Boston Bar Association

Fall 2010

Trusts & Estates Section

Fall 2010 **Newsletter**

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Inside this Issue

Estate and Trust Litigation in Federal Court

By Mark E. Swirbalus, Esq., Day Pitney LLP

To say that federal courthouse doors have been swung wide open for estate and trust disputes may be an overstatement, but we might be seeing the beginning of a trend. Given the heavy case loads and budget cuts affecting the probate courts, litigating estate and trust disputes in federal court could be an attractive option under the right circumstances, particularly in light of recent decisions discussing the so-called "probate exception" to federal subject matter jurisdiction.

The Probate Exception

In *Jimenez v. Rodriguez-Pagan*, 597 F.3d 18 (1st Cir. D.P.R. 2010), the First Circuit provided a helpful primer on the probate exception. Borrowing from the Supreme Court's decision in *Markham v. Allen*, 326 U.S. 490 (1946), the First Circuit explained that "[t]he probate exception is a judge-made doctrine stemming from the original conferral of federal equity jurisdiction in the Judiciary Act of 1789[,]" and that "[t]he ambit of that jurisdiction, coterminous with that exercised by the framers' contemporaries in the English courts of chancery, 'did not extend to probate matters.'" In *Markham*, the Supreme Court had held that federal courts have no authority to "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."

Application of the probate exception proved difficult in the wake of *Markham*, because the standard that federal courts cannot "interfere" with probate proceedings did not lend itself to an easy definition.

In *Marshall v. Marshall*, 547 U.S. 293 (2006) (the Anna Nicole Smith case), the Supreme Court revisited the issue and provided some clarity, explaining that the "interference" language is essentially a reiteration of the general principle that when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res. Thus, the probate exception applies only where a federal court is being asked to engage in "purely" probate matters such as the probate or annulment of a will and the administration of an estate, or the disposal of property that is already in the custody of a probate court. The probate exception does not, however, bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction. Simply stated, the Supreme Court made clear in *Marshall* that the scope of the probate exception is "distinctly limited."

Recent Application in Massachusetts

Two recent decisions by the United States District Court for the District of Massachusetts help to illustrate the "distinctly limited" nature of the probate exception.

In *Dumas v. Snow*, Civil Action No. 10-10187-GAO, 2010 U.S. Dist. LEXIS 86292 (D. Mass. Aug. 23, 2010), the plaintiff sought a declaration that she has a current income interest and a contingent remainder interest in a testamentary trust, and she also brought a claim for breach of fiduciary duty against the successor trustee, alleging that the trustee had failed to recognize her interest and to make proper distributions to her under the trust.

The defendants moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the plaintiff's claims fell within the probate exception, or,

alternatively, that the Court should exercise its discretion to abstain from adjudicating claims which it deems to be uniquely probate matters. The Court rejected both arguments and denied the motion to dismiss.

Regarding the probate exception, the Court explained that a federal court "may exercise its jurisdiction to adjudicate rights" in property in possession of a state probate court "where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." Here, the plaintiff's claim for a declaration regarding her interest in the trust would not interfere with any property in the possession of a probate court. Moreover, her claim for breach of fiduciary duty against the trustee would not interfere with a probate court's administration of the estate. The decedent's estate had already been settled in the Barnstable Probate and Family Court.

Based on the same reasoning, the Court held that there was no cause to abstain because there was no pending probate court action in which the same or similar issues were being presented. The Court noted that the defendants failed to cite any case in which a federal court abstained from exercising jurisdiction because a state court action *might* be filed.

In *Harhay v. Starkey*, Civil Action No. 08-CV-30229-MAP, 2010 U.S. Dist. LEXIS 45473 (D. Mass. May 10, 2010), the Court grappled with a family dispute that was described in Shakespearian terms. The decision begins memorably with the following prologue: "In Act I, Scene 2, of Shakespeare's play, Hamlet describes his relationship with his stepfather as 'little more than kin and less than kind.' This litigation exemplifies the degree of venom, and utter confusion, that can arise from disputes among family members. It also provides an example of how judicial processes can be abused when family rancor threatens to demand more than its fair share of the court's time."

The plaintiffs alleged that the defendants, as executrix and counsel for the estates of their mother and two aunts, swindled them of their family inheritance by misappropriating assets during the mother's lifetime with an allegedly forged power of attorney. The plaintiffs brought claims against the defendants for conversion, fraud, negligence and breach of fiduciary duty.

The defendants moved to dismiss the claims under the probate exception, arguing that the claims were based on the plaintiffs' alleged interests as beneficiaries or heirs of three estates, and that this lawsuit followed apparently pending actions by the probate court. The Court held that the probate exception did not apply, however, because it cannot be used to dismiss tort claims merely because the issues intertwined with claims proceeding in probate court. All of the claims brought by the plaintiffs in federal court sounded in tort and sought damages against the defendants themselves, rather than against any of the estates. As the Court noted, these claims would not even be cognizable in probate court, which does not have jurisdiction to hear tort claims or award damages.

The Take-Away from these Decisions

The lesson learned from these decisions may be that federal court ought to be considered as a viable forum for certain estate and trust disputes. Despite the Court's disdain for what it described as the "family rancor" in the *Harhay* case, the Court nevertheless may be sending a message that family disputes – hopefully with less rancor – are welcome in the John Joseph Moakley U.S. Courthouse.

The Defense of Marriage Act and Massachusetts' Recognition of Same-Sex Marriage: A Summary of Recent Litigation

By Kerry L. Spindler, Esq., Goulston & Storrs, P.C.

In summer of 2010, Judge Tauro of the United States District Court for the District of Massachusetts held in two cases that the distinction drawn by the Defense of Marriage Act ("DOMA")[1] between same-sex and opposite-sex marriage is in violation of the United States Constitution. Although the District Court has stayed the decisions while on appeal to the First Circuit, the status of same-sex marriage under federal law is an issue of ongoing importance to estate planners and their same-sex clients. Brief summaries of DOMA, in relevant part, and the decisions follow.

Summary of DOMA

In 1996, Congress enacted, and President Clinton signed into law, DOMA. Section 3 of DOMA[2] defines the terms "marriage" and "spouse" for the purposes of federal law. Under this provision, "marriage" is limited to the union of one man and one woman, and "spouse" is limited to a husband or wife of the opposite sex.

Prior to DOMA, the federal government's recognition of a marriage was determined by reference to the relevant state's marital law.[3] DOMA's uniform definition of marriage implicates more than 1,000 federal laws, and, as a result, a large number of federal benefits, rights and privileges where eligibility turns on marital status.[4]

1 Pub. L. No. 104-199, 110 Stat. 2419 (1996).

2 1 U.S.C. § 7.

3 *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 391–93 (Mass. Dist Ct. 2010).

4 *Id.* at 379.

Gill v. Office of Pers. Mgmt.

In *Gill v. Office of Pers. Mgmt.*,[5] the plaintiffs—a group of same-sex couples and surviving spouses of same sex couples, all married in Massachusetts—argued that DOMA denied them certain federal marriage-based benefits available to similarly-situated heterosexual couples in violation of the equal protection principles embodied in the Fifth Amendment's Due Process Clause. Specifically, each plaintiff requested to be treated as married with respect to health benefits based on federal employment, social security retirement and survivor benefits, or income tax filing status. The federal government denied the requests, citing DOMA's mandate that it recognize only heterosexual marriages.

The District Court ultimately determined that DOMA "fails to pass constitutional muster even under the highly deferential rational basis test" because there is "no fairly conceivable set of facts that could ground a relationship between DOMA and a legitimate government objective." In relying on the rational basis test the District Court bypassed the issue of whether the strict scrutiny standard, which is reserved for fundamental rights and suspect classes, was warranted.

The District Court began with an analysis of the four motivations articulated by Congress when it passed DOMA a decade and a half ago. First is that DOMA encourages responsible procreation and child-bearing. The District Court, however, cited consensus among medical, psychological and social welfare communities that children raised by gay and lesbian parents are as well-adjusted as those raised by heterosexual parents.

5 *Id.* at 374.

Moreover, even if Congress believed in 1996 that children had the best chance of success if raised jointly by biological parents, a desire to encourage heterosexual couples to procreate and rear their own children does not provide a rational basis for denying same-sex marriage federal recognition. Finally, encouraging procreation generally is not a rational basis for denying recognition to same-sex marriage because the ability to procreate is not a precondition to marriage.

The government's second motivation is that DOMA defends and nurtures the institution of traditional heterosexual marriage. However, DOMA's denial of marriage-based benefits to same-sex spouses bears no reasonable relation to making heterosexual marriages more secure. Moreover, if Congress seeks to make heterosexual marriage appear more valuable or desirable, it achieves this only by punishing same-sex couples, and the Constitution will not abide by such "a bare congressional desire to harm a politically unpopular group".

The government's third and fourth motivations are that DOMA defends traditional notions of morality and preserves scarce resources. However, a governing majority's view that a particular practice is immoral is not sufficient reason for upholding a law. Furthermore, although resource conservation can be a legitimate government interest, it alone does not justify a particular classification.

The District Court next looked to the motivations presently articulated by the government—that DOMA is a means to preserve the status quo pending resolution of a contentious debate taking place in the states over whether to sanction same-sex marriage, and that absent DOMA, the definitions of "marriage" and "spouse" under federal law would be too variable. Family law, however, is the province of the states, and the District Court found that Congress acted improperly in creating a federal definition of marriage. Moreover, the status quo at the federal level was for the federal government to continue to recognize any marriage declared valid under state law. DOMA thus does not maintain the status quo—it is a departure therefrom.

In concluding, the District Court held that the government's rationale is "without footing", found that there is no reason to believe that same-sex married couples are different than heterosexual married couples in any relevant way, and inferred that animus is the basis for DOMA's distinctions. "Because animus alone cannot constitute a legitimate government interest", there is no rational basis to support DOMA. Thus, DOMA, as applied to the plaintiffs, violates the equal protections afforded by the Due Process Clause.

Commonwealth of Mass. v. U.S. Dept. of Health & Human Servs.

In the *Commonwealth of Mass. v. U.S. Dept. of Health & Human Servs.*,[6] Massachusetts, as the plaintiff, argued that DOMA violates the Constitution's Spending Clause because it forces Massachusetts to discriminate against its own citizens in order to receive and retain federal program funds. It also causes Massachusetts to pay a disproportionate federal tax. Specifically, DOMA interferes with federal funding of the State Cemetery Grants Program and MassHealth, and increases Massachusetts' Medicare Tax payments. Massachusetts also argued that DOMA violates the Constitution's Tenth Amendment by intruding on Massachusetts' exclusive authority in the area of family law.

As a State Cemetery Grants Program recipient, Massachusetts owns and operates two military cemeteries. Federal funds were used to construct the cemeteries and are now received to partially reimburse Massachusetts for veterans' burials. Funding, however, is based on Massachusetts' compliance with a federal regulation restricting the cemeteries to only veterans, their spouses, and children. DOMA precludes recognition of same-sex spouses, and thus prevents Massachusetts, contrary to its own laws, from burying a veteran's same-sex spouse without risking a "recapture" of several million dollars of prior federal funding and foreclosing Massachusetts' ability to receive future funds.

Massachusetts also receives annual federal funding in support of MassHealth. Although DOMA requires MassHealth to assess eligibility for same-sex spouses as if each were unmarried, the Massachusetts' 2008 MassHealth Equality Act provides that no person recognized as a spouse under Massachusetts law will be denied benefits on account of DOMA. Massachusetts estimated that DOMA's restrictions with respect to same-sex spouse participants have already cost the Commonwealth nearly $3 million.

In addition, the value of health care benefits provided to a same-sex spouse of a Massachusetts employee is imputed income to the employee for federal income tax purposes. Massachusetts, as an employer, pays a Medicare tax based on each employee's taxable income. Where an employee is charged with imputed income as a result of same-sex health care benefits, Massachusetts pays a higher tax. Massachusetts estimated that DOMA's disparate treatment of same-sex and opposite-sex spouses has cost it nearly $200,000 in additional taxes and expenses.

The District Court began with an analysis of the Spending Clause, which provides, in relevant part, that "Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the common Defence and general Welfare of the United States...." The federal government argued that DOMA is within Congress' authority under the Spending Clause to determine how money is best spent to promote the "general welfare" of the public. However, among the requirements that Spending Clause legislation must satisfy is that it must not be barred by other constitutional provisions. Spending Clause power thus cannot be used to induce states to engage in activities that would themselves be unconstitutional. Whereas this court just held in *Gill* that DOMA is barred by the equal protection principles of the Fifth Amendment's Due Process Clause, it also held that the Spending Clause cannot be used to save DOMA and induce states to distinguish between same-sex and opposite-sex spouses.

Lastly, the District Court turned to the Tenth Amendment issue. A federal statute violates the Tenth Amendment if it regulates the states as states,[7] concerns attributes of state sovereignty, and impairs a state's ability to structure integral operations in areas of traditional governmental functions. The District Court found that DOMA has a substantial impact on Massachusetts' bottom line, intrudes on its ability to define the marital status of its citizens—the archetypical area of state sovereignty—and interferes with its authority to recognize same-sex marriages and afford individuals in such marriages the same benefits, rights and privileges as afforded to individuals in opposite-sex marriages. DOMA, therefore, is in violation of the Tenth Amendment.

Conclusion

Many predict that the *Gill* and *Commonwealth of Massachusetts* decisions will spend the next several years in the appeals process and may eventually become the subject of petitions for certiorari. The District Court's stay of these decisions notwithstanding, the dynamic legal environment and litigation around DOMA suggest that estate planners working with same-sex spouses should strive to create flexible estate plans capable of producing optimal distribution, income, gift, and estate tax results in DOMA and post-DOMA situations. To this end, distribution and tax provisions should effectuate the client's intent to the highest degree possible, whether or not DOMA is in effect when planning and death occurs.

6 *Mass. v. U.S. Dept. of Health & Human Servs.*, 698 F. Supp. 2d 234, 235 (Mass. Dist. Ct. 2010).

7 The District Court acknowledges the federal government's argument that an additional Medicare tax withholding does not offend the Tenth Amendment because this is regulation of Massachusetts as an employer, rather than as a state. The District Court dismisses this argument in determining that Massachusetts has standing to challenge DOMA's interference in its relations with its public employees under *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51 n. 17 (1986) and that the "states as states" criterion is not so broad as to preclude Massachusetts' challenge to DOMA.

Ansin Case Confirms Validity of Postnuptial Agreements

By Sarah M. Waelchli, Esq., Hemenway & Barnes, LLP

On July 16, 2010, the Massachusetts Supreme Judicial Court issued the first clear ruling that a postnuptial agreement is valid in Massachusetts. The case, *Ansin v. Craven-Ansin* (SJC-10548), provided a unanimous opinion that postnuptial agreements or "marital agreements" are permissible and fully enforceable if created properly. The SJC ruled, however, that postnuptial agreements will be subject to a higher level of scrutiny than prenuptial agreements or separation agreements.

Ansin involved a couple who had been married for 19 years prior to signing a postnuptial agreement. They had two adult sons and a combined estate of approximately $19 million. After periods of separation, the couple signed a postnuptial agreement to settle the division of their assets if they were to divorce. The parties were represented by separate counsel and engaged in substantial negotiations over the agreement. The SJC found that the couple was committed to continuing their marriage after signing the agreement, but two years later the husband filed for divorce. The SJC held that the agreement, which gave the wife $5 million and 30% of the appreciation in the marital assets (among other benefits) was enforceable.

The SJC set forth five standards for the enforceability of postnuptial agreements, each subject to the "careful scrutiny" of the court: (1) whether the agreement was free of coercion or fraud; (2) whether each party knowingly, and in writing, waived his or her rights to property and support upon divorce; (3) whether each party had the opportunity to hire counsel; (4) whether each party provided full and fair disclosure of finances, including current and reasonably anticipated assets, income and liabilities; and (5) whether the agreement was substantively fair and reasonable at the time of execution and upon divorce. As an additional hurdle to the enforceability of these agreements, the SJC placed the burden of satisfying these criteria on the spouse seeking to enforce the agreement.

The utility of postnuptial agreements in the estate planning context remains unclear. Estate planners may wish to use postnuptial agreements to ensure that particular family assets (the family business, family vacation home or other inherited assets) stay in the family line at death. While *Ansin* confirmed the enforceability of postnuptial agreements upon divorce and set forth standards that made sense in that context, it did not address the enforceability of such agreements upon death. *Ansin* may provide some guidance, but a clear ruling on the enforceability and standards for postnuptial agreements upon death is yet to come.

IRS Announces 2011 Inflation Adjustments

The IRS recently announced inflation adjustments for several tax provisions related to estate planning.

- **Valuation of Qualified Real Property in Decedent's Gross Estate.**
The maximum reduction in estate tax value for qualifying real property used in a farm or business valued under section 2032A is $1,020,000 for estates of decedents dying in 2011.

- **Interest on a Certain Portion of the Estate Tax Payable in Installments.**
The value of a closely-held business interest on which the payment of estate taxes may be deferred (and on which interest will be charged at a rate of 2%) is increased to $1,360,000 for estates of decedents dying in 2011.

- **Annual Exclusion for Gifts.**
The gift tax annual exclusion remains at $13,000 for 2011.

- **Annual Exclusion for Gifts to Non-U.S. Citizen Spouse.**
The annual exclusion for gifts to a non-U.S. citizen spouse increases to $136,000 for 2011.

- **Tax Responsibilities of Expatriation.**
The exemption for appreciation in assets recognized by a covered expatriate is increased to $636,000 for expatriations that occur in 2011.

- **Expatriation to Avoid Tax.**
The standard for determining whether an expatriate is a "covered expatriate" under section 877A(g)(1) is based on whether his or her average annual net income tax exceeded $147,000 (increased from $140,000) for the five taxable years ending before the date of expatriation for tax years beginning in 2011.

- **Notice of Large Gifts Received from Foreign Persons.**
For 2011, gifts from foreign persons in excess of $14,375 in a taxable year are required to be reported.

See Rev. Proc. 2010-40 (Nov. 15, 2010).

Announcement: Sign up for the Trusts & Estates Section Blog

The Trusts & Estates Section is pleased to announce the Trusts & Estates Section Blog, available at http://bbatrustsandestates.blogspot.com.

The Trusts & Estates Section is using the blog to post timely articles, alerts and other substantive materials relevant to the field. We intend it to be an easy and convenient forum to share and discuss developments in trusts and estates law and practices. Blog features include:

- **Subscription feature.** How will you know when a new article is added to the blog? Subscribe to receive updated content by email alert, RSS feed, or by "following" the blog in your Google Reader. Visit http://bbatrustsandestates.blogspot.com, choose your preferred subscription method from the right hand column, and subscribe!

- **Search function.** Do you wonder if an article on a particular topic has been published to the blog? Type your search terms into the search box in the top left corner to search the entire blog.

- **Comment function.** Did you read an article and have something you want to add? Click on the comment link at the end of each article and share your ideas with the author and other blog visitors.

- **Sharing function.** Do you want to share an article with a colleague? Click on the buttons at the end of each article to share it via email, Facebook, Twitter, or other social networks.

- **Links.** Want to know how to find other helpful Trusts & Estates Section resources, including prior Trusts & Estates Section newsletters? Follow the links in the right hand column. (Note that newsletter articles will be co-published to the blog and in the traditional PDF format in the short term; however, we hope to transition to a blog-only format down the road).

Questions, comments or need help subscribing? Contact pjohnson@bostonbar.org.

Upcoming Events

Litigating in Different Counties: Helping the Probate Courts to Help Us
Tuesday, December 7, 2010, 12:00-1:00 pm
Boston Bar Association - 16 Beacon Street, Boston

Practicing in the Probate and Family Court can be challenging. The Court's practices often vary from county to county. Recent budget cuts have resulted in significant staff decreases, often including the loss of the most experienced Court personnel through early retirement programs. How can we as practitioners work with the Probate Court to best serve our clients and the Court, and move our cases forward?

Speakers Patricia Keane Martin and Ruth A. Mattson, both of Bowditch & Dewey, LLP, will address the following: Identifying and accommodating procedural and substantive differences among counties (including roundtable discussion); Moving uncontested submissions through the court, such as trust reformations, allowance of an uncontested account; Effect of MUPC: guardianships and conservatorships; Identifying the best person at the courthouse to help you; Contested matters, such as will contests and equity complaints; Possible effects of new MUPC on judicial procedure.

Trusts & Estates Section Mid-Year Review
Friday, December 10, