy Lesson: It is not wise to rely upon expectations of an inheritance in performing services for a relative. Put any such agreements in writing. Courts do not uphold expectations -- only agreements, or actual will provisions.

Failed spendthrift trust. The U.S. Bankruptcy Court decided that a bankruptcy trustee could reach property left to the debtor in a spendthrift trust. Although property in a spendthrift trust is normally protected from creditors, in this case the trust also contained a power of appointment, which gave the debtor the ability to withdraw funds from the trust. In re Behan.

Legacy Lesson: Inclusion of a boilerplate provision in a trust does not provide "magic bullet" protection. It is critical that the language of the entire document be reviewed.

Will on an iPhone? The Leimberg newsletter of February 18, 2014 contained an article by Bruce Steiner reporting an Australian case in which a will created on an iPhone was held to be valid. The case depended on an Australian statute that defined a "document" to include a disk or other material on which writings could be reproduced.

I would not recommend that anyone be the first to try this approach. While the Uniform Probate Code contains a provision with language similar to the Australian statute, Massachusetts did not adopt that section of the UPC. Massachusetts law still requires signature of two persons who actually saw the testator sign the will. Unlike some states, Massachusetts does not accept holographic wills (i.e. wills handwritten by the testator without witnesses). Theoretically, if the testator and the witnesses were together, and the witnesses saw the testator affix an electronic signature, and then affixed their own electronic signature, an argument might be made. But for peace of mind, I would strongly recommend killing trees over exciting electrons.

IRA rollover rule change. On January 28, 2014 the Tax Court overturned IRS Publication 590's long-standing interpretation of the IRA rollover rule. The publication had stated that the rule of one rollover every 12 months applied to each IRA owned by a taxpayer. The Tax Court held that the rule is one rollover *per taxpayer* every 12 months, not one rollover *per IRA*.

Because of the serious consequences, the IRS indicated that that it would issue regulations consistent with the case, whether or not it was upheld on appeal. However it indicated that the new interpretation would not apply to rollovers occurring before January 1, 2015. The IRS also made it clear that a direct transfer between IRA custodians is not a rollover, and is not subject to the 12 month rule. Bobrow v. Commissioner of Internal Revenue.

Vacation home in wife's name. A bankruptcy trustee was permitted to pursue claims against the proceeds from the sale of a vacation home, even though the house had been solely in the name of the debtor's wife. The trustee asserted that under the facts of the case there was a resulting trust, and that the husband's creditors should have access to 50% of the sale proceeds. A U.S. District Court judge ruled that there were factual issues involved that could not be resolved before trial. Riley v. Crapser.

Legacy Lesson: Particularly in bankruptcy, simply putting property into a spouse's name is not an effective form of creditor protection.

Million Dollar Accuracy Penalty. In Estate of Helen P. Richmond, the Tax Court issued an opinion that is very useful in understanding its approach to valuing business interests held by an estate. One other notable aspect of the opinion was the 20% accuracy penalty imposed on the taxpayer for under-reporting the tax liability. The penalty can be avoided if the taxpayer acts with reasonable cause and in good faith. However, the taxpayer in this case relied upon a draft valuation report prepared by the accountant for the estate, who had no valuation credentials and little experience with valuations. The result was a penalty of $1,141,892.

> **Legacy Lesson:** As the Tax Court noted, hiring a qualified appraiser could have saved the estate over one million dollars. Especially where valuation issues were difficult, as they were in this case, it is critical to hire an experienced certified appraiser. The estate may have saved a few thousand dollars in the short run by using a friendly CPA, but the long-term result was disastrous. I am happy to help people find a qualified appraiser who can act as part of the team.