RECENT DEVELOPMENTS IN FIDUCIARY LITIGATION

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INDEX OF TOPICS AND CASES

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ANTICIPATORY BREACH OF CONTRACT

Torres v. Torres
84 Mass. App. Ct. 1117 (Oct. 30, 2013)

This decision is issued pursuant to Rule 1:28, and is primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. This decision may be cited for its persuasive value but not as binding precedent.

Facts

Jesse E. Torres, III ("Jesse"), alleged that he and his mother, Sophie Torres ("Sophie"), had, in 2009, reached an agreement requiring Sophie to leave Jesse certain parcels of real property in her will. The purported contract permitted Sophie to sell or finance the various pieces of property during her life for her own benefit and required any proceeds not used by Sophie to become Jesse's property upon Sophie's death. As consideration for this, Jesse relinquished any claim he might have against Sophie or her estate for services rendered, or funds loaned to her, as long as the terms of the ostensible contract were respected. If the terms of the supposed contract were violated, "any monies and interest will become fully due and payable." In 2011, subsequent to the execution of the contract Sophie executed a new will, which Jesse claimed was a breach of her contractual obligation to him under the 2009 agreement.

Procedure

The plaintiff appealed the ruling of the Superior Court concluding that Massachusetts law prohibits a claim for anticipatory breach of a contract to make a will.

Issue

Does Massachusetts law prohibit a claim for anticipatory breach of a contract to make a will?

Discussion and Decision

The Appeals Court vacated the judgment of the lower court and allowed the suit to go forward, but solely as an action in quantum meruit and not as a contract action.

The Court noted that Jesse's action "purports to raise several questions of first impression, namely whether we recognize contracts not to revoke a will, and whether an action for breach of such a contract is premature until the death of the testator, as in an action to make a will." However, the Court, in an act of "judicial prudence" declined to address these questions, as it concluded that they were unnecessary to decide in this case, as Jesse had available to him a viable action in quantum meruit. The quantum meruit action was available to Jesse because "the contract specifies that Jesse's damages will be the very monies and interest he loaned to his parents, whether the litigation is denominated a contract action or an action in quantum meruit, the merits and, if Jesse is successful, the relief, will be identical."

CONVERSION

Surabian v. Billings
84 Mass. App. Ct. 1108, 993 N.E.2d 372 (August 29, 2013)

This decision is issued pursuant to Rule 1:28, is primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. This decision may be cited for its persuasive value but not as binding precedent.

Facts

The plaintiff brought an action for tortious conversion against Pauline and Mark Billings, individually, and against Pauline Billings, as voluntary administratrix of the estate of Stephanie LaFlash-Surabian (decedent), the late daughter of the plaintiff and the defendant Pauline Billings. The plaintiff filed the lawsuit on November 22, 2011, three years and forty days after the decedent's death. The complaint alleged that the defendants had property of the plaintiff that had been in the possession of the decedent at the time of her death and that the defendants would not return to him. The plaintiff stated in the complaint that '[p]laintiff…has been trying to get possession from the estate of Stephanie ever since her death on October 13, 2008.' The plaintiff represented to the court that he demanded what he alleged was his property and the defendant in her capacity as administratrix refused in 2009. None of the property alleged to belong to the plaintiff was listed as part of the estate in the voluntary administration statement. The complaint also alleged that the defendants refused to return the plaintiff's property without court action on the date the complaint was actually filed.

Procedure

Applying a three-year statute of limitations with respect to the claims against the defendants individually and a one-year statute of limitations with respect to the claims against the defendant as administratrix, the motion judge concluded that the plaintiff had been aware of his cause of action for over three years prior to filing the complaint and all of the plaintiff's claims were barred by the applicable statutes of limitations. The motion judge granted the defendants' motion to dismiss. The plaintiff appealed.

Issue

Have the applicable statutes of limitations run by the time the complaint was filed?

Discussion and Decision

The question of when the cause of action accrued is central to the determination of whether the applicable statutes of limitations had run by the time the complaint had been filed. Conversion occurs when an individual exercises acts of ownership, control or dominion over personal property to which he has no right of possession at the time. When a defendant's possession is not wrongful at its inception, conversion occurs where there is a demand to return the personal property and the demand is refused. In this case, the plaintiff's cause of action would have accrued when the defendants refused the plaintiff's demand for the property. More than one year passed between the date on which the cause of action for conversion against the estate accrued and the date on which the complaint was filed. Accordingly, the one-year statute of limitations would bar a cause of action for conversion against the administratrix. However, nothing in the complaint against the defendants individually asserted with sufficient clarity that any cause of action for conversion accrued on the date of the decedent's death or even shortly thereafter. Therefore, the three-year statute of limitations would not bar a cause of action for conversion against the defendants individually.

The Appeals Court reversed the allowance of a motion to dismiss the complaint against the defendants individually. The Court affirmed the trial judge's dismissal of the plaintiff's claim against the estate. The Court suggested that if the defendants in their capacity as individuals assert that the property alleged to belong to the plaintiff was, in fact, part of the estate, the statute of limitations would be no bar and the plaintiff could either amend his complaint on remand or assert a new claim against the administratrix that the estate engaged in wrongful conduct.

DECANTING

Morse v. Kraft
466 Mass. 92 (July 29, 2013)

Facts

Richard Morse ("Morse") was the trustee of The Kraft Irrevocable Family Trust under Declaration of Trust dated January 4, 1982 (the "1982 Trust"). Under the 1982 Trust, four separate subtrusts were established, one for the benefit of each of Robert and Myra Kraft's (the "Krafts") four sons. Each son was a current income beneficiary of his own subtrust, with his children as the contingent remainder beneficiaries.

The 1982 Trust allowed only "Disinterested Trustees" to make decisions regarding distributions from the subtrusts. Since each of the Krafts' sons was eligible to receive current distributions from his own subtrust, each son was prohibited by the terms of the 1982 Trust to serve as the Disinterested Trustee of his own subtrust. As a result, Morse has served as the sole trustee of each subtrust since the creation of the 1982 Trust. Morse is now in his 80s and close to retirement. He would like to transfer the 1982 Trust property into a new trust (the "2012 Trust"), which has the same beneficiaries as the 1982 Trust but provides that each of the Krafts' sons may serve as trustee and exercise distributive powers over his own subtrust.

Morse believes that this transfer of trust property is in the best interest of the beneficiaries from a "management perspective." Morse is seeking the opinion of the SJC to confirm that such a transfer is also in the best interest of the beneficiaries from a "financial perspective." Each subtrust under the 1982 Trust is exempt from the generation-skipping transfer (GST) tax. In order to ensure that a transfer of trust property to the 2012 Trust would not jeopardize the GST tax exempt status, Morse sought the SJC's interpretation of the 1982 Trust to ensure that the power to decant, without the approval of the beneficiaries or the court, is authorized by the terms of the 1982 Trust.

Procedure

In accordance with the ruling in Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), when pursuing a ruling affecting federal tax issues, it is advisable for a plaintiff to seek such a ruling by the highest court in the relevant state. Accordingly, Morse brought this action before a single justice of the SJC and the single justice reserved and reported it to the full court. All of the parties stipulated to the relevant facts and each defendant, other than the Internal Revenue Service, assented to the relief sought.

Issues

Does Morse have the power to decant the property from the 1982 Trust to the 2012 Trust? And, if so, will the property distributed continue to be exempt from the GST tax?

Discussion and Decision

In addition to receiving affidavits from Robert Kraft, the settlor of the 1982 Trust, the attorney who drafted the 1982 Trust and Morse, all of which stated it was the settlor's intent to give the trustee the power to decant, the SJC analyzed the relevant terms of the 1982 Trust. Although the 1982 Trust does not contain explicit decanting powers, the 1982 Trust does provide that the disinterested trustee of each subtrust has the power to distribute net income and principal, as he deems desirable, to the son or to apply the distribution for the son's benefit. Moreover, the disinterested trustee may exercise these distributive powers in his discretion without order or license of the court. In light of this broad, discretionary language, as well as the affidavits of the settlor, the drafting attorney and the disinterested trustee, the SJC held that the power to decant was inherent in the terms of the 1982 Trust. As a result, Morse, as the disinterested trustee, may transfer property of the 1982 Trust into new subtrusts under the 2012 Trust without the consent of the beneficiaries or the court.

DIVORCE

Waxman v. Waxman

84 Mass. App. Ct. 314 (September 30, 2013)

Facts

Robert Waxman and Jean Waxman were in the middle of divorce proceedings when Robert died. Jean and Robert's children from his first marriage disagreed regarding the disposition of Robert's assets.

Procedure

Jean brought a declaratory judgment action to Superior Court to determine her ownership over three assets in Robert's estate, namely (1) proceeds from the sale of the couple's jointly held condominium, (2) the jointly owned vehicle, and (3) Robert's IRA.

The motion judge granted summary judgment in favor of Jean on the sale proceeds and the vehicle but denied summary judgment on the IRA, which went to a bench trial before a separate judge, who found in favor of Robert's children.

Robert's children appealed the decision regarding the sale proceeds and the vehicle. Jean cross-appealed the award of the retirement account to the children. The Court affirmed the judgment.

Issue

Whether transfer of assets prior to the filing of divorce proceedings violates the automatic restraining order that attaches upon the commencement of divorce proceedings.

Discussion and Decision

The Court affirmed the summary judgment ruling with respect to the assets that Jean and Robert held as tenants by the entirety and as joint tenants, ruling that such assets passed to Jean upon Robert's death.

The Court also affirmed the decision regarding Robert's IRA, finding that Robert did not violate the automatic restraining order under Supplemental Probate Court Rule 411, since Robert changed the beneficiary designation on his IRA prior to the filing of the complaint of divorce and before the automatic restraining order took effect.

FIDUCIARY DUTY

Alford v. Thibault
83 Mass. App. Ct. 822 (June 27, 2013)

Facts

Under the terms of his mother's will, Defendant Thibault received a life estate in a condominium unit in Newburyport, with the power to sell the property in his absolute discretion. The will further directed that in the event of sale, the net proceeds would be split evenly between Thibeault and his sister (as co-remainderman). Thibault was also appointed as the executor of the will, with the full power to sell the property thereunder.

The subject property, with an approximate fair market value of $190,000, had fallen into serious disrepair, and was delinquent with regard to property tax payments. Due to tax liens of $88,802, a tax taking auction was imminent. Plaintiff Alford was aware of the property's fiscal situation, and purchased the remainder interest from Thibault's sister for $500. He then offered to partner with Thibault, repair the property, and split the proceeds upon sale. Ultimately, Thibault did not accept this offer, but instead sold the property for $120,000 to a third party, Coughlin and Russo. The net proceeds upon sale were $26,400.93, and Thibault fled the area without paying 50% of the proceeds to his co-remainderman, Alford.

Alford filed suit in Superior Court, alleging breach of fiduciary duty, conspiracy to commit a breach of fiduciary duty, and fraudulent conveyance. Alford argued that Thibault owed him a duty to maximize the sale price of the property, and that this duty was breached by accepting a price well below fair market value. Alternatively, Alford argued that the sale for below market value was a fraudulent transfer under M.G.L. c. 109A. The Superior Court held that Thibault owed Alford no fiduciary duty, as he was acting as a devisee under the will, and not as executor. In addition, the court found no case law in which a life tenant with a power of sale owes a fiduciary duty to the remaindermen, absent more facts. Lastly, the court held that there was no fraudulent transfer as to Alford, as the property was not reachable to him as a creditor until after the sale occurred. While all claims were dismissed by the trial judge, Alford was awarded 50% of the net proceeds, representing his remainder interest in the property.

Procedure

Alford appealed the Superior Court's decision finding no fiduciary duty on the part of Thibault, and ruling that there was no fraudulent transfer. The Appeals Court affirmed the judgment of the Superior Court.

Issue

Did Thibault, as a life tenant, owe a fiduciary duty to the remainderman to maximize sale price? Was the sale for less than fair market value a fraudulent transfer?

Discussion and Decision

Breach of Fiduciary Duty

As there was no case law with similar facts to support Alford's claim that Thibault owed him a fiduciary duty, the Appeals Court agreed that in exercising the power of sale, Thibault acted as a devisee and not as the executor. Further, the court noted that Thibault executed all documents related to the sale in his individual capacity, and he was sued in his individual capacity.

As a devisee, Thibault was merely required to: (1) comply with the terms of the will; and (2) act in good faith. While he did not provide 50% of the net proceeds to the remainderman, the court found that he otherwise complied with the will's terms, which were found to be "sufficiently clear and unambiguous." Thibault's mother gave him absolute discretion to sell the property at any price he deemed advisable, without limitation. While the sale of the property for less than fair market value was not ideal, the court noted that price alone is not evidence of bad faith. Thibault was under great pressure to sell, given the tax liens, and there was no evidence Alford's offer would have been any better. Accordingly, the Court affirmed the Superior Court's judgment that no fiduciary duty existed, and that the Plaintiff could not contest the terms of the sale.

Fraudulent Transfer

M.G.L. c. 190A requires that the Plaintiff demonstrate (1) that he is a creditor and (2) that Thibault fraudulently transferred the property. The Superior Court ruled, and the Appeals Court affirmed, that Alford did not demonstrate a fraudulent transfer. Case law has established that a transfer is not fraudulent in fact unless there is a resulting diminution in assets available to the creditor. Because the property was not available to Alford prior to the transfer, and because the transfer itself created value (as opposed to reducing value), the court found he could not maintain an action for fraudulent transfer against Thibault.

GUARDIANSHIP

Scanzani vs. Scanzani
84 Mass. App. Ct. 1102, 990 N.E.2d 108 (July 12, 2013)

This decision is issued pursuant to Rule 1:28, is primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. This decision may be cited for its persuasive value but not as binding precedent.

Facts

Lauretta Scanzani was born in 1922 and is the mother of four sons. Three of her sons filed an action in the Probate Court claiming that she is incompetent and seeking the appointment of a guardian. The plaintiffs' evidence of their mother's diminished capacity included a specific incident involving their mother's inability to find her car in a parking lot and her attendant confusion about the nature of the errand she was undertaking. They also asserted a deteriorating relationship with her, her disinclination to leave the house, weight gain, lack of memory and her cardiologist's suspicion that she may have had a minor stroke. However, their main point of contention was the fact that the mother decided to sell her house and exclude the sons from her estate plan.

The mother presented evidence that the paramedics who responded to the parking lot incident, her cardiologist and her estate planning attorney all found her competent. The court made special note of the attorney's affidavit and the evidence he had relied on in determining that the mother was competent.

The Probate Court found that the sons had failed to establish an issue of competency and provided thirty days for them to offer additional evidence. The sons filed several affidavits –

including one from a psychiatrist with a subspecialty in geriatric psychiatry, but the rest were from family members who would be disadvantaged by the mother's changes to her estate plan. In spite of this additional evidence, the Probate Court dismissed the sons' complaint.

Issue

Did the Probate Court abuse its discretion by failing to find that the mother was incompetent or had diminished capacity?

Discussion and Decision

Even though the Appeals Court acknowledged that a finding of incompetence could have been found based on the evidence presented, they found no abuse of discretion in the Probate Court's ruling. They noted that cases have long recognized the materiality of estate planning attorneys and doctors examinations in determining competency of clients and patients.

HEALTHCARE PROXY

Johnson v. Kindred Healthcare
Case No. SJC-11335, 2014 Mass. LEXIS 7 (Jan. 13, 2014)

Facts

The administrators of the decedent's estate sued a nursing home and related entities and individuals in Superior Court for wrongful death. In response, the defendants sought to enforce the mandatory arbitration provision in the nursing home agreement, which the decedent's wife (and health care agent) had signed on his behalf. The estate argued that the mandatory arbitration provision was not binding because it was not a "health care decision" as defined by and used in the health care proxy statute.

Procedure

The lower court held that the decedent's former wife had not made a "health care decision" when entering into the agreement with the health care facility and, therefore, the arbitration provision was not binding.

Issue

Does a health care agent's agreement with a health care facility to arbitrate disputes arising from the principal's stay at the facility constitutes a "health care decision" binding on the principal pursuant to the health care proxy statute, G.L. c. 201D, § 5?

Discussion and Decision

The Supreme Judicial Court held that the arbitration provision in the agreement at issue did not constitute a “health care decision” as contemplated by the health care proxy statute. Instead the Court explained, the Massachusetts Legislature intended to distinguish between a health care proxy, which limits an agent’s decision-making authority on behalf of an incapacitated person to health care decisions, and a durable power of attorney, guardianship or conservatorship, each of which authorizes much broader decision-making power on behalf of an incompetent person. “Unlike a health care proxy, a durable power of attorney can authorize an agent to make decisions affecting the principal’s business, estate, finances, and legal relationships in a variety of contexts unrelated to health care.” The Court highlighted the legislative history of the health care proxy statute, pointing out that the Legislature had rejected an alternative bill that would have combined the fiduciary roles of health care agent and attorney-in-fact.

The Supreme Judicial Court’s decision is in line with the majority view of other jurisdictions that have considered this issue.

MALPRACTICE

Cheney v. Flood
2014 Mass. App. Unpub. LEXIS 154 (Feb. 7, 2014)

Facts

Plaintiff brought a malpractice claim against his late stepfather’s former attorney attorney on the grounds that the attorney should have known that the decedent wanted the plaintiff and her children to be his only beneficiaries. The complaint also asserted a cause of action for quantum meruit seeking payment from the decedent’s estate for services that the plaintiff and her family provided in the years leading up to his death.

Procedure

The lower court dismissed malpractice claim brought against decedent’s former attorney.

Issue

Whether the relative of a decedent could bring a malpractice claim against the decedent’s former attorney?

Discussion and Decision

The Appeals Court held that the plaintiff did not properly appeal the dismissal of the malpractice claim; however, had she done so, her appeal would have been unsuccessful under the Supreme Judicial Court's ruling in Miller v. Mooney, 431 Mass. 57, 61 (2000). In Miller, the Supreme Judicial Court held that the surviving relatives of a decedent could not bring claims against a lawyer based on allegedly erroneous statements the lawyer made to one of the relatives concerning the terms of the decedent's will because they could not establish that they had an attorney-client relationship with the lawyer. Rather, the duty of care owed by an attorney arises only from an attorney-client relationship.

With respect to the quantum meruit claim, the Appeals Court held that the plaintiff could not establish any express agreement with the decedent for such payment and instead had only offered evidence that she assumed she would be a beneficiary of the estate because she "always hoped that he would eventually have a little bit to pay [her] back. This is different, the Appeals Court observed, from situations in which a decedent expressly agreed to make someone a beneficiary in exchange for the performance of services prior to the decedent's death. "[M]oral obligation is not legal obligation [and a] hope or expectation, even though well founded, is not equivalent to either legal detriment or reliance." Congregation Kadimah Toras-Moshe v. DeLeo, 405 Mass. 365, 366-367 (1989).

MEDICAID/MASSHEALTH

Doherty v. Director of Medicaid

31 Mass. L. Rep. 369 (August 14, 2013)

Facts

In 2006, the decedent Muriel S. Doherty moved to a nursing home in North Andover. She applied for Medicaid benefits through the MassHealth program, and was subsequently denied by the Executive Office of Health and Human Services ("EOHHS"). The denial of benefits was based upon the fact that Muriel was the beneficiary of an irrevocable trust with a value of $630,000, which EOHHS argued was a countable asset well in excess of the maximum allowed for Medicaid eligibility. The Superior Court and Appeals Court upheld the EOHHS determination, reasoning that the trust instrument granted Muriel access to discretionary principal distributions, thereby triggering the inclusion of those assets for Medicaid eligibility purposes. As a result of this denial of benefits, almost $400,000 was paid to the nursing home until Mrs. Doherty's death in 2010.

In 2012, Mrs. Doherty's heirs obtained a judgment from the probate court, reforming the trust retroactive to April 12, 2000. Provisions allowing for principal distributions to Muriel were removed, as it was stipulated that Muriel never intended for trustees to have discretionary authority to make such distributions. Any language in the trust to the contrary was described as a correctable "scrivener's error." With this reformed trust in hand, the heirs demanded that EOHHS reconsider the 2006 denial of benefits, and reimburse them the full amount paid by Mrs.

Doherty to the nursing home. The defendant EOHHS refused to reopen their 2006 determination, and Mrs. Doherty's heirs filed suit in Superior Court.

Procedure

The plaintiffs' lawsuit sought a declaration from the Superior Court that MassHealth must recognize the probate court's reformation of the trust, and reconsider Muriel's request for benefits in light of the reformed trust. EOHHS moved to dismiss the complaint under Mass.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. The court allowed the defendant's motion to dismiss.

Issue

Does the family of an applicant to MassHealth have standing to apply for benefits after the death of the applicant?

Discussion and Decision

The Superior Court ruled that the plaintiffs had no standing to sue EOHHS. The court reasoned that the plaintiffs could not allege an injury within the area of concern of the Medicaid statute, which is to provide benefits "for those eligible for financial assistance." Admittedly, none of the heirs were indigent or in need of such benefits. In addition, the court found no provisions in the statute allowing heirs of an estate to apply for them. Moreover, as a matter of public policy, the court considered the adverse effects of allowing standing in this case. Permitting heirs to seek Medicaid benefits through the use of reformed trusts could bring "disastrous results" to the Medicaid program, "putting large amounts of public money into the hands of those who need it least."

While the existence of the reformed trust was not determinative in the outcome of this case, the *dicta* provided at the end of the ruling sheds light on the subject "for the benefit of the parties and future litigants." The court expressed skepticism in the plaintiffs' claim that a scrivener's error was made in Muriel's originally-drafted trust. Muriel never elected to reform the trust during her lifetime, presumably because she preferred the option of taking discretionary principal distributions over being indigent for the sake of asset protection. The court found it very unlikely that there was ever any misunderstanding on Muriel's part as to the terms or purpose of the trust.

STATUTE OF LIMITATIONS

Stevens v. Stevens

84 Mass. App. Ct. 1109; 993 N.E.2d 373 (September 3, 2013)

This decision is issued pursuant to Rule 1:28, is primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. This decision may be cited for its persuasive value but not as binding precedent.

Facts

Plaintiff and his brother were the beneficiaries of a realty trust established by their mother (the trustee). Each brother held a 50% beneficial interest in the trust. The trust prohibited any change in beneficial interests without the consent of both brothers. Eight years after establishing the trust, the trustee transferred the trust property to herself and the plaintiff's brother as tenants-in-common (40% to herself and 60% to the plaintiff's brother), without the plaintiff's knowledge. After this transfer, and at the encouragement of the trustee and the plaintiff's brother, the plaintiff worked to market the property for sale. Ten years later when a buyer was located, the trustee and the plaintiff's brother disclosed to plaintiff that they (not the trust) were the record owners of the property, but assured plaintiff that they would make things "right". For a time, the trustee and the plaintiff's brother made periodic payments to the plaintiff, however, as the closing date for the sale drew near, the trustee and the plaintiff's brother denied that the plaintiff had any interest in the trust and ceased all payments and communications with the plaintiff.

Procedure

The plaintiff brought this suit against his mother and brother claiming that they wrongfully deprived him of his share of a family trust. After a bench trial, a judge of the Superior Court ruled in favor of the plaintiff and awarded him damages. The plaintiff's mother and brother appealed.

