The Accountant/Attorney Liability Reporter

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Trustees Who Breached Their Fiduciary Duties To A Charitable Trust Were Removed From Office By The Court

By Nancy M. Reimer, Esq. and Patricia B. Gary, Esq.

THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS affirmed an order of a Probate and Family Court judge, holding that it was not error for the judge to remove two trustees of a charitable trust from office, and name a successor trustee. Two trustees of the Lotta M. Crabtree charitable trusts (a third trustee had died on July 5, 2000) were charged with breaching their fiduciary duties, and committing a fraud upon the court, because they filed accounts that failed to disclose the manner of payments of trustees' fees. The Appeals Court found that while some of the breaches were relatively minor, two of the breaches justified removal of the trustees.

First, in violation of the terms of the Agricultural Fund, the trustees did not distribute all of the income of the fund, but instead, made contributions to an endowment at the University of Massachusetts. Although the "full discretion" given to the trustees under a 1971 court decree authorized them to decide which students would receive assistance, and whether the assistance would be loans or grants, and allowed them to determine the terms of such loans and grants, nothing in the language of the decrees authorized the trustees to use less than the full income for these purposes. Thus, while the Appeals Court found that the goals of the trustees in contributing to an endowment at the University of Massachusetts were laudable, it concluded that the trustees had breached their fiduciary duties, and that the breach warranted removal of the trustees.

Because these practices were not disclosed in accounts filed by the trustees, the Appeals Court upheld the Probate Court's removal of the trustees from office.

The second breach sufficient for removal was the trustees' practice of using the Agricultural Fund to pay their fees for work done in connection with the other trusts. The trustees acknowledged that neither Lotta M. Crabtree's will, nor the Agricultural Fund, authorized them to use the fund to pay fees incurred by other Lotta M. Crabtree trusts, but that this was done out of convenience and longstanding practice. Because these practices were not disclosed in accounts filed by the trustees, the Appeals Court upheld the Probate Court's removal of the trustees from office.

Standard For Removal Of A Trustee

A judge's decision to remove a trustee is reviewed by the Appeals Court to determine whether the findings are "clearly erroneous," *Edinburg v. Cavers*, 22 Mass. App. 212, 219 (1986) and "whether there is an abuse of discretion." *Cooney v. Montana*, 347 Mass. 29, 38 (1964); G.L. c. 203, § 12. The trustees have the burden of showing that they have "discharged the duties of trustee with reasonable skill, prudence, and judgment." *Rugo v. Rugo*, 325 Mass. 612, 617 (1950). The question is not whether the trustee has been shown to have acted from dishonest or selfish motives, *see Scott v. Rand*, 118 Mass. 215, 218 (1875), but "whether the circumstances are such that the continuance of the trustee in office would be detrimental to the trust." *Steele v. Kelley*, 46 Mass. App. 712, 742 (1999), quoting from 2 Scott, Trusts § 107, at 104, & 107.3, at 124-125 (Fratcher 4th ed. 1987).

Applying the above standard, the Appeals Court concluded that the Probate Judge did not abuse his discretion in removing the trustees from office.

Expert Testimony

The Appeals Court reversed the Probate Court's determinations with regard to the trustees' fees. The trustees contended, on appeal, that the Probate Judge had abused his discretion by refusing to allow an expert to testify on the reasonableness of the trustees' fees. The Probate Judge excluded the testimony of the expert because, although he was a Senior Vice President of Finance and Administration, as well as Chief Financial Officer of the Boston Foundation, he had never acted as a trustee of a charitable trust. Instead, his experience with a charitable foundation involved the "making of grants."

The Probate Judge's order surcharged the trustees personally for amounts paid for rent, secretarial work . . .

The Appeals Court explained that an expert "need not possess 'an intimate level of familiarity with every component of a transaction or device as a prerequisite to offering expert testimony.'" *Microfinancial, Inc. v. Premier Holidays Intl., Inc.*, 385 F.3d 72, 80 (1st Cir. 2004); *see also Adoption of Hugo*, 428 Mass. 219, 233 (1998) ("[t]here is no requirement that testimony on a question of discrete knowledge come from an expert qualified in [a] subspecialty rather than from an expert more generally qualified"). Accordingly, the Appeals Court held that it was an abuse of discretion to refuse to allow the expert to testify as to the reasonableness of the trustees' fees, and remanded for an evidentiary hearing on this issue.

