



Boston Bar
ASSOCIATION

2008

WINTER

Trusts & Estates Section

WINTER 2008 Newsletter

A PUBLICATION OF THE BOSTON BAR ASSOCIATION TRUSTS & ESTATES SECTION

WINTER 2008

1

Calendar of Section Events

What's Coming Up?

Following is a list of a number of the upcoming events sponsored by the Trusts & Estates Section of the Boston Bar Association.

Thursday, March 27, 2008: Brown Bag Lunch: "Intrafamily Loans." Speaker: **Kimberly Cohen, Ropes & Gray.**
Sponsor: The Estate Planning Committee

Thursday, April 24, 2008: Brown Bag Lunch: "Charitable Lead Trusts." Speaker: **Susan Abbott, Goodwin Procter.**
Sponsor: The Estate Planning Committee

Tuesday, April 29, 2008: Brown Bag Lunch: "Probate and Estate Administration." Speaker: **Mary P. Heatwole, of Rackemann Sawyer & Brewster.**
Sponsor: Estate Planning Fundamentals Committee

Wednesday, April 30, 2008: Brown Bag Lunch: "Medicaid: the Deficit Reduction Act one year later and how it has affected planning." Speaker: **Steve Cohen of Cohen & Oalican.**
Sponsor: Elder Law and Disability Planning Committee

Thursday, May 22, 2008: Brown Bag Lunch: "Vacation Homes." Speaker: **Melissa Langa, Bove & Langa.**
Sponsor: The Estate Planning Committee

Tuesday, June 17, 2008: Brown Bag Lunch: "Ethical considerations in representing elderly and disabled clients." Speaker: **Linda Bauer of the Board of Bar Overseers.**
Sponsor: Elder Law and Disability Planning Committee

June 2008: Continuing Legal Education: "Year-in-Review" (exact date and speakers to be finalized shortly).
Sponsor: The Estate Planning Committee

Section Co-Chairs



Mel A. Warshaw

JP Morgan Private Bank
50 Rowes Wharf, 4th Floor
Boston, MA 02110
(617) 310-0511

melvin.a.warshaw@jpmorgan.com



Nancy Dempze

Hemenway & Barnes
60 State St
Boston, MA 02109
(617) 557-9726

ndempze@hembar.com

Inside this Issue

Update from the Pro Bono Committee of the Trusts and Estates Section of the BBA

By Michael Baker, Esq. and Suma V. Nair, Esq., Co-Chairs

Page 3

Compensatory Stock Options and Estate Administration

By Leiha Macauley, Esq.

Page 4

Recent Probate Case of Interest:

[Maimonides School v. Coles, Trustee](#)

Page 7

Section Leadership

Page 10

ARTICLES WANTED

You are all invited and encouraged to contribute an article on any subject of interest, particularly if you find yourselves dealing with an unusual or undecided issue in Massachusetts. Please contact, Amiel Weinstock at amiel.weinstock@klgates.com or Christopher Perry at Christopher_D_Perry@notes.ntrs.com to pursue this further.

Update from the Pro Bono Committee of the Trusts and Estates Section of the BBA

By Michael Baker, Esq. and Suma V. Nair, Esq., Co-Chairs

As co-chairs of the Pro Bono Committee of the Trusts and Estates Section of the BBA, we are excited to provide you with information on our newest pro bono project. We have partnered with Volunteer Lawyers Project (“VLP”) and Legal Advocacy Research Center (“LARC”) to provide intake services and legal advice over the telephone to low-income callers regarding probate, estate administration and estate planning matters.

Your commitment would be an hour on any Wednesday afternoon, as often as once a month and as little as once a year. You can work from the comfort of your own office, and there are no codes to open and no files to maintain. You will be given 2-3 phone numbers and a paragraph about each caller’s issue - you call them; they don’t call you. This is strictly an advice line - you have absolutely no commitments to the caller after the call, although you may choose to take a caller on as a full pro bono client through VLP/LARC if you wish. If you determine that a caller requires additional legal assistance, and you prefer not to provide the assistance yourself, VLP/LARC will find someone to take the case.

Jerald D. Burwick of Jager Smith P.C. has been actively involved in the project for about 3 months, and in that time has handled over 10 matters. In his experience, each matter takes about 45 minutes to an hour. Representative matters include: the son of an intestate decedent who died owning real property with a mortgage that is about to be foreclosed; the spouse of a decedent whose house was transferred to a nominee trust and subsequently sold by the Trustees without permission from

the beneficiaries or an accounting; and the mother of a special needs child who needs an estate plan. We thank Jerry for his continuing commitment to pro bono work on behalf of the BBA.

When we developed this new project, we hoped that a flexible commitment such as this would allow more experienced attorneys to participate in pro bono legal services without fearing that the commitment would take over their practices. Please consider donating even a tiny portion of your time and expertise to this project.

Please let us know if you have any questions, and whether you would like to volunteer. Our contact information can be found at the end of this e-newsletter.

Compensatory Stock Options and Estate Administration

By Leiha Macauley, Esq.

Nine issues to keep in mind when administering an estate holding non-publicly traded compensatory stock options:

Determine Whether the Option is an Incentive Stock Option or a Non-Qualified Stock Option

Incentive Stock Option (“ISO”). An ISO is an option granted to an individual for any reason connected with her employment with a corporation, its subsidiary, or its parent company to purchase stock of the corporation. An ISO carries favorable income tax features if the specific requirements of Internal Revenue Code (“IRC”) § 422 are met. If the § 422 requirements are met, ISOs are not taxed to the optionee as ordinary income, notwithstanding their compensatory nature. Instead, ISOs are taxed as capital gain when the underlying stock is sold. (But note: the difference between the fair market value of the stock and the option exercise price of an ISO is an item of tax preference for purposes of the alternative minimum tax, taxable at the time of option exercise.) A few of the important plan requirements to qualify as an ISO include (1) the option must not be exercisable more than 10 years from the grant date; (2) the option price must not be less than the fair market value of the underlying stock at the grant date; and (3) the option may not be transferred other than by will or the laws of descent and distribution and may be exercisable only by optionee. In addition to the plan requirements, the optionee must hold the stock acquired by exercise of an ISO for two years from date of grant and one year from date of exercise. Failure to meet

either requirement results in a disqualifying disposition. If a disqualifying disposition occurs, the optionee will recognize ordinary income equal to the spread at the time of exercise and short-term capital gain for any gain after the exercise date. Importantly, the optionee must be an employee of the granting corporation (or its parent or subsidiary) at all times during the period from the grant date to three months before the exercise date. Likewise, a decedent must have been an employee within three months before her date of death.

Non-qualified Stock Option (NSO). If stock options granted to an employee or independent contractor in connection with performance of services do not qualify as ISOs, the options are NSOs. There are no specific plan requirements for NSOs. NSOs simply follow the rules under IRC § 83 for taxing property in connection with employment and performance of services. NSOs may be offered to non-employees, such as directors. An individual may transfer NSOs to family members and others if the option agreement permits such a transfer. NSOs may be issued for any term of years. There is no taxable event to the employee on the NSO grant if the NSO has no readily ascertainable value (see Reg. § 1.83-7(b) for readily ascertainable value requirements). The taxable event is deferred until the NSO is exercised. On exercise, the optionee recognizes ordinary compensation income equal to the difference between the fair market value of the stock acquired and the option price (the spread). ***Caution: while the withholding tax due may be the employer’s obligation, by agreement the optionee generally assumes the withholding tax obligation as a condition of the exercise. The withholding tax liability may be a problem for an estate to pay if the***

spread is significant. The holding period of the underlying stock for capital gain tax purposes begins on the date of exercise. Stock received on exercise must be held for more than one year to receive long-term capital gain treatment on post-exercise appreciation.

Exercise Expiration Date.

Read the plan and agreement as soon as possible after the decedent's death. Some plans (though very few) forfeit unvested options at death. Many plans accelerate the exercise expiration date (usually to 12 months after date of death, but sometimes to six or three months).

Effect of Death on Holding Periods and Basis.

Incentive Stock Options. If an employee dies holding ISOs, IRC § 421(c) provides that the normal holding period requirements no longer apply. Therefore, an executor or administrator may sell the underlying stock after exercising an ISO without the adverse tax consequences of a disqualifying disposition. The basis of the option (not the underlying stock) is adjusted to the fair market value on the decedent's date of death. Since property passing from a decedent is deemed to have a long-term holding period, the **option** has met the long-term capital gain/loss holding requirement; however, the holding period of stock acquired by the executor's exercise of the option begins on the date of exercise (because the stock was acquired by purchase, not by passing from the decedent).

Non-Qualified Stock Options. NSOs are considered income that the decedent earned a right to collect before death but had not yet reported for tax purposes. Therefore, the spread on NSOs is income in respect of a decedent ("IRD"): NSOs do not receive a step-up in basis on the decedent's date of death. The transferee (the estate or heir) steps into the place of the

decedent with respect to the taxation of the option and will realize IRD on exercise. If the decedent died holding an NSO not taxed at grant (most), the compensation element remains open even though the option passes to the estate or the heirs.

Selection of the Tax Year for the Estate.

If the estate is facing significant income tax consequences concerning options, the choice of tax year is important. Typically the accelerated exercise period will be within one year from the decedent's date of death. The executor may select a tax year before or after the exercise date. It is also important to coordinate the options' exercise with distributions to beneficiaries to carry out the distributable net income ("DNI") to beneficiaries who may be in lower income tax brackets and to avoid trapping the income in the estate. Also consider the income tax deferral for beneficiaries by selecting a noncalendar tax year. Because most beneficiaries file on calendar years, there is the possibility to defer the beneficiaries' reporting of income until they file their tax returns for the year the estate's taxable year ends.

Tax Liability for Non-Qualified Stock Options Gifted Before Death.

If a decedent gifted NSOs during her lifetime (**ISOs may not be transferred**) and the options remain unexercised by the donee, the estate continues to be liable for ordinary income tax when the donee exercises the NSOs. The estate must remain open until all options have been exercised by the donees. The executor or administrator has no control over the timing of the exercise. If the underlying stock has appreciated, the estate may incur significant income tax liability.

Valuation Methods.

The intrinsic value (the excess of the fair market

value over the cost to exercise the option, or the spread) was often used for estate tax valuation of stock options until 1998. Rev. Proc. 98-34, 1998-1 C. B. 983 sets forth a safe harbor methodology for valuing vested employee stock options. If the procedure is followed, the IRS will treat the valuation and option as “properly determined for transfer tax purposes.” If Rev. Proc. 98-34 is followed, the notation “FILED PURSUANT TO REV. PROC. 98-34” should be printed at the top of Form 706. Unvested options and options for stock not publicly traded are not covered by Rev. Proc. 98-34. The Rev. Proc. 98-34 model is essentially the Black-Scholes model, with slight modification. The Rev. Proc. 98-34 formula should be used even where the stock’s value is equal to or less than the option’s exercise price (often referred to as “underwater options”). A zero value may not be accepted by the IRS. Notably, the Rev. Proc. 98-34 formula will always return a positive value for underwater options, because option pricing models presume that any stock, if given enough time, has a probability of rebounding. Keep in mind that no discounting for lack of marketability or otherwise is permitted under Rev. Proc. 98-34. The executor or administrator should hire an independent appraiser if the executor would like to consider a discount.

Alternate Valuation Election.

Alternate valuation affects the basis of ISOs, which receive a new basis on a decedent’s date of death. Therefore, the election affects the capital gain or loss for income tax purposes when the estate or beneficiary sells the stock acquired by exercise of the option. The election for alternate valuation affects the income tax basis of the decedent’s assets for gain or loss purposes, except for NSOs, which are considered IRD. Generally, though, the election is worthwhile because the estate tax rates are considerably higher than income tax rates. Keep in mind, however, that the alternate valuation regulations provide special guidance on valuing

property that is only affected by a “lapse of time.” Reg. §20.2032-1(a)(3). Options are affected by a lapse of time because one aspect of their value under Black-Scholes and other formulas depends on the amount of time remaining for the optionee to exercise the option. These types of property interests that are affected by a lapse of time must be valued as of the decedent’s date of death, instead of the six-month anniversary date, but they may be adjusted for differences in value that are not due to the mere lapse of time from the decedent’s date of death.

Alternative Minimum Tax.

If the estate exercises ISOs on stock that has appreciated since the decedent’s date of death and the estate does not dispose of the stock before its tax year-end, the estate may incur alternative minimum tax (AMT). Similar to individuals, the estate must include the ISO option spread on the exercise date in its AMT income in the year the option is exercised. The executor must increase the estate’s AMT income by the difference between the ISO basis and the stock’s fair market value on the exercise date.

Watch out for State Income Taxation.

Compensation income may be reportable on a state income tax return for the state in which the individual or decedent earned the income, notwithstanding the individual’s residency or domicile at the time the compensation income is realized. If a decedent held options received in connection with his employment in a state different from his domicile state at death, an income tax return may be required for that state on realization of the income.

THIS INFORMATION IS PROVIDED FOR EDUCATIONAL AND INFORMATIONAL PURPOSES ONLY AND IS NOT INTENDED AND SHOULD NOT BE CONSTRUED AS LEGAL ADVICE.

Recent Probate Case of Interest

Maimonides School v. Coles, Trustee

Case Summary by Christopher D. Perry, Esq.
2008 WL 466197 (Mass.App.Ct., February 25, 2008)

Chris Perry is the Sr. Fiduciary Officer at Northern Trust in Boston, in charge of trust and account administration and client relationships.

Legal Issues: Testamentary Capacity and Undue Influence.

Facts

The decedent, Leonard R. Brener (“Brener”), died on December 8, 2001, at age eighty-five. He never married and died childless. He had conducted a successful career as a stock broker and died with an estate of approximately \$8 million. Several nieces and nephews survived him.

In 1997, Brener executed a pour-over will and a revocable inter-vivos self-declaration of trust. He named his friend and accountant of thirty years, Harris Coles (“Coles”) as successor trustee on his death. In the trust, he gave \$50,000 to his niece, Lois Rosen, \$10,000 to a nephew, \$15,000 to Coles, and \$15,000 to Coles’ wife. The rest of the trust he gave to such charitable organizations as the trustee determined.

In 1997, Brener also entered into a gift agreement with Maimonides School, committing \$750,000 to the school during his lifetime and \$2 million at death; provided, however, that Maimonides was not allowed to enforce the contract to the extent Brener’s estate needed funds to pay bequests to friends and family.

In early 2001, Brener was diagnosed with esophageal cancer. The medical records at the time indicated that he was clinically depressed

and expressed thoughts of suicide. They also described Brener as “alert, oriented, lucid, coherent.”

Lois Rosen, Brener’s niece, and her husband (“Herbert”), had maintained a close relationship with Brener for many years. Brener was Herbert’s stock broker since 1969. The Rosens had regularly visited with Brener in an assisted living residence and then helped him to move to a condominium. They attended to him until his death.

In February, 2001, at Coles’ suggestion, Brener executed a First Amendment to his revocable trust by which he designed 30% of the rest of his estate, after the specific gifts described above, to Maimonides School, 30% to the Perkins School for the Blind, 10% to the Carroll Center for the Blind, and 30% to Beth Israel Deaconess Medical Center. Before that time, other than the 1997 gift agreement with Maimonides, Brener had made only nominal gifts to charity.

In October, 2001, Brener was admitted to the hospital, and shortly thereafter suffered from stroke-like symptoms. Lois Rosen was with him at the time and reported the symptoms to the nurse. Within a few days of the incident, Brener had recovered. The medical records state that during this period after his stroke-like symptoms he was “awake, alert...[a]ble

to tell [the doctor] where he [was], date, very joking, good naming...memory recall.”