Discussion and Decision

Although there were many procedural issues discussed, the court reviewed only one substantive issue. The court rejected the trustee and the plaintiff's brother's contention that the plaintiff's claim was barred by the statute of limitations. The court found that plaintiff had reasonably relied on the trustee and his brother's promise to make things "right", and that the trustee and his brother had actually fulfilled that promise for a period of time before backing out. The plaintiff timely filed his promissory estoppel claim approximately one year after the last payment from the trustee and his brother, therefore falling well within the six year statute of limitations period.

STATUTE OF WILLS/STATUTE OF FRAUDS

Berkowitz v. Berkowitz
Civil Action No. 11-10483-DJC, 2013 U.S. Dist. LEXIS 134791 (Sept. 20, 2013)

Facts

In 1998, Plaintiff Samuel Berkowitz ("Samuel") gave a general power of attorney to his daughter, Defendant Bonnie Berkowitz ("Bonnie"). The following year, Samuel conveyed certain real estate to Bonnie, allegedly instructing her that if he were to die, then she should use the value of the real estate to take care of his then-wife Barbara Berkowitz ("Barbara") for her lifetime, and thereafter that Bonnie should share the remaining value with her brother. In 1999 and 2000, Barbara and Bonnie engaged in a series of transactions that had the effect of removing securities totaling in value of over $1 million from Samuel's control. When Samuel learned of these transactions in 2002, he believed they had been made in furtherance of the oral trust he had created in 1998 and pursuant to Bonnie's power of attorney. At some point thereafter, Samuel learned that Barbara and Bonnie had sold the real estate that he had conveyed to Bonnie in 1998 for approximately $1.7 million. Believing at that point that Bonnie had "swindled" him with respect to the securities and the real estate, Samuel revoked his power of attorney. In June 2008, Samuel asked Bonnie for an accounting of the oral trust assets. In response, Bonnie – for the first time – repudiated holding any assets in trust for Samuel.

Procedure

On March 22, 2011, Samuel sued Bonnie in the United States District Court for the District of Massachusetts, claiming that she had breached her fiduciary duty by repudiating the oral trust in 2008. Bonnie moved for summary judgment, arguing that Samuel's claim was barred by: (1) the statute of frauds; (2) the statute of limitations; (3) judicial estoppel; and (4) the doctrine of laches. The Court denied Bonnie's motion.

Issue

Whether, as a matter of law, Samuel's claim was barred by the statute of frauds, the statute of limitations, judicial estoppel, and/or laches?

Discussion and Decision

Statute of Frauds

While the Court acknowledged that the statute of frauds applies to contracts for the conveyance of land, it recognized an exception for trusts that result by implication of law. The Court held that one such trust, which arises by implication of law and, therefore, does not require a written instrument, is a resulting trust, and that a genuine issue of fact existed as to whether a resulting trust was created when Samuel transferred the real property to Bonnie. Moreover, the Court acknowledged that the statute of frauds does not apply to the securities that were allegedly held pursuant to the oral trust, because it was not a contract to make or revoke a will or codicil. Even if the oral trust were made in contemplation of Samuel's death, and thus arguably fell within the statute of frauds, the statute of frauds would not apply to a constructive trust, and a genuine issue of fact as to the existence of a constructive trust.

Statute of Limitations

The Court rejected Bonnie's argument that Samuel's claim was barred by the three-year statute of limitations for tort actions, emphasizing that the limitations period for a breach of fiduciary duty claim does not accrue "until the trustee repudiates the trust and the beneficiary has actual knowledge of that repudiation." The Court held that when Samuel had received actual notice of Bonnie's repudiation was an open question and, as a result, the Court could not determine when the statute of limitations had been triggered.

Judicial Estoppel

The Court rejected Bonnie's argument that Samuel was estopped from bringing his breach of fiduciary duty claim because he had failed in earlier proceedings to list in his financial disclosures the same assets (real estate and securities) in which he was now asserting an interest. The Court explained that, among other things, Samuel's "prior position" (i.e., his failure to disclose the assets in prior proceedings) may have been based on "inadvertence or mistake."

Laches

The Court rejected Bonnie's argument that Samuel's claim was barred by the doctrine of laches because it remained a disputed issue of fact whether Samuel unreasonably delayed in bringing the suit and whether any such delay was justified, e.g., was a result of Samuel's intention to afford the interested parties sufficient time to reach an amicable resolution.

Nichols v. Pritzker
84 Mass. App. Ct. 1106; 991 N.E.2d 664 (August 8, 2013)

This decision is issued pursuant to Rule 1:28, is primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. This decision may be cited for its persuasive value but not as binding precedent.

Facts

The decision contains very few facts. Plaintiff argued that she had an oral contract with the decedent and his wife prior to their deaths that governed disposition of their shared property after their deaths. Plaintiff argued that the oral agreement was a promise to give Plaintiff all of their shared property after their deaths. Plaintiff provided certain assistance to the Defendant in 2008. Plaintiff prevailed in a jury trial and was awarded $1,553,037.56 as a result of the decedent's breach of his and his wife's promise.

Procedure

Defendant (trustee of decedent's trust and executor of decedent's estate) appealed from a judgment entered in the Superior Court in favor of the Plaintiff.

Issue

Did the trial judge err in admitting character testimony in support of the Plaintiff and evidence of the Defendant's pretrial expenditures, and was the evidence insufficient to prove consideration existed for the agreement between the Plaintiff and the Defendant?

Discussion and Decision

The Appeals Court affirmed the Superior Court's decision. Defendant argued that the Statute of Wills and Statute of Frauds should apply, including the clear and convincing evidence standard. The Court disagreed, noting that an oral agreement between Plaintiff and the decedent did not implicate the Statute of Wills or Statute of Frauds. The Court stated that detrimental reliance on a promise is considered a valid substitute for consideration and there was sufficient evidence that the certain events created a reasonable expectation that the Plaintiff would be compensated by the Defendant for her assistance.

TAX LIABILITY

Grey v. Grey
84 Mass. App. Ct. 1121; 997 N.E.2d 1222 (November 21, 2013)

This decision is issued pursuant to Rule 1:28, is primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. This decision may be cited for its persuasive value but not as binding precedent.

Facts

The defendant, Carol Grey ("Carol"), was the wife of the decedent, Howard A. Grey ("Howard"). At the time of Howard's death, an action for divorce was pending between him and Carol. Carol offered Howard's will for probate and Howard's children, Richard Grey and Alicia McIntyre, challenged the validity of the will.

The parties attempted to settle the matter and executed a will agreement, estate administration agreement and a side letter on November 1, 2002. On April 8, 2003 the court issued a decree allowing the will as compromised and ordering the administration of the estate. After the parties executed the settlement documents, but before the decree entered, a dispute over the distribution of $97,178 in tax refunds arose. On April 1, 2003, the parties signed an agreement to hold the funds in escrow and move forward with the administration and save the dispute over the tax refund for another day.

The will agreement provided that the children bear all tax liability. The estate administration agreement provided that if the estate taxes are adjusted from the amount on the amended estate tax return, then any increase or decrease shall be to the benefit or detriment of the children and borne by their share and not Carol's share.

Procedure

The children filed an equity complaint in February, 2009 after the parties failed to reach an agreement regarding the distributions of the escrow account. The Probate and Family Court awarded the children the estate tax refund and awarded attorney's fees to their counsel. Carol appealed both judgments.

Issues

1. Did the will compromise supersede the three settlement documents?

2. Were the children precluded or estopped from resolving this belated dispute?

3. Was the award of attorney's fees to the children's counsel appropriate?

Discussion and Decision

1. The Appeals Court held that nothing in the record supported Carol's position that the will compromise superseded the settlement documents. To the contrary, the Appeals Court stated that the will compromise specifically names and incorporates the estate administration agreement. Also, the escrow agreement directs that the outstanding estate tax refund issue be determined by interpreting the settlement documents. The repeated cross-referencing reflects the integration of the settlement documents in the will compromise.

2. The Appeals Court held that the children were not precluded or estopped from resolving this belated dispute because the issue was not addressed by the April 8, 2003 decree.

3. The Appeals Court cites G.L. c. 215 § 45, which provides that judges are vested with broad discretion to award costs and fees. The judge also heard arguments from the parties and considered an affidavit from the children's counsel before determining that the request for fees was fair and reasonable. Cummings v. National Shawmut Bank, 284 Mass. 563, 569 (1933). The judge who awarded the fees was the same judge who presided over various hearings and rules on the cross motions for summary judgment. As a result, the Appeals Court found that there was no abuse of discretion and affirmed the award of attorney's fees by the Probate and Family Court. However, the court denied the children's and Carol's requests for appellate fees.

TRUSTEE REMOVAL

Harp v. Swartz

83 Mass. App. Ct. 1139; 989 N.E.2d 559 (July 1, 2013)

This decision is issued pursuant to Rule 1:28, is primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. This decision may be cited for its persuasive value but not as binding precedent.

Facts

Edward Swartz ("Edward") created a trust under his will, naming his brother Robert Swartz ("Robert"), his brother Morris Swartz ("Morris") and First National Bank of Boston (the "Bank") as trustees. The beneficiaries of the trust were Edward's sister, Rosalyn Deigh ("Rosalyn"), his daughter Alma Swartz ("Alma"), his daughter Ella Zonis ("Ella"), and the issue of Ella living at his death, which included the plaintiffs, Leah Harp ("Leah") and Nadia Zonis ("Nadia"). Leah and Nadia were 3 and 6 at Edward's death. (Morris died in 1975.)

The trust held real estate properties around Boston. The trustees determined that Robert would manage the properties and were advised that Robert could receive compensation comparable to a paid professional manager in Boston. It was undisputed that Robert professionally managed the properties and that the trust substantially increased in value as a result. However, Robert's compensation greatly exceeded comparable professional management fees.

The trust granted the trustees wide discretion to make equal or unequal distributions to the beneficiaries. From the beginning, the trustees made distributions to Rosalyn, Alma and Ella. The trustees made no distributions to the plaintiffs, Leah and Nadia, until 1997. After 1997, the trustees made distributions to Leah and Nadia, but at amounts less than the distributions to the other beneficiaries.

From 1987 to 1997, the plaintiffs made periodic inquiries to Robert for financial information on the trust. During that time, it came to light that the trustees had not filed probate trust accounts for over ten years. It also became evident that Robert viewed the plaintiffs as "secondary beneficiaries" and not entitled to the same financial benefits as the other beneficiaries.

As of 2006, Robert was 95 years old, in a wheelchair and had been spending significant periods of time in Florida over the past 20 years.

Procedure

In 2006, the plaintiffs filed a complaint in Superior Court seeking removal of all of the trustees. The Superior Court judge removed the Bank and Robert as trustees. The judge found that even though the trustees did not breach their fiduciary duties, Robert's compensation was excessive, the trustees failed to make distributions to the plaintiffs for 25 years without reason, and Robert and the Bank were neglectful in their trust administration. The other factors the judge considered when making the determination included: (i) the trustees failed to file probate accounts for 10 years, (ii) a family division between the trustees and plaintiffs had occurred, (iii) Robert's physical infirmity was at a critical level, and (iv) Robert's residence outside of Massachusetts.

The trustees appealed the decision, arguing that, individually, the various factors cannot sustain the judge's decision.

Issue

Did the trustees' actions warrant removal?

Discussion and Decision

Trustee removal is a matter of equity, and courts have broad discretion in determining whether removal is appropriate. There was no error in the judge's determination that all of the circumstances warranted removal.

UNDUE INFLUENCE

Estate of Elizabeth B. Lacey
84 Mass. App. Ct. 1108 (Aug. 29, 2013)

This decision is issued pursuant to Rule 1:28, is primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. This decision may be cited for its persuasive value but not as binding precedent.

Facts

On September 26, 2000, the decedent executed her first will, pursuant to which she bequeathed her entire estate to her dear friend and life-long neighbor and her neighbor's children. In November of 2000, the decedent executed a second will, pursuant to which she bequeathed her entire estate to an individual (and his children) whom she had only first befriended in the latter years of her life.

Procedure

The beneficiaries of the prior will successfully contested the subsequent will under which they would receive nothing. The beneficiary of the second will appealed.

Issue

Whether the probate court: (i) erred in adopting "verbatim" many of the appellee's proposed factual findings; (ii) incorrectly found that the decedent had been unduly influenced to execute her second will; and (iii) deprived the appellant of due process by delaying two years in rendering its decision?

Discussion and Decision

The Appeals Court ruled in favor of the appellee on all of the aforementioned issues. First, it ruled that the probate court had not erred in adopting some (but not all) of the proposed findings because the trial judge provided her own conclusions of law and reasoning. Second, the Appeals Court concluded that the probate court's finding of undue influence were not "clearly erroneous," where there was evidence that the appellant misappropriated the decedent's assets and invoked the privilege against self-incrimination when asked about doing so. Third, the Appeals Court rejected the argument that the appellant had been deprived of due process because he has no legal interest in the estate and, therefore, the delay had caused him no harm.

<u>Giuseppe D'Amico v. Anna MacMillan et al.</u>
2013 Mass. Super. LEXIS 132 (August 7, 2013)

<u>Facts</u>

The plaintiff, D'Amico has three adult daughters who he had helped financially, including providing them with homes, periodically throughout their adult lives. The defendant, Anna, is one of his daughters. Between 1983 and 2009, he acquired and sold four businesses and was an experienced businessman. The most recent sale of one of his businesses occurred in 2009 for $1.4 million. He also owned several real properties both in Florida and Massachusetts, and had significant experience with real estate transactions.

In 2009, D'Amico executed a will, which included his desire for his property located at 73 Swifts Beach Road in Wareham, Massachusetts ("Swifts Beach Road"), to go to Anna or her heirs. On several occasions he expressed his desire for her to use and take over this property, along with his intention to add an additional building so one of her children could live next door.

In 2010, he fell ill and was hospitalized in Massachusetts. During his hospitalization he insisted that Anna obtain a form deed from the Registry as it was and had been his desire for her to own the property. He was very insistent and after stalling and providing excuses for each delay, Anna complied. There was a notary and witness present at the execution of the new deed transferring Swifts Beach Road to Anna. The witness and notary were hospital personnel and both stated that he was very aware of the transaction and had discussions with him, prior to witnessing his signature. His medical records also demonstrate that he was consistently alert, and specifically on August 17, 2010, when he signed the deed, medical records show he was not confused, or disoriented.

Once he was well enough, D'Amico went back to Florida to live with his ex-wife, Anna's mother. Anna, her mother, and her two sisters would not allow him to fly back to Massachusetts the following summer due to his access to health insurance being limited to Florida. At this point, D'Amico became belligerent and began telling Anna's sisters and mother that he never deeded the property to her. Anna was still in Massachusetts, where D'Amico wanted to be, and Anna's family knew all along of his desire for her to own Swifts Beach Road. Anna's sisters and mother defended her and when D'Amico eventually filed this lawsuit against Anna, stopped speaking to D'Amico.

Throughout the trial, D'Amico's testimony in support of his claim was that he had no recollection of deeding Swifts Beach Road to Anna.

<u>Procedure</u>

The plaintiff filed suit against the defendant alleging that the defendant exercised undue influence when he deeded Swifts Beach Road to the Defendant on August 17, 2010. A jury-waived trial occurred on July 18 – 22, 2013 before Associate Justice Merita A. Hopkins at Plymouth Superior Court. Judgment was ordered for the defendant with the claim dismissed because there was no evidence to support the claim, and the quitclaim deed transferring Swifts Beach Road from Plaintiff to Defendant was declared to be valid, quieting title for the defendant.

Issue

Was the plaintiff's deed transferring Swifts Beach Road to the defendant procured by undue influence?

Discussion and Decision

The burden of establishing undue influence falls on the party challenging the validity of a transaction. If the deed was procured by undue influence, D'Amico would be able to avoid the transfer and retain ownership of the property.

To establish undue influence, a party must demonstrate the following four elements:

> (1) an unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means.

The Superior Court gives examples of case law to demonstrate that an unnatural disposition occurs when the disposition is illogical, and it is not one that an individual would ordinarily make absent undue influence. Citing Paine v. Sullivan, 79 Mass. App. Ct. 811, 817 (2011), one way to determine whether a disposition is unnatural is for the court to look to an individual's course of conduct over the years.

Here, the court found that the previous dealing between D'Amico and his family make clear that the transfer was a completely natural one for him to make. Throughout his life D'Amico had provided housing options for his adult daughters, either as outright transfers of property or as rent-free living arrangements, including Anna. D'Amico continuously expressed his desire for Anna's children to live on the property in a building he planned to build next door. Even more compelling to the court that this was a natural disposition was the fact that D'Amico's will called for Anna to receive the Swifts Beach Road property. If he wanted Anna to receive the Swifts Beach Road property eventually, it would be natural for him to want her (his daughter) to receive this gift during his life.

Since D'Amico could not establish that this was an unnatural disposition, his undue influence claim fails. The court went on to address the remaining elements, none of which D'Amico was able to prove existed.

In the Matter of the Estate of Alice R. Sharis
83 Mass. App. Ct. 839; 990 N.E.2d 98 (June 28, 2013)

Facts

Alice R. Sharis ("Alice") died in February 2010 at the age of 94, survived by 3 daughters, 16 grandchildren, and several great-grandchildren. Her second husband, Peter ("Peter"), predeceased her by 13 months. He had suffered from Alzheimer's disease and lived in a nursing home for the last 6 months of his life. J. Richard Spinelli ("Richard") was one of Alice's grandchildren. After separating from his wife in November 2003, Richard lived in Alice's home until Alice's death. He did not contribute monetarily to the upkeep of the home, but he did drive Alice to various appointments and destinations. While living there Richard came to take control of Alice's and Peter's checking accounts and signed numerous checks on their behalf. In 2007, Alice signed a durable power of attorney naming Richard as her attorney-in-fact. In 2008, Richard contacted an attorney to draft a will for Alice. The attorney had minimal contact with Alice, interacting primarily with Richard. The attorney did not attend the execution of the will, which took place at Peter's nursing home. The employees who witnessed the will did not notice anything that would indicate that Alice lacked testamentary capacity, and Richard was not present in the room when she signed (though he was at the nursing home).

The will provided that Alice's assets be distributed to her husband Peter if he survived her. If not, the will provided that her house, its contents, and her stocks and securities pass to Richard, her savings and checking accounts be split among her three daughters, and her residuary estate be split among Alice's three daughters and Richard.. Following the execution of the will, Richard opened a checking account in his name in trust for Peter and Alice, and transferred over $70,000 from Alice's checking account to the trust account, from which substantial sums were then expended.

Procedure

One of Alice's daughters brought an action in the Suffolk Division of the Probate and Family Court Department in 2010, contesting the will on grounds of undue influence and lack of testamentary capacity. That court disallowed the will, and Richard appealed to the Appeals Court of Massachusetts.

Issue

Whether the will should be disallowed on the grounds of undue influence.

Discussion and Decision

A claim of undue influence is comprised of 4 elements: (1) an unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means. The Court found that Alice's advanced age, her lack of familiarity with wills, and her limited education were all indicative of susceptibility, and that it was relatively clear that Richard had the opportunity to take advantage. Furthermore the Court noted that although Richard lived with Alice during the last 8 years of her life, there was no evidence of a particularly close relationship, and that, given her close relationship to other relatives, the dispositions favoring Richard over her other descendants were not natural.

The Appeals Court said that while the burden of proof ordinarily lies with the party contesting the will, a fiduciary (which Richard was in his capacity as Alice's attorney-in-fact) who benefits in a transaction with the person for whom he is a fiduciary bears the burden of establishing that the transaction did not violate his obligations.

Richard argued that Alice had independent counsel (the lawyer who prepared the will), which is generally a defense to an undue influence allegation. However, the Court found that Alice did not truly benefit from the advice of independent counsel given that Richard selected the attorney, communicated with the attorney, filled in certain terms on the will, and transported Alice to the signing. The attorney never met with Alice or reviewed the terms of the will with her.

The Court also noted that there was an element of secrecy with respect to the will, as no one in the family other than Richard was made aware that she had a will. Furthermore, the Court pointed out that Richard's transfer of funds from Alice's checking account to the trust account disrupted the bequest of Alice's checking and savings accounts to her daughters, and that Richard's failure to account fully for these funds was a factor in the initial judge's credibility findings.

The Court mentioned that there was no direct evidence that Richard unduly influenced Alice, but reasoned that this is true in most undue influence cases, which tend to be based largely on circumstantial evidence. The Court ultimately found that the judge's ruling that undue influence occurred was not clearly erroneous, and thus affirmed the decision. The Court did not address the issue of testamentary capacity.

Adler v. Adler
83 Mass. App. Ct. 1135 (June 7, 2013)

This decision is issued pursuant to Rule 1:28, is primarily addressed to the parties, and therefore may not fully address the facts of the case or the panel's decisional rationale. This decision may be cited for its persuasive value but not as binding precedent.

Facts

Ivy Ruth Adler (the "Decedent") executed a series of estate plans following her husband's death in 1997. The first estate plan in question, dated November 7, 1997 (the "1997 Will"), divided the Decedent's assets, including many real estate holdings, equally between the Decedent's two children, Davina and Bruce. From 2000-2001, with Bruce's help and with a new attorney, the Decedent deeded two properties outright to Bruce and revised her estate plan (the "2001 Will"), leaving the vast majority of her estate to Bruce.

The Decedent struggled with mental health issues following her husband's death, and was eventually diagnosed with moderate to severe Alzheimer's disease in November, 2003. Bruce acted as her attorney-in-fact. Upon the Decedent's death in 2006, Bruce filed a petition for probate of the 2001 Will.

Procedure

Davina and others contested Bruce's petition for the probate of the 2001 Will on the grounds of lack of capacity and undue influence, and also brought a suit in equity seeking rescission of the two deeds and the trust drafted along with the 2001 Will. The probate court declared the 2001 Will, deeds and trust invalid, finding the Decedent lacked testamentary and contractual capacity and that Bruce had exercised undue influence over her. The 1997 Will was reinstated in place of the 2001 Will. Bruce appealed the judgment.

Issue

Did the probate court commit a legal error in finding that the Decedent lacked testamentary and contractual capacity and had been unduly influenced when she executed her 2001 Will?

Discussion and Decision

The Appeals Court affirmed the judgment. Both parties presented extensive evidence as to the Decedent's capacity or lack thereof in 2000-2001. Since Davina offered a threshold showing of evidence of the Decedent's incapacity, the legal presumption of capacity that would normally be granted to a will proponent was reversed, giving Bruce the burden of persuasion. After outlining the standards for testamentary capacity, the Court failed to find legal error in the probate court's judgment that the Decedent lacked testamentary capacity.

The decision also outlined the standard for contractual capacity, a more rigorous standard. The Court found it reasonable that the probate court found no contractual capacity in a decedent who was already found to lack testamentary capacity.

The Court then reviewed four common indicia of undue influence. The Court found again that the burden of persuasion was rightfully shifted to Bruce, since he was a fiduciary who benefitted from the claimed exercise of the influence. All four indicia were found in the Decedent's case, and the Court ruled there was no error in the probate court's findings that Bruce failed to prove the absence of undue influence when the Decedent executed her 2001 Will.

Finally, the Court affirmed the remedy of reinstating the 1997 Will, as no party claimed during the probate trial that the 1997 Will was defective, and the 1997 Will was therefore the last record of the Decedent's true wishes prior to her incapacity.