Expenses

The Appeals Court also reversed the Probate Court's determination with regard to the proper calculation of expenses. The Probate Judge's order surcharged the trustees personally for amounts paid for rent, secretarial work, and accounting services, because the judge found that these expenses are customarily included in the trustee fee, and are not chargeable as separate expenses. The Appeals Court reversed, holding that while a judge might be justified in concluding that such expenses are properly chargeable against the trustee's fee, there is no rule which prohibits trustees from charging separately for such services. *Shirk v. Walker*, 298 Mass. 251, 255 (1937); *Lipsitt v. Sweeney*, 317 Mass. 706, 715 (1945). In view of the fact that it was the longstanding practice of the trusts to bear the administrative expenses, and that practice was expressly disclosed in prior accounts which were all approved by the court, the Appeals Court held that it was error to surcharge the trustees for these expenses.

The decision demonstrates that when a trustee of a charitable trust commits a breach of fiduciary duty by violating the settlor's express intention regarding distribution of the trust income, the breach of fiduciary duty warrants removal of the trustee from office. Under these circumstances, where the settlor's expressed intention is violated, it does not matter if the breaches are honest errors of judgment which resulted in no personal gain to the trustees.

The decision also illustrates that an expert may be qualified to testify even if he or she does not possess an intimate level of familiarity with every aspect of a subspecialty, as long as the expert is generally qualified on the subject of the testimony. ■

The Massachusetts Supreme Judicial Court Addresses The Appropriate Standard Of Care For Professionals

By Warren D. Hutchison, Esq. and Ethan B. Domke, Esq.

THE SUPREME JUDICIAL COURT OF MASSACHUSETTS ("SJC") recently reinforced the law in Massachusetts governing the standard of care for professionals. In *Palandjian v. Foster*, 446 Mass. 100 (2006), the SJC re-established that the appropriate standard of care in cases involving professionals is what a member of the profession generally would do under similar circumstances, and not what a particular "expert" would do under similar circumstances.

The dispute in *Palandjian* involved claims by the plaintiffs, Mr. Palandjian's son and widow, for wrongful death, medical malpractice, and loss of consortium against three defendant physicians following the death of Mr. Palandjian from gastric cancer. The plaintiffs in the action claimed that the defendants were negligent in failing to diagnose Mr. Palandjian's cancer at an earlier stage.

The standard of care for professionals is based on the customs of the particular profession.

At trial in the Superior Court, the jury found that the three defendants, having met the applicable standard of care, were not negligent in treating Mr. Palandjian. In meeting the standard of care, the jury found that the defendants exercised "the degree of care and skill of the average qualified practitioner, taking into account advances in the profession[.]" *Palandjian*, 446 Mass. at 104 (citing *Brune v. Belinkoff*, 354 Mass. 102, 109 (1968)). On intermediate appeal, the Appeals Court of Massachusetts vacated the Superior Court's decision excluding certain expert testimony related to the standard of care. The SJC granted appellate review and affirmed the judgment of the Superior Court.

Although the case involves physicians, concepts apply generally to all professionals, i.e. accountants, attorneys, architects and engineers, as expert testimony is necessary to establish the standard of care for all professionals. Specifically, the SJC states, "because the standard of care is based on the care that the average qualified (professional) would provide in similar circumstances, the actions that a particular (professional), no matter how skilled, would have taken are not determinative." *Palandjian*, 446 Mass. at 104-105. The standard of care for professionals is based on the customs of the particular profession. Accordingly, the testimony of what actions a particular expert witness would have taken in similar circumstances is not determinative of professional liability. Instead, the "minimum common skill" in the profession determines the applicable standard of care. *Palandjian*, 446 Mass. at 105 (citing W.L. Prosser & W.P. Keeton, Torts § 32 at 187 (5th ed. 1984)). The minimum common skill of a profession is the lowest common skill level and knowledge that all members of the profession must exhibit.

In providing expert testimony concerning the applicable standard of care within a profession, the expert's testimony must be "based on the expert's knowledge of the care provided by other qualified (professionals), not on scientific theory or research." *Palandjian*, 446 Mass. at 108. Accordingly, how a professional practices his or her profession is a fact, not an opinion. When an expert witness provides testimony concerning the applicable standard of care in a local profession and the expert bases his or her testimony on facts other than how the local profession practices, such expert testimony should not be admissible. Each expert witness in professional liability cases must have knowledge of the minimum common skill of the local profession to provide testimony concerning the applicable standard of care within the profession. Expert witnesses who are not members of the local profession and are without knowledge of the local profession therefore should not be permitted to provide expert testimony regarding the standard of care.

NEW&NOTEWORTHY
FROM DONOVAN HATEM LLP

Donovan Hatem LLP presents a special seminar:
"Accountants: Learn Practice Methods to Limit Your Legal Liability"
Wednesday, June 21, 2006
8:00 am - 12:00 pm
Boston Marriott Newton

Speakers include:
- A. Marvin Strait, CPA
- James Popp, Esq., Claim Consultant, CNA Insurance Companies
- John Marciniec, Vice President, Aon Insurance Services
- Donna M. White, Partner, Donovan Hatem LLP
- Nancy M. Reimer, Partner, Donovan Hatem LLP

To register, call 617-406-4609.

Coming in September 2006:
A new publication from the Trusts & Estates Group at Donovan Hatem LLP.
See page 10 for a sneak preview!

If you would like to join the mailing list for this new newsletter, please call 617-406-4609.

In Probate Actions Judges Enjoy Broad Discretion In Awarding Attorney's Fees And Costs

By Nancy M. Reimer, Esq. and Stephen R. Wilson, Esq.

THE MASSACHUSETTS APPEALS COURT AFFIRMED a Massachusetts Probate and Family Court judge's decision to award attorney's fees and costs to a defendant arising from her defense of a complaint brought by the plaintiff for modification of monthly child support payments.

The defendant, Roberta P. Brooks ("Mrs. Brooks"), and the decedent, Thomas W. Brooks, Jr., entered into a separation agreement, which subsequently merged with a judgment of divorce nisi on June 27, 1994. The Agreement specified that Mr. Brooks would pay $2,156 per month in child support for the couple's two minor children. The Agreement also specified that Mr. Brooks would contribute toward his children's college expenses. Although the Agreement defined what constituted the emancipation of a child, it did not provide for reduction of child support when only one of the two children became emancipated. The Agreement provided that if Mr. Brooks died before expiration of his child support and college education obligation, the estate would remain liable for those costs until the terms of the Agreement discharged that obligation.

On January 2, 2002, Mr. Brooks died, leaving an estate with a pre-tax net worth of approximately $3,000,000. His will left his entire residuary estate to two equally divided testamentary trusts. The will named Mr. Brooks's son as sole beneficiary of one trust and his daughter as sole beneficiary of the other trust. Mr. Brooks's brother, James D. Brooks ("Executor"), was named executor of the estate and co-trustee of the two testamentary trusts. Upon the daughter's college graduation in May 2002, the Executor reduced the amount of monthly child support by one-half to $1,078. On July 26, 2002, the Executor filed a complaint for modification seeking confirmation of the 50% reduction in child support and a declaration that the remaining child support obligations would terminate entirely upon funding of Mr. Brooks's son's testamentary trust. At the time, Mr. Brooks's son was still a minor.

The Executor filed a complaint for modification . . . and a declaration that the remaining child support obligations would terminate entirely upon funding of Mr. Brooks's son's testamentary trust.

Mrs. Brooks moved for summary judgment seeking to enforce the terms of the separation agreement. The motion claimed the complaint for modification lacked the requisite material change in circumstances necessary to amend the terms of the separation agreement. The Court granted Mrs. Brooks motion for summary judgment and awarded Mrs. Brooks her attorney's fees and costs of $15,899 incurred in defending the action, as the Executor did not have reasonable cause to file the action. The Executor appealed.

In Massachusetts, domestic relations practice, G.L. c 208, § 38, provides an exception to the "American Rule" of each litigant bearing his or her own attorneys' fees. In relevant part, § 38 provides that "[i]n any proceeding under this chapter whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated." G.L. c 208, § 38. A judge may award attorneys fees and costs incurred in defending a complaint for modification. *See Saraceno v. Saraceno*, 369 Mass. 967 (1976); *Cooper v. Cooper*, 62 Mass. App. Ct. 130, 141 (2004). The standard for reversing an award of attorney's fees and costs is an abuse of discretion.

The Massachusetts Appeals Court found that the Probate Judge's decision to award Mrs. Brooks's attorney's fees and costs was within the Probate Judge's discretion, particularly because the complaint for modification lacked the requisite material change in circumstances. The Appeals Court rejected the Executor's argument that G.L. c. 208, § 38 authorized an award of attorney's fees and costs "only" when the judge determines that an award was needed to overcome an economic hardship finding that neither the Legislature nor case law limited such a narrow construction of the statute. *See, e.g. Downey v. Downey*, 55 Mass. App. Ct. 812, 819 (2002).

The costs, however, are eligible for reimbursement in the Executor's final account, "unless the Probate Court determines that the action was prosecuted or defended without reasonable cause."

The Massachusetts Appeals Court also addressed whether the Probate Judge could require that the Executor pay personally for Mrs. Brooks's attorney's fees and costs. The costs assessed against an executor in an action commenced by or against the executor are the personal responsibility of the executor. G.L. c. 230, § 8. The costs, however, are eligible for reimbursement in the Executor's final account, "unless the Probate Court determines that the action was prosecuted or defended without reasonable cause." Thus, the Probate Judge's order requiring the Executor to pay Mrs. Brooks's attorneys fees was consistent with G.L. c. 230, § 8, as the action was filed without reasonable cause.

The Appeals Court did not address the appropriateness of whether the Executor should be reimbursed in the Executor's final account. The Appeals Court found that the appropriateness of that directive should be resolved in the action that was pending in the Probate and Family Court regarding the administration of Mr. Brooks's estate.

Chapter 93A And Attorney Malpractice: More Than Mere Negligence

By Warren D. Hutchison, Esq.

A RECENT SUPERIOR COURT DECISION affirmed the proposition that where a plaintiff claims legal malpractice against a defendant attorney, in order to recover under Mass. Gen. Laws. Ch. 93A, the plaintiff must prove more than mere negligence. To prevail in a Chapter 93A claim, the plaintiff must prove aggravated conduct by the attorney, such as conduct involving dishonesty, fraud, deceit or misrepresentation. Indeed, if such aggravated conduct is present, recovery under Chapter 93A is permissible even if the underlying claim for legal malpractice fails. *See Mary Lingis as the Executrix of the Estate of Edward J. Lingis v. Burton A. Waisbren, Jr.* (20 Mass. L. Rep. 439; 2006 Mass. Super. LEXIS 58 (January 25, 2006).

This case is unique because it identifies two scenarios for satisfying the 93A requirements. Aggravated conduct can include either a knowing and willful violation of 93A, or compounded negligence coupled with special circumstances. The special circumstances to be considered in conjunction with compounded negligence are knowing, or willful, conduct. Thus, the necessary conduct to be proven in both standards requires an element of intent.

The underlying claim arose out of a medical malpractice action. The plaintiff, Mary Lingis ("Lingis"), was the executrix of her brother's estate. Lingis' brother Edward was diagnosed with sepsis after being initially hospitalized in 1997 for depression and anorexia. Edward died of a rampant infection on April 23, 1997. Lingis retained attorney Burton Waisbren, Jr. ("Waisbren") to sue Edward's doctors for medical malpractice. Waisbren filed the complaint on March 23, 1998.

To prevail in a Chapter 93A claim, the plaintiff must prove aggravated conduct by the attorney, such as conduct involving dishonesty, fraud, deceit or misrepresentation.

From the very beginning of the lawsuit, Waisbren made a number of mistakes. He misstated the parties' names in the case caption. Waisbren waited for two (2) years before a Medical Malpractice Tribunal was convened. Waisbren did not attend the Tribunal, but rather sent an associate who was unfamiliar as to the facts and unable to respond to the questions propounded by the Tribunal members. Neither before nor after the Tribunal did Waisbren file any discovery requests, or take depositions on key issues, including the quality of care, or the details of the physicians' employment relationship with the hospital. Waisbren also failed to obtain experts or take expert discovery.

Significant to the court's analysis were the two occasions where it found Waisbren had deliberately misled Lingis. First, Waisbren failed to file a presentment letter within the two year period following the accrual of the claim, therefore barring claims against several potential defendant doctors. The doctors moved for summary judgment for this failure. On January 26, 2001, Waisbren informed Lingis about the summary judgment motion, but did not mention his failure to follow the necessary rules. Waisbren instead claimed the motion was brought under a novel theory, and did not file an opposition because it would have been 'futile' and subject Lingis to sanctions.

Second, without authorization from Lingis, on February 6, 2001, Waisbren executed a stipulation of dismissal with prejudice. Furious, Lingis called Waisbren about the dismissal. Waisbren told her "it's finished" and hung up on Lingis, thereafter refusing to take her calls. Lingis was shocked at the dismissal and questioned why Waisbren had waited two (2) years to discuss the theory presented in the doctors' summary judgment motion. Within weeks of the dismissal, Lingis hired new counsel and initiated an action against Waisbren alleging legal malpractice and violation of G.L. c. 93A.

Negligent representation by an attorney does not violate c. 93A where the attorney does not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The legal malpractice claim was tried before a jury, reserving the G.L. c. 93A claim for the trial judge. To prevail on the legal malpractice claim, the jury was instructed that to find liability, Lingis needed to prove, by a preponderance of evidence, that she would have succeeded in her medical malpractice claim, i.e. she would have recovered damages in the underlying claim. At trial, the jury's verdict was that Lingis would not have succeeded in proving her claim, and therefore judgment was entered in favor of Waisbren on the legal malpractice claim.

On the 93A claim, the court ruled that more than "mere negligence" must be found. Negligent representation by an attorney does not violate c. 93A where the attorney does not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. *See Poly v. Moylan, 423 Mass, 141, 151 (1996).* Here, the court examined Waisbren's conduct to determine whether his actions involved fraud, deceit, dishonesty or misrepresentation. The court stated the plaintiff's burden could be met in one of two ways. First, the standard could be met with proof of deliberate misconduct. The court pointed to Waisbren's misleading of Lingis about the summary judgment motion and the execution of the stipulation of dismissal with prejudice, without Lingis' consent as prime examples of Waisbren's deceitful conduct. Second, the court ruled that a record of compounded negligence could support reasonable inferences of intentional or reckless deceit if other circumstances are present. The court presented a laundry list of separate items of negligence committed by Waisbren. All of Waisbren's conduct (misstating the parties' names in the caption, waiting for two years to convene a Medical Malpractice Tribunal, and failing to file discovery, etc.), if done negligently, could combine to form compounded negligence.

What converted Waisbren's conduct, that in multiple respects was below that of the average qualified lawyer practicing the medical malpractice specialty in the relevant time period, from mere negligence to a violation of chapter 93A is the deceit implicit in his dismissal of the claim without obtaining Lingis' consent and then falsely claiming he had done so and by giving Lingis a false story as to why in February 2001 he believed she had no case.

Lingis v. Waisbren signifies the court's willingness to impose chapter 93A liability in legal malpractice actions, even when the attorney is not found liable on the underlying legal malpractice claim.

This article represents a simplified discussion of a complex estate planning tool. There are many ways to structure a GRAT to deal with specific situations. If you have any questions about this or any other estate planning technique, please contact Donna M. White, Partner, Estate Planning Group, 617-406-4526.

Estate Planning Reform and Client Inertia: Is the GRAT One Answer?

"Why should I consider any estate or gift planning? The estate tax goes away in 2010, doesn't it?"

How many times have we heard a client say this in response to our efforts to get him or her to focus on the magnitude of estate taxes their families will likely face and the steps they might take today to lower that tax. The uncertainty we face today in the estate planning area is staggering.

Will Congress repeal the estate tax or merely increase the estate tax exemption and/or lower the top estate tax rate? • Will Congress do nothing and allow for estate tax repeal during 2011 only to start the 2012 tax year with a mere $675,000 exemption and a top estate rate of 55%? • Will President Bush muster the votes for a complete repeal despite sliding voter approval ratings and a burgeoning deficit? • Will we have a larger exemption and higher top rate or a lower exemption and a lower top rate? • Will the states respond to the loss of revenue by increasing their own estate tax rates?

The problem is particularly acute for clients who have already utilized their $1 million dollar gift tax exemption and who are faced with paying gift taxes in connection with further estate planning efforts. Yet year after year, their assets continue to appreciate and their businesses continue to grow.

One estate planning technique that may be useful in these uncertain times is the short term (two year) grantor retained annuity trust (GRAT). The GRAT has a number of appealing features to clients in this situation.

First, the client may serve as the sole trustee of the GRAT and therefore, maintain control over the transferred assets.

Second, the client retains the right to receive a yearly annuity equal to the full value (fair market value on the date of transfer) of the transferred assets, together with interest calculated at a rate determined monthly by the IRS. Any appreciation in excess of the total annuity payments passes to the next generation either outright or, to provide more flexibility and security, to a trust for any one or all of the client's spouse, children, grandchildren or charitable organizations.

Third, if the GRAT is properly structured, the value of the transfer, for gift tax purposes, is zero, allowing the transfer of the appreciation to the client's family (or charitable organizations) to pass free of any gift tax.

So what are the drawbacks to this technique? First the client must survive the term of the GRAT. If he or she dies prior to the termination of the GRAT, all of the assets transferred to the GRAT will be included in his or her estate, essentially putting the client back in the same situation the client was in prior to creating the GRAT, less the cost of creating the GRAT.

Although not necessarily a drawback, what happens if the value of the assets falls during the term of the GRAT? If the value of the transferred assets falls during the two year term of the GRAT, all of the assets will be returned to the client as part of the annuity payment and they can then be used to fund a new GRAT, with the initial transfer value at the now lower fair market value.

The client might also raise the opposite concern. What happens if the value of the assets appreciates too much! If the client is not certain how much the assets will appreciate over the two year term and has some expectation that the appreciation will be significant (sale of company or taking the company public), the client may want to put a cap on the amount of appreciation that passes to the client's family. For example, the GRAT would provide that the balance of assets remaining in the GRAT at the end of term pass to a trust for the client's children and grandchildren up to $X and the remainder distributed back to the client. A more tax effective way to get to the same result would be to distribute all of the remaining assets to an irrevocable trust that included the client's spouse. Assuming the marriage continued intact, the Trustee could make discretionary distributions to the spouse to supplement the client's/spouse's needs.

Let's look at an example of how this technique might work. Assume a client transfers an asset worth $1,000,000 to a 2-year GRAT at a time when the IRS prescribed interest rate is 6.0%, the current rate for June, 2006. The GRAT requires an annuity payment to the client of $545,435 at the end of year 1 and $545,435 at the end of year 2. No taxable gift results from funding this trust.

The possible benefits of creating this GRAT are as described in the chart below based on hypothetical appreciation rates of 10% to 100%.

Growth Rate	Approximate Value to Family (Value Removed from Client's Taxable Estate)	Approximate Estate Tax Savings (50%)
10%	64,587	32,294
20%	240,044	120,022
30%	435,500	217,750
50%	886,413	443,207
100%	2,425,000	1,212,500

Although obvious from the example, the more likely the asset will appreciate during the term, the larger the savings for the client. A client who is preparing to sell his or her interest in a business or is considering a public offering for his or her company obviously is a prime candidate for this technique. However, using the GRAT technique with some part or a client's entire investment portfolio, capturing the excess appreciation in the account every two years and eliminating the estate tax on that appreciation could prove to be a powerful tool. As one of my clients likes to refer to the technique, *"You are protecting me on the upside and not hurting me on the downside."*

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