Legacy Advisors Alert

Fourth Quarter 2013

Boston Legacy Planning LLC is happy to provide summaries of key legal decisions over the past three months that may affect the way you plan with your clients.

Agreement to leave a will. A son loaned money to his mother, who agreed that she would leave certain real property to him in her will. When she did not do so, he sued. The Superior Court dismissed the claims, saying that Massachusetts does not allow a claim for anticipatory breach of a contract to make a will. The Appeals Court reversed, allowing the action to go forward, but only to permit the son to recover of the money he had loaned, and not to require that the entire property the left to him in a will. The case did not make clear whether a contract not to revoke a will would be treated differently than a contract to make a will. Torres v. Torres.

Legacy Lesson: Agreements to make a will are not enforceable while the testator is still alive. However, a person may recover funds paid in exchange for a promise to make a will.

Arbitration by non-signatory. The US District Court for the District of Massachusetts held that an employee was required to arbitrate a dispute with a former employer and former supervisor under the Wage Act even though he had not signed a non-compete agreement requiring arbitration, where acceptance of employment was conditional on acceptance of the non-compete, and where all claims were inextricably intertwined. Paradise v. Eagle Creek Software Services, Inc.

Putting house in wife's name for creditor protection. The Massachusetts Appeals Court decided that a lawyer could satisfy a judgment for counsel fees using a house standing in the name of the defendant's wife. The husband had promised to pay the legal fees after the house was sold. The house had been owned by the couple as tenants by the entirety, and was sold for more than $1 million. Several months later the wife acquired title to a $900,000 condominium in her name only. The Court found for the lawyer on a resulting trust theory. Snyder v. Green.

Legacy Lesson: Putting property into your spouse's name is not a viable form of asset protection.

Dispute over unequal inheritances. An 88 year-old woman altered her estate plan to favor one of her four sons. The other three sons sued and requested appointment of a temporary Guardian pending the outcome of the case. The trial court denied the request and the Appeals Court and the Supreme Judicial Court upheld the denial where the mother's doctors stated that she was competent, and most of the affidavits asserting her incapacity were from family members who would be disadvantaged by the change in the estate plan. The SJC held that it was appropriate for the trail court judge to reject or minimize the credibility of that evidence based on financial motivation. Scanzi v. Scanzi.

Legacy Lesson: Unequal inheritances are a frequent ground of litigation. Where that is intended, extra care must be taken to avoid claims of incapacity or undue influence. This case illustrates that strategic guardianship applications can be rejected at an early stage but it also shows that defeating such claims can be expensive. This case began in the Probate Court before moving to the Appeals Court and the Supreme Judicial Court. One has to wonder whether this fight could have been avoided.

Arbitration clause in trust enforced. A judge of the US District Court for the District of Massachusetts enforced an arbitration clause in a trust, despite a claim that arbitration had been waived by participating in a prior state court action. The FPE Foundation v. Solomon.

Legacy Lesson: This case does not justify broad generalizations about the enforceability of arbitration provisions in estate planning documents. More recent cases from the SJC have refused to uphold arbitration clauses in health care proxies and in a trust. On the other hand, the First Circuit (Benzio v. Draeger) upheld an arbitration provision in an attorney's engagement letter, despite a claim that the relationship was fiduciary in nature. The topic of ADR provisions in the

estate planning context is an important one, one that deserves a fuller treatment than is possible in a newsletter.

Trusts and creditor protection. A bankruptcy appellate panel permitted a bankruptcy trustee to recover property that had been transferred out of trust. The debtor's mother had created a trust with a life estate in with her son as beneficiary. She later executed a deed transferring the property to her son for one dollar. After the mother's death, the son obtained a mortgage which was not paid. In bankruptcy, he claimed that it was a breach of fiduciary duty for the mother to sell the property to him. The court rejected this creative argument. In re Porst.

Legacy Lesson: This case illustrates the tension between providing creditor protection by leaving property in trust, and providing flexibility by getting it out of outright. It also shows the unhappy result when a beneficiary tries to have it both ways.

Medicaid malpractice. The December 2, 2013 edition of Massachusetts Lawyers Weekly reported $100,000 legal malpractice verdict against a lawyer who provided Medicaid planning for a woman and her husband. He erroneously told them that they could not reserve a life estate in their house without making them ineligible for MassHealth and without subjecting the house to a claim for recovery by MassHealth. The attorney advised that they should simply put the house in the names of the two children. One of the children refused to return the house when the mother later wanted to get it back.

The woman sued the lawyer for $193,000, the amount she had paid for the house. The lawyer admitted liability, but denied damages, arguing that the woman was able to live in the house without paying rent, so she essentially had a life estate. The jury apparently split the baby, awarding $100,000 of the $193,000 claimed.

Legacy Lesson: This case illustrates the problems that can arise when parties attempt Medicaid planning with attorneys who are not well-versed in the complexity of the law. It also shows the risk of creditor protection planning that relies on family members to follow instructions based on moral obligations. Even experienced Medicaid attorneys devise plans where the client's ability to regain control over their property depends upon moral obligations, rather than legal obligations. As this case shows, there is a significant risk that these types of plans will not work.

Excessive fees in probate. In a decision issued on September 30, 2013, the Supreme Judicial Court disciplined an attorney for charging excessive fees in probating an estate. The attorney served both as executrix of the estate and as attorney for the estate. The total value of the estate was about $1.2 million. The fees totaled $134,000, of which about $100,000 was for work as an executrix, and $34,000 was for work as an attorney.

A majority of the lawyers reviewing the case filed that the hourly rate was reasonable, but that the number of hours spent on the estate was unreasonable. The board concluded that a reasonable total fee would have been $60,000-$65,000. There was a very detailed review of the amount of time that particular services should have been charged.

A minority of the board members dissented on the grounds that the probate court judge had approved the fee amounts, and that the judge was in the best position to assess the value of the services. The Supreme Judicial Court justice who issued the opinion also stated that none of the fee amounts were outrageously or even remarkably high, nor was the total especially high in light of the value of the clients estate. The Board of Bar Overseers recommended a public reprimand, but the SJC Judge ordered a private admonition.

Legacy Lesson: Attorneys need to be concerned that even after a petition for fees is approved by the Probate Court, another group of lawyers may second-guess their fees. There is a different

takeaway for non-lawyers. Many judges and lawyers do not think that legal and executor fees of more than 10% of the value of a probate estate are especially high. Even the majority of the board, who found the fees excessive, thought five percent of the value of the estate would be reasonable. This is consistent with other reported cases, and with comments from Probate Court employees that legal fees of five percent of the value of the estate are presumptively reasonable. This case underscores the importance of proper planning to avoid expensive settlement fees.