Boston Bar Association

Trusts & Estates Section

Winter 2009 **Newsletter**

A PUBLICATION OF THE BOSTON BAR ASSOCIATION TRUSTS & ESTATES SECTION

Calendar of Events

Long-Term Care Planning for the Second Marriage: Advanced Planning, Crisis Planning and Ethical Issues

Wednesday, February 25, 2009 - 12:30 pm
Boston Bar Association - 16 Beacon Street

Steve Cohen, Cohen & Oalican, LLP, and Ken W. Shulman, Day Pitney LLP, will discuss issues that arise when one spouse in a second marriage requires nursing home care or expensive care at home.

Topics will include:

-How does one handle the competing interests between the current spouse and the children of the first marriages?
-Can the attorney represent both spouses?
-What is the effect of pre-marital agreements?
- Is divorce a strategy that one should consider and, if so, when?

Keeping Your Head When All About You Are Losing Theirs: Dealing With A Layoff

Wednesday, February 25, 2009 - 4:00 pm
Boston Bar Association 16 Beacon Street

Gina Walcott, Lawyers Concerned for Lawyers, and Chris Morrison, Hanify & King, P.C., will lead a four panel progam covering a full range of issues and options in the current economy. This comprehensive program will provide insight for lawyers in all positions.

I. Be prepared
Maris Abbene and Marni Goldstein Caputo will provide their insight as career services professionals on how attorneys can be ready to "hit the ground running" on a job search.

II. Be Connected
A panel of attorneys who have been through a lay-off will discuss how they reacted, recovered, and became re-employed.

III. Be Smart
A panel of experts discuss resources available to recently laid-off lawyers (i.e., LCL, BBA, unemployment benefits, Cobra, etc).

IV. Be Creative
A Panel of lawyers from "alternative career paths" and hiring partners from local firms will talk about how a JD can remain relevant even if you are not practicing law.

BBA CLE: The New Massachusetts Uniform Probate Code

Thursday, March 12, 2009 - Conference: 3:00 - 6:00 pm, Reception: 6:00 - 7:00 pm
The Hyatt Regency Hotel - One Avenue de Lafayette

The Trusts & Estates Section of the Boston Bar Association is currently planning a comprehensive CLE program on the new Massachusetts Uniform Probate Code.
The program will cover all aspects of the new legislation, including:

-Guardianship and Conservatorship Provisions
-Estate Administration
-Potential Necessary Changes to Estate Planning Documents
-Trust Administration
-An Overview of the Effective Date Provisions

Inside this Issue

Recent News

On January 15, 2009, Governor Deval L. Patrick signed Senate Bill Number 2622, enacting the Massachusetts Uniform Probate Code. The MUPC will simplify and streamline the administrative process for routine trust and estate matters, thereby reducing costs and delays for Massachusetts residents. The MUPC is also designed to modernize the laws governing Massachusetts trusts and estates into the twenty-first century, and to align Massachusetts trust and estate laws more closely with those of other jurisdictions. 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 governing instruments that became irrevocable prior to the date the MUPC becomes effective.

Notwithstanding, the act will apply to any proceedings in court then pending, or thereafter commenced, regardless of the date of the death of the decedent, unless the court finds the former procedure should be made applicable in a particular matter.

Unless there is a clear indication of the contrary intent, or the governing instrument became irrevocable prior to the effective date, any rule of construction or presumption provided in the MUPC applies to governing instruments executed before the effective date. The MUPC will not affect the qualification of any personal representatives (including guardians of minors and incompetent individuals) appointed prior to the effective date of the MUPC, but those representatives will have only the powers that are conferred and the duties imposed by the MUPC for any acts occurring after the effective date. Keep your eye out for the March/April Boston Bar Journal and the Spring Trusts & Estates Section Newsletter, both of which will include more substantive articles on the MUPC.

What is Reasonable? Determining Fiduciary Fees in Massachusetts

By Joshua Miller, Esq.

For an attorney in Massachusetts, serving as an executor or trustee ("fiduciary") for a trust or estate can be a rewarding and fulfilling role. However, there are numerous pitfalls for an attorney when setting and collecting his or her fees for serving as a fiduciary.

The will or trust, as the case may be, controls the fees a fiduciary may charge for providing fiduciary services. However, the instrument often simply states that the fiduciary is entitled to reasonable compensation (or fails to address the issue entirely). Similarly, Massachusetts General Statutes c. 206, §16 states that "[a]n executor, administrator, guardian, conservator or trustee shall be allowed his reasonable expenses, costs and counsel fees incurred in the execution of his trust, and shall have such compensation for services as the court may allow." Accordingly, to determine what is considered "reasonable," the fiduciary must look to Massachusetts case law.

There are a few key cases in Massachusetts that guide the fiduciary in setting reasonable fees. In 1948, the Supreme Judicial Court in McMahon v. Krapf, 323 Mass. 118 (1948), enumerated the factors to be used in determining reasonableness of trustee fees. The Court's list included size of the estate, marketable nature of the assets, factual and legal questions involved, time expended, skill and ability employed, amount usually paid to others for similar work and results accomplished. Id. at 123. None of these factors alone is decisive. These standards are similar to those used to establish the reasonableness of legal fees. The determination how the factors are applied to the particular facts of the case at hand rests largely in the discretion of the probate court judge. The Court in Corcoran v. Thomas, 6 Mass. App. Ct. 1990 (1978), held that "[t]he only rule of law is that the fiduciary is to receive just and reasonable compensation for all services performed in his trust." The Corcoran Court then continued by stating that "[e]verything that a fiduciary does rightly and properly is to be paid for…." Id. Consideration is also given to the net benefit that may result from the fiduciary's services. Sullivan v. Sullivan, 335 Mass. 268 (1957). Finally, if multiple fiduciaries are serving, each is entitled to compensation in proportion to his or her services.

Many of the cases involving fiduciary fees, including the cases mentioned above, involve the situation where the results obtained by the fiduciary were unfavorable to the trust or estate. For example, the executor in McMahon paid unwarranted bills and incurred unnecessary expenditures that were detrimental to the estate. In Corcoran, the executor charged the estate for fees ordinarily charged by a real estate broker for the sale of the real estate. The Court prevented the executor from taking the broker's fee because, in applying some of the factors enumerated above, such as the time expended and skill involved, the services performed by the executor in selling the property did not warrant the fee. What is interesting to note about the Corcoran case is that the Court specifically did not take into account the general commissions paid to a real estate broker, despite the amount usually paid to others for similar work being one of the factors from McMahon.

Among all the factors from McMahon, time expended has been determinative in calculating reasonable fees for an attorney acting as a fiduciary. In Grimes v. Perkins School for the Blind, 22 Mass. App. Ct. 439 (1986), Mr. Grimes was acting both as the executor and the attorney for the estate. It is not uncommon for an attorney to act in multiple roles and the Court acknowledged that being one's own attorney may be efficient. However, in reviewing Mr. Grimes' time records, the Court took issue not only with the amount of time Mr. Grimes spent on various tasks, but that he did not separate out his time between his role as executor and his role as attorney. There was a concern that the estate was getting billed twice for the same service and Mr. Grimes was charging his hourly rate for "humdrum work," such as going to the post office. The Court in Grimes also noted that no special skills were required, the case was not complex, it was a small estate and Mr. Grimes did not produce an appreciable benefit to the estate.

An attorney acting as a fiduciary will get called on to perform many different tasks. In some cases, it would be more appropriate for the executor to hire someone to perform the work, then to do it himself and charge his hourly rate. For example, if the fiduciary mows the lawn at the decedent's house, he or she should not charge his or her standard rate. On the other hand, there are other responsibilities that require the skill and knowledge of an attorney or professional, such as the sale of property, interpretation of a legal document, and preparation of an estate or fiduciary tax return, in which it is proper to charge his or her hourly rate. Therefore, if an attorney is acting in multiple roles, prior to performing a certain task, he or she should determine whether it should be performed in his or her role as attorney, fiduciary or delegated to someone at a more appropriate billing rate.

Corporate trustees, banks and trust offices very often use fee schedules to charge for their services as fiduciary. However, such percentage schedules are not appropriate for an individual fiduciary. If a testator or settlor appoints a corporate fiduciary with a fee schedule, there is an inference that the fee schedule was known and agreed to. This is not the situation with an individual fiduciary. In the Grimes case, an expert was presented who relied on fee schedules to attempt to prove the reasonableness of the fees. The Court held that "there is no rule of law and no principal of right by which such commissions are to be charged or allowed without regard to the rendition of actual services therefore." Grimes, 22 Mass. App. Ct. at 443. A percentage schedule may be used as a guide, but it is "not to be mechanically applied without consideration of the care, thought and intelligence" which are given to the service of the fiduciary. Id. at 444. In trusts and estates with charitable beneficiaries, the Massachusetts Attorney General has objected to individual fiduciaries who charged fees solely based on a schedule and did not provide any further substantiation to the reasonableness of their fees. If an attorney would like to charge a fee schedule for his or her services as a fiduciary, that should be discussed when the controlling document is drafted and made a part of such instrument.

If the instrument is silent as to the amount of fiduciary fees charged to the estate or trust, the attorney must look to the statute and Massachusetts case law to determine how much he or she should charge for serving as the fiduciary. The attorney is entitled to receive the fair value of his or her services and the amount charged should be reasonable based on the services provided and the factors set forth in McMahon. Relying on Massachusetts case law to set fees is challenging because much of that case law is based on situations where the actions by the fiduciary were a detriment to the estate or trust. These cases do not involve the situation where an additional fee is warranted because the actions by the executor or trustee provided a windfall. Therefore, when the attorney is charging fiduciary fees, he or she should determine the appropriate fees to charge by applying the factors enumerated in McMahon to the services provided and the results obtained.

May 1, 2009 Deadline to Comply With the New Massachusetts Data Security Requirements

By David L. Silvian and Timothy H. Madden

All trusts and estates practitioners should be aware of new Massachusetts data security requirements that will apply beginning on May 1, 2009. For the details, see M. G. L. Ch. 93H and the implementing regulations, Standards for Protection of Personal Information of Residents of the Commonwealth, 201 CMR 17.00.

It is important to be aware that these requirements apply to any person or business possessing the personal information of Massachusetts residents. Its scope is not limited to financial institutions or large companies.

The Regulations will require entities holding personal information of Massachusetts residents to establish a comprehensive, written information security program. The program should, among other things:

-identify and assess internal and external security risks and take steps to limit those risks
-inventory all systems (electronic and paper) that hold such information
-develop policies regarding how employees are allowed to transport and access personal information outside of the office
-limit access to personal information to those employees reasonably required to know such information; and
-encrypt "to the extent technically feasible" all wirelessly transmitted data and documents sent over the Internet or saved on laptops or other devices.

In addition, all entities subject to the Regulations must obtain written certification from third-party providers as to the third-party's compliance with the Regulations prior to January 1, 2010. The deadline for ensuring encryption of portable devices other than laptops is also January 1, 2010.

A company possesses personal information, and is therefore subject to the new requirements, if it possesses the following, unless obtained from a publicly available source:

- a Massachusetts resident's first name (or initial) and last name

- in combination with any of the following:

    • Social Security number,

    • driver's license number or state-issued identification number, or

    • credit or debit card or other financial account number (without regard to whether any required PIN or security code is included).

-Financial account is not defined in the regulations, but read broadly it would include bank accounts, brokerage accounts, retirement plans, life insurance and employee benefit information.

-The rules expressly apply whether personal information is stored in paper or electronic format.

We should all be taking a closer look at these regulations and acting to implement their requirements as the May 1 deadline approaches.

For further information, see Bingham McCutchen's Privacy and Security Alerts at http://www.bingham.com/PracticePub.aspx?PracticeID=27, or contact **Mark E. Robinson**, Partner, or **Timothy H. Madden**, Counsel, at the Boston office of Bingham McCutchen LLP. They have advised numerous clients on data security regulations and data breach incidents.

An Overview of SIPC and FDIC Rules

By Leiha Macauley

Recent financial markets turmoil is prompting individuals to examine more closely the status of the brokerage firms that hold securities on their behalf and the banks and savings institutions in which they have deposits. In the event of a brokerage firm's insolvency, customer investment accounts may be protected by the Securities Investor Protection Corporation (SIPC). In the event of a bank failure, customer deposits may be protected by the Federal Deposition Insurance Corporation (FDIC). The following is a brief summary of SIPC and FDIC protections.

Is the Institution Covered by FDIC or SIPC?

The determination of whether an institution is covered by FDIC or SIPC is based on whether the institution is a bank or a broker-dealer. Banks lend funds received through customer deposits, and insure those deposits through the FDIC. Broker-dealers operate to connect buyers and sellers of securities, are regulated by the Securities and Exchange Commission (SEC), and are SIPC members.

SIPC

SIPC acts when a brokerage firm fails owing customers cash and securities. Historically, most persons who are eligible get their investments back from SIPC. When a brokerage is closed due to bankruptcy or other financial difficulties and customer assets are missing, SIPC steps in as quickly as possible and, within certain limits, works to return customers' cash, stock and other securities. However, not everyone, and not every loss, is protected by SIPC.

SIPC is not designed to make investors whole when the value of their investments falls. SIPC merely replaces missing stocks and other securities to the extent possible, even if those missing investments have increased in value. Importantly, SIPC does not compensate all victims in the event of loss due to investment fraud.

Customers of a failed brokerage firm get back all securities (such as stocks and bonds) that already are registered in their name or are in the process of being registered. The firm's remaining customer assets are then divided on a pro rata basis with funds shared in proportion to the size of claims. If sufficient funds are not available in the firm's customer accounts to satisfy claims within these limits, the reserve funds of SIPC are used to supplement the distribution, up to a ceiling of $500,000 per customer, including a maximum of $100,000 for cash claims. Additional funds may be available to satisfy the remainder of customer claims after the cost of liquidating the brokerage firm is taken into account.

FDIC

FDIC protects against the loss of insured deposits if an FDIC-insured bank or savings association fails. FDIC deposit insurance is backed by the full faith and credit of the United States government. FDIC insurance coverage automatically applies to bank deposits.

FDIC insurance covers funds in deposit accounts, including checking and savings accounts, money market deposit accounts and certificates of deposit (CDs). FDIC insurance does not, however, cover other investments that insured banks may offer, such as stocks, annuities, and mutual funds.

The FDIC provides separate coverage for deposits held in different account ownership categories. The chart below shows total amounts that an accountholder can have in these common ownership categories at each FDIC-insured bank as of January 1, 2009.

Basic FDIC Deposit Insurance Coverage Limits

Single Accounts (owned by one person)	$250,000 per owner
Joint Accounts (two or more persons)	$250,000 per co-owner
IRAs and certain other retirement accounts	$250,000 per owner
Trust Accounts	$250,000 per owner per beneficiary subject to specific limitations and requirements
Corporation, Partnership and Unincorporated Association Accounts	$250,000 per corporation, partnership or unincorporated association
Non-interest Bearing Accounts	Unlimited coverage – only at participating FDIC-insured banks and savings associations. (This coverage is available through December 31, 2009, for non-interest bearing transaction accounts at institutions participating in FDIC's Temporary Liquidity Guarantee Program.)

On January 1, 2010, the standard FDIC coverage limit will return to $100,000 for all deposit categories except IRAs and certain retirement accounts, which will continue to be insured up to $250,000 per owner.

For more information, see http://www.sipc.org/how/brochure.cfm and http://www.fdic.gov.

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
pmshapland@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.