On October 30, 2001, Brener executed the Second Amendment to his revocable trust, effectively substituting the Rosens for the four charitable institutions as the recipients of the residue of the estates. Affidavits presented to the Court indicated that on October 29, 2001, Brener told Coles of his intention to amend his trust, that he had given Maimonides School “enough,” and that he wanted to give the residue of his estate to the Rosens “for the love and affection that they had shown” him. Coles later received a call from attorney Shaw confirming Brener’s request for a second amendment. The Rosens were not present during the signing of the Second Amendment to trust, and later testified that they did not know they had been named in the trust. Attorney Shaw testified that Brener knew “what he was doing,” and “[d]idn’t show any confusion.” In the Second Amendment to his revocable trust, Brener removed the \$15,000 gift to Coles’ wife. Testimony at the time described Brener as alert, oriented, lucid, mentally clear, with good memory, coherent and conversant.

During October and November, 2001, Brener made a series of alternative gifts to Maimonides School, worth approximately \$338,000.

Brener died on December 8, 2001.

Probate Court Decision

The four charitable institutions (“contestants”) brought an action in the Probate and Family Court for a declaratory judgment invalidating the October trust amendment, alleging Brener lacked mental capacity and that he was the subject of undue influence at the time. Coles and the Rosens (“proponents”) were named defendants. In support of their action, the contestants presented the expert testimony of

two doctors, neither of whom had ever seen or treated Brener. Proponents and contestants presented cross motions for summary judgment. The judge of the Probate Court denied the contestants’ motion, allowed the proponents’ motion, and entered a summary judgment of dismissal of the claims of the charitable institutions.

Legal Issues

Did the trial judge err by applying the standard for testamentary capacity, rather than the standard for capacity to contract, when deciding the summary judgment motions on the question of whether Brener lacked mental capacity to execute the Second Amendment to this trust?

Did the trial judge err by finding that the contestants’ expert witnesses failed to provide evidence sufficient to defeat the presumption that Brener had the requisite mental capacity?

Did the trial judge err in finding no genuine issue as to whether Brener’s gift to the Rosens was the subject of undue influence?

Discussion and Decisions

Standard for Testamentary Capacity Upheld.

The Court of Appeals held that the trial judge correctly applied the standard for testamentary capacity and not the more demanding test for contractual capacity, finding that Brener’s pour-over will and the second trust amendment comprised “parts of an interrelated whole.” The Court reasoned that Brener’s trust instruments were not complex and, therefore, they did not require contractual capacity for their intelligent creation and execution. Furthermore, the Court reasoned that the use of one standard for mental capacity to execute a pour-over will and another standard to execute a simultaneous

revocable inter-vivos trust would unnecessarily and impractically risk inconsistent results, citing *Clymer v. Mayo*, 393 Mass. 754, 766 (1985).

Presumption of Mental Capacity Not Defeated.

The Court upheld the trial court's decision that Brener possessed the requisite testamentary capacity. The Court found that the testimony of two expert witnesses offered insufficient evidence to defeat the presumption that Brener had requisite mental capacity to execute the second trust amendment. The Court noted that the proponents had the burden of proof on the issue of testamentary capacity. The Court found the doctors' testimony lacking in evidence to suggest that Brener was senile or delusional, or that he did not recognize his family and friends. The Court noted that the promise of one of the expert witnesses to "expand on his affidavit at trial" was insufficient to forestall a motion for summary judgment. It was noted in a footnote that one of the expert witnesses had been chairman of the Maimonides School board of trustees for the previous fifteen years.

Failure to Prove Undue Influence. In order to prove undue influence, the moving party must prove, among other factors, that an unnatural disposition was made. The Court upheld the trial court's decision that the evidence presented by the contestant's expert witnesses failed to create a genuine issue as to whether Brener's gift to the Rosens was unnatural. The Court found that the gift to the Rosens was consistent with the natural gratitude a person in Brener's situation would have felt for a relative who offered comfort through the bleakness of terminal illness. Another factor that must be established in order to prove undue influence is that an opportunity to unduly influence the testator was in fact used. The Court found that the Rosens did not involve themselves in any way in Brener's estate planning affairs, nor did they prevent family, friends or the contestants from visiting and communicating with Brener.

Section Leadership

Section Co-Chairs

Melvin Warshaw
JP Morgan Private Bank
50 Rowes Wharf, 4th Floor
Boston, MA 02110
(617) 310-0511
melvin.a.warshaw@jpmorgan.com

Nancy Dempze
Hemenway & Barnes
60 State St
Boston, MA 02109
(617) 557-9726
ndempze@hembar.com

Ad Hoc Spousal Elective Share

Deborah Manus
Nutter McClennen & Fish LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210
(617) 439-2000
dmanus@nutter.com

Colin Korzec
U.S. Trust Company, N.A.
Vice President and Trust Counsel
225 Franklin Street
Boston, MA 02110
(617) 897-3254
colin_korzec@ustrust.com

Ad Hoc Uniform Probate Code

Raymond Young
Young & Bayle
150 Federal St
Boston, MA 02110
(617) 737-0404
ryoung@youngandbayle.com

Colin Korzec
U.S. Trust Company, N.A.
Vice President and Trust Counsel
225 Franklin Street
Boston, MA 02110
(617) 897-3254
colin_korzec@ustrust.com

CLE Committee

Kelly Aylward
Law Firm of Bove & Langa, P.C.
Ten Tremont Street, Suite 600
Boston, MA 02108
(617) 720-6040
aylward@bovelanga.com

Josh Miller
Holland & Knight LLP
10 St. James Avenue
Boston, MA 02116
(617) 305-2056
joshua.miller@hklaw.com

Elder Law & Disability Planning

Ken Shulman
Day Pitney LLP
One International Place
Boston, MA 02110
(617) 345-4789
kwshulman@daypitney.com

Marjorie Suisman
Davis, Malm & D'Agostine, P.C.
1 Boston Place
Boston, MA 02108
(617) 589-3836
msuisman@davismalm.com

Estate Planning Committee

Anne Marie Towle
Choate, Hall & Stewart LLP
Two International Place
34th Floor
Boston, MA 02110
(617) 248-5129
amtowle@choate.com

Stephen Ziobrowski
Day Pitney LLP
One International Place, 17th Floor
Boston, MA 02110
(617) 345-4600
sziobrowski@daypitney.com

Estate Planning Fundamentals Committee

Jennifer Shea
Bank of America
100 Federal Street
Boston, MA 02110
(617) 434-7068
jennifer.n.shea@bankofamerica.com

M. Christine Prina
Nutter McClennen & Fish LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 439-2496
cprina@nutter.com

Fiduciary Litigation Committee

Steven Gurdin
Conn Kavanaugh Rosenthal Peisch & Ford, LLP
Ten Post Office Square
Boston, MA 02109
(617) 482-8200
sgurdin@ckrpf.com

Joseph Bierwirth
Hemenway & Barnes
60 State St
Boston, MA 02109
(617) 557-9728
jbierwirth@hembar.com

Pro Bono Committee

Michael Baker
544 Central Street
Holliston, MA 01746
(508) 429-0728
michael_baker@verizon.net

Suma Nair
Goulston & Storrs - A Professional Corporation
400 Atlantic Ave
Boston, MA 02210
(617) 574-7913
snair@goulstonstorrs.com

Trust & Estates Communications

Amiel Weinstock
K&L Gates
State Street Financial
One Lincoln Street
Boston, MA 02111
(617) 951-9093
amiel.weinstock@klgates.com

Christopher Perry
Northern Trust
One International Place
Boston, MA 02110
(617) 235-1835
cdp7@ntrs.com

Trust & Estates Legislative Committee

Andrew Rothstein
Goulston & Storrs - A Professional
Corporation
400 Atlantic Ave.
Boston, MA 02110-3333
(617) 574-4089
arothstein@goulstonstorrs.com

Jay Rosenbaum
Edwards Angell Palmer & Dodge LLP
111 Huntington Ave.
Boston, MA 02199
(617) 239-0382
jrosenbaum@eapdlaw.com

Trust & Estates New Developments

Ellen Berkowitz
Holland & Knight LLP
10 St. James Avenue
Boston, MA 02116
(617) 573-0289
ellen.berkowitz@hklaw.com

Michelle Porter
Goulston & Storrs - A Professional
Corporation
400 Atlantic Ave
Boston, MA 02210
(617) 482-1776
mporter@goulstonstorrs.com