



Boston Bar
ASSOCIATION

SPRING 2009

Trusts & Estates Section

Spring 2009 Newsletter

Trusts & Estates Section Co-chairs



Nancy Ellen Dempze

Hemenway & Barnes LLP
ndempze@hembar.com



Anne Marie Towle

Athena Capital Advisors
amtowle@athenacapital.com

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Upcoming Events

The New Massachusetts Adopted Child Statute

Thursday, May 28, 2009 - 12:00 PM

Hemenway & Barnes LLP, 60 State Street, Boston, 8th floor

Marc J. Bloostein, Ropes & Gray LLP, will lead a discussion of chapter 524 of the Acts of 2008, now known as the Adopted Child Statute. The discussion will cover the law prior to the new statute, the circumstances behind its enactment, and an update what the BBA (and others) are doing in response. The discussion will also cover practical courses of action for trustees of trusts subject to the new statute.

BBA Law Day Dinner 2009

Monday, June 1, 2009 - 5:30 p.m. Reception, 7:00 pm Dinner

Seaport World Trade Center

Join fellow colleagues at the largest legal gathering in the Greater Boston community! The BBA is putting together a table for the Trusts & Estates Section! If you are interested in purchasing a ticket to the event, and sitting with other Section members, please contact Katie Elmore at [kelmore@bostonbar.org](mailto:kelmor@bostonbar.org) or (617) 778-1904. The deadline to register is May 15, 2009.

Trusts & Estates Year In Review

Monday, June 15, 2009 - 4:00 pm - 7:00 pm

Past Programs

An Overview of Long-Term Care Insurance - April 29, 2009

Join David F. Keefe III, Eagle Strategies LLC, for a class that is truly an overview of Long-Term Care Insurance. Find answers to your questions. What is it? What does it cover? How much does it cost? What are the alternatives? In addition, Mr. Keefe will discuss the current environment for Long-term care insurance. The insurance industry has been affected by the economic downturn. Learn about financial ratings of insurance companies and how to choose a company to work with. Special focus will be on product design, 2009 tax deductibility, and examples of current rates.

An Introduction to QPRTs - April 29, 2009

Dennis R. Delaney, Hemenway & Barnes, LLP, will review the basic principles and relevant Internal Revenue Code sections governing qualified personal residence trusts ("QPRTs"). This brown bag lunch will be an excellent introduction to QPRTs for new lawyers, as well as a good refresher for more experienced practitioners.

Life Insurance Basics - May 12, 2009 - 12:30 pm

Lawyer, financial planner and former insurance professional Francis J. Sennott, Ropes & Gray LLP, will discuss various types of life insurance policies, their special features and the ways in which they can be used most effectively in estate planning. This presentation will help new lawyers gain a better grasp of the nuts and bolts of their clients' life insurance policies and understand more fully which types of policies are most appropriate for particular planning situations.

An Act Further Regulating the Rights of Adopted Children

By Marc J. Bloostein

Ropes & Gray LLP

On January 15, 2009 Governor Patrick signed into law chapter 524 of the Acts of 2008, and it became effective 90 days later. That new law, called “An Act Further Regulating the Rights of Adopted Children,” changed the clearly understood rule of construction that applied to terms like “child”, “grandchild” and “issue” in wills, trusts and similar instruments executed before August 26, 1958. When the Legislature modernized the law in 1958 to presume that adopted persons are included in such terms unless the instrument plainly states otherwise, it made the new law effective only to instruments executed after its effective date. The old law, which presumed adopted persons to be excluded unless they were adopted by the testator or settlor, continued to apply to earlier instruments—until now. Chapter 524 provides, quite simply, “Section 8 of chapter 210 of the General Laws [which contains the presumption including adopted persons in terms like ‘child,’ ‘grandchild’ and ‘issue’] shall apply to all grants, trust settlements, entails, devises, or bequests executed at any time, but this section shall not affect distributions made before May 1, 2009 under testamentary instruments executed before September 1, 1969.”

Chapter 524 came as a surprise to the trusts and estates bar, banks and other professional trustees. This is in sharp contrast with other recent legislation such as the Massachusetts Uniform Probate Code, the Massachusetts Principal and Income Act and the Massachusetts Prudent Investor Act, each of which underwent a thorough review process. A careful review of chapter 524 would have focused on at least three significant issues.

First, there is uncertainty about the provision in chapter 524 stating the new rule does not affect distributions under “testamentary instruments” made before May 1, 2009. The meaning of “testamentary instruments” is

unclear—“testamentary” usually refers to a will, but “instruments” suggests a broader meaning. Moreover, it is hard to understand why the new statute should apply to any distributions under any instrument made before the law became effective, and as a practical matter how that might work.

Second, lawyers have relied on the current state of the law, and have counseled numerous clients about how to provide for adopted children who were not benefited by pre-1958 family trusts. In many cases where such trusts benefit only natural-born descendants, parents and grandparents with both natural and adopted descendants have adjusted their estate plans to compensate the adopted descendants who were not thought to be beneficiaries under the pre-1958 trusts. In some cases these plans can be revised to take into account this new development, but in others the parents or grandparents have died and their corrective estate plans are irrevocable; in those cases their intentions will be thwarted if their adopted descendants now also benefit under the pre-1958 trusts. It is instructive that in two cases in which the Supreme Judicial Court created new judicial rules affecting property rights—*Sullivan v. Burkin*, 390 Mass. 864 (1984) (including a revocable trust in the spousal elective share) and *Powers v. Wilkinson*, 399 Mass. 650 (1987) (changing the common law presumption to include nonmarital descendants in the term “issue”)—the Court gave its decision only prospective effect. In *Powers* the Court explained, “As was said in *Sullivan*, supra, ‘The rule of *Kerwin v. Donaghy* [317 Mass. 559 (1945)] has been adhered to in this Commonwealth for almost forty years The Bar has been entitled reasonably to rely on that rule in advising clients. In the area of property law, the retroactive invalidation of an established principle is to be undertaken with great caution.’” 399 Mass. at 662.

Finally, there is a question about the constitutionality of chapter 524. The issue is whether the Legislature, in changing the rule of construction operative on pre-1958 instruments and thereby diminishing the established and enforceable rights of natural born descendants, deprived those individuals of property without due process of law. The analysis under both the United States and Massachusetts Constitutions is whether retroactive application is reasonable considering the nature of the public interest that motivated the Legislature to enact the retroactive statute, the nature of the rights affected retroactively, and the extent or scope of the statutory effect or impact. See *American Mfrs. Mut. Ins. Co. v. Comm'r*, 374 Mass. 181 (1978). Although courts avoid declaring statutes unconstitutional if at all possible, application of the balancing test in this case could result in the chapter 524 being held unconstitutional. It is hard to say the public interest is served by chapter 524 given that the current version of G.L. c. 210, § 8 has been on the books since 1958 and this new provision making it retroactive has come along 51 years later—not exactly evidence of a pressing need. Looking at the nature of the rights affected, the cases suggest that a retroactive statute’s impact on “vested” property rights is an important factor. See, e.g., *Carleton v. Framingham*, 418 Mass. 623 (1994); *American Mfrs. Mut. Ins. Co. v. Comm'r*, 374 Mass. 181 (1978); *Pittsley v. David*, 298 Mass. 552 (1937). A beneficial interest in a trust is clearly a property right. Moreover, the reliance factor is of considerable importance in applying this balancing test—as noted above, the rights of natural born beneficiaries were long-standing, and people planned their affairs based upon the well understood meaning of the terms of pre-1958 trusts.

Although the Supreme Judicial Court has not faced the due process issue in the context of a retroactive change to a statutory rule of construction, the history of G.L. c. 210, § 8 is instructive. In 1969, the Legislature made the current presumption including adopted persons in terms like “issue” retroactive to all instruments, with a constitutional savings provisions that did not apply the rule retroactively “with respect to any interests or right therein which had vested prior to [September 1, 1969].” St. 1969, c. 27. In *Billings v. Fowler*, 361 Mass. 230 (1972), the Court considered what the 1969 statute meant by vested interests and rights. It construed the term broadly

to protect the constitutional rights of biological children and grandchildren living when the statute was enacted, noting, “If such substantial interests were to be taken away from them by statute, there would be a significant question whether and to what extent this could constitutionally be done.” *Id.* at 241. Application of the constitutional savings provision of the 1969 law created uncertainties, and in 1975 the Legislature repealed the 1969 law, restoring certainty in this area. St. 1975, c. 769.

Chapter 524 presents a challenge to the trusts and estates bar and to professional trustees. There may be an effort to repeal the law, and if is not repealed in the near future, there likely will be litigation challenging its constitutionality. In the meantime, though, trustees have to determine whether they are administering trusts affected by the law, and if so, they have to decide how to handle current distributions during this period of uncertainty.

Ten Significant Changes Under the Massachusetts Uniform Probate Code

By Leiha Macauley and Raymond H. Young

Day Pitney and Young & Bayle (respectively)

- 1. Effective Date and Trusts and Estates Affected.** Provisions relating to guardians and guardianship proceedings, personal representative bonds, and durable powers of attorney go into effect on July 1, 2009. The remainder of the MUPC goes into effect on July 1, 2011. The MUPC applies to pre-existing governing instruments, but it does not apply to those instruments that became irrevocable prior to its effective date. In general, however, administration of all trusts, whenever executed, and including those that became irrevocable prior to the effective date of the MUPC, will be governed by the provisions of Article VII of the MUPC. The MUPC also will apply to any proceedings in court pending on, or commenced after, its effective date, regardless of the date of the death of the decedent, unless the court finds the former procedure should apply in a particular matter.
- 2. Informal Probate and Appointment Proceedings.** If a decedent dies testate, a magistrate may issue a statement of informal probate of the will and appoint a personal representative upon the filing of a petition with the original will and a death certificate, and at least seven days' notice to heirs and devisees.
- 3. Changes to Intestate Succession.** The MUPC directs that all property, both real and personal, not disposed of by a decedent's will passes to heirs in the same manner. Also, the MUPC enlarges a surviving spouse's share of an intestate estate to
 - All intestate property if the decedent's and surviving spouse's only surviving descendants are descendants of their marriage;
 - \$200,000 plus $\frac{3}{4}$ of any balance if the decedent is survived by a parent but no descendants;
 - \$200,000 plus $\frac{1}{2}$ of the balance if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more descendants who are not descendants of the decedent; or
 - \$100,000 plus $\frac{1}{2}$ of the balance if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.
- 4. Premarital Wills.** Under the MUPC, marriage no longer revokes a premarital will, despite no provision in the will stating that it was executed in contemplation of the marriage. Unless a will expresses a contrary intention, a surviving spouse will receive an intestate share of that portion of the estate passing under the will to anyone other than the decedent's descendants.
- 5. No Continuing Court Oversight for Trusts.** Testamentary or inter vivos trust petitions for various matters, including appointment and removal of a trustee, settlement of accounts, determination of questions arising out of administration, compromise of some controversies, and termination and distribution, will not subject the trust to continuing supervisory proceedings.
- 6. Foreclosing Beneficiary Claims.** A beneficiary has only six months after receiving a final account or statement showing the trust termination or termination of the trustee's appointment to commence a breach of trust claim. Such receipt by a minor beneficiary's parent will likewise bar a claim commencing more than six months after receipt.
- 7. Trustee Notice Requirements.** Within 30 days of accepting a trustee appointment, the trustee must notify all current beneficiaries (and beneficiaries with future interests, if possible) of (a) the appointment, (b) the court having jurisdiction over the trust, and (c) the trustee's name and address. A trustee is required to release annual

accountings and a copy of the governing instrument to a beneficiary who makes a request. A trustee has an express duty to administer the trust in a situs appropriate to the trust's purposes and its efficient management.

to a nursing facility after a court finding that the admission is in the incapacitated person's best interest, even if the incapacitated person does not object to the admission.

8. **Virtual Representation.** In formal proceedings concerning trusts and estates, the MUPC extends limited virtual representation, permitting a person who is not otherwise represented, or is unborn or unascertained, to be bound by an order to the extent his or her interest is represented by another party with a substantially identical interest. A parent may represent a minor child if there is no conflict of interest.
9. **Distinguishing Guardianship and Conservatorship.** The MUPC provides that a guardian will make decisions pertaining to the "incapacitated" person's support, care, health, and welfare, and a conservator will manage the "protected" person's property. Without good cause to act otherwise, the court will appoint as guardian or as conservator (or both) the individual named in the incapacitated person's most recent durable power of attorney. Both conservatorship and guardianship provisions list others entitled by successive priority.
10. **Increased Court Oversight of Guardians and Conservators.** The MUPC increases court oversight of all guardian and conservator appointments in the following manner:
 - Guardians must report in writing to the court within 60 days of appointment detailed information about the incapacitated person, his living arrangements, required services, the guardian's visits, plans for future care, opinions as to current care, and more.
 - Conservators are subject to the Uniform Prudent Investor Act and must provide an inventory of the protected person's estate within 90 days.
 - An annual report and review is required for a guardian and conservator.
 - The probate court may no longer grant a guardian authority to commit an individual to a mental health or retardation facility. Such authority may only be granted to a guardian by the district court. A guardian may only admit an incapacitated person

Case Summary: Gates v. Reilly, 453 Mass. 460 (2009)

By Joseph L. Bierwirth, Jr. and Shana Maldonado

Hemenway & Barnes LLP

On March 24, the Supreme Judicial Court decided a case of interest to those administering estates and those seeking to bring claims against estates. *Gates v. Reilly*, 453 Mass. 460 (2009). The decision contains an interesting discussion of the statute of limitations applicable to claims by creditors of an estate and the circumstances under which the Court may grant relief beyond the statutory limitations period. As with other cases dealing with this subject, the Court attempted to strike a balance between competing goals – the need of executors for certainty in closing estates and the public policy in not foreclosing legitimate claims due to the short limitations period ordinarily applicable to estates.

In *Gates*, the decedent owned a school and an interest in the property on which it was situated. Over the years, two of her nieces, plaintiffs *Gates* and *Russell*, worked at the school. The decedent repeatedly promised that *Gates* and *Russell* would become the sole owners of the school and property upon her death.

However, upon the decedent's death, her will left the estate to the decedent's eight nieces and nephews in equal shares. The plaintiffs initiated a superior court action in multiple counts as creditors of the estate pursuant to G.L. c. 197, § 9, seeking monetary damages based on the decedent's promises to them. The superior court granted the executors' motion to dismiss some of the claims as untimely, given that the action was filed more than one year after the decedent's death. The plaintiffs filed for relief from the dismissal by bringing a bill in equity in the county court under G.L. c. 197, § 10.

The Supreme Judicial Court found that justice and equity required consideration of the plaintiffs' claims under Section 10 because they were sufficiently grounded in law and fact and the defendants failed to show that they were prejudiced by the late filing of the claims. While recognizing that the purpose of the one-year statute of limitations is to expedite settlement of estates, the Court emphasized the remedial nature of Section 10 which implicates the equitable powers of the

courts.

The Court also concluded that the plaintiffs were not chargeable with culpable neglect in failing to prosecute their claims within the one-year limitations period because they relied on their attorneys' advice that their interests were being protected. Agency principles do not apply to petitions under Section 10 and the court found no fault with the petitioners themselves.

Of primary importance in the Court's decision was the fact that the executors knew of the plaintiffs' claims before the one-year period ran, due to the filing in the Probate Court of a notice of claim. In the future, executors charged with knowledge of a claim or potential claim should not ignore the Court's equitable power under Section 10 to reinstate claims – even those filed outside of the one-year short limitations period.

For more information contact Mr. Bierwirth at jbierwirth@hembar.com.

Section Leadership 2008-2009

Section Co-Chairs

Nancy Dempze
Hemenway & Barnes LLP
60 State Street
Boston MA 02109
617-557-9726
ndempze@hembar.com

Anne Marie Towle
Athena Capital Advisors LLC
55 Old Bedford Rd
Lincoln MA 01773
781-274-9300
amtowle@athenacapital.com

Ad Hoc Spousal Elective Share

Colin Korzec
U.S. Trust Company
225 Franklin Street
Boston MA 02110
617-897-3254
colin.korzec@ustrust.com

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

Ad Hoc Uniform Trust Code

Raymond Young
Young & Bayle
101 Arch Street
Boston MA 02108
617-737-0404
ryoung@youngandbayle.com

Melvin Warshaw
Financial Architects Partners
800 Boylston Street
Suite 3010
Boston MA 02199
617-259-2900
mwarshaw@fiarch.com

CLE

Kelly Aylward
Bove & Langa, P.C.
10 Tremont Street
Suite 600
Boston MA 02108
aylward@bovelanga.com

Susan Robb
Sullivan & Worcester LLP
One Post Office Square
Boston MA 02109
617-338-2462
srobb@sandw.com

Elder Law & Disability Planning

Ken Shulman
Day Pitney LLP
One International Place
17th Floor
Boston MA 02210
617-345-4789
kwshulman@daypitney.com

Steven Cohen
Cohen & Oalican, LLP
18 Tremont Street
Suite 903
Boston MA 02108
617-263-1035
scohen@cohenoalican.com

Estate Planning

Dennis Delaney
Hemenway & Barnes LLP
60 State Street
Boston MA 02109
617-557-9722
ddelaney@hembar.com

Peter Shapland
Day Pitney LLP
One International Place
17th Floor
Boston MA 02210
617-345-4766
pmsapland@daypitney.com

Estate Planning Fundamentals

Christine Keane
Nutter McClennen & Fish LLP
World Trade Center West
155 Seaport Boulevard
Boston MA 02210
617-439-2496
ckeane@nutter.com

Cameron Casey
Ropes & Gray LLP
One International Place
Boston MA 02110-2624
617-951-7987
cameron.casey@ropesgray.com

Fiduciary Litigation

Joshua Miller
Holland & Knight LLP
10 St. James Avenue
11th Floor
Boston MA 02116
617-305-2056
joshua.miller@hklaw.com

Robert O'Regan
Burns & Levinson LLP
125 Summer Street
Boston MA 02110
617-345-3000
roregan@burnslev.com

New Developments

Ellen Berkowitz
Holland & Knight LLP
10 St. James Avenue
11th Floor
Boston MA 02116
617-854-1413
ellen.berkowitz@hklaw.com

Leiha Macauley
Day Pitney LLP
One International Place
17th Floor
Boston MA 02210
617-345-4602
lmacauley@daypitney.com

Newsletter

Christopher Perry
Northern Trust
One International Place
Suite 1600
Boston MA 02110
617-235-1835
cdp7@ntrs.com

Bradley Van Buren
Holland & Knight LLP
10 St. James Avenue
11th Floor
Boston MA 02116
617-305-2086
bradley.vanburen@hklaw.com

Pro Bono

Suma Nair
Goulston & Storrs - A Professional
Corporation
400 Atlantic Ave
Boston MA 02210-3333
617-574-7913
snair@goulstonstorrs.com

Kathryn Muldoon
Goodwin Procter LLP
Exchange Place
53 State Street
Boston MA 02109
617 -570-1588
kmuldoon@goodwinprocter.com

Public Policy

Andrew Rothstein
Goulston & Storrs - A Professional
Corporation
400 Atlantic Ave
Boston MA 02210-3333
617-574-4089
arothstein@goulstonstorrs.com

Matthew Hillery
Edwards Angell Palmer & Dodge LLP
111 Huntington Avenue
Boston MA 02199
617-239-0289
mhillery@eapdlaw.com

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, **Bradley Van Buren** at bradley.vanburen@hklaw.com or **Christopher Perry** at cdp7@ntrs.com to pursue this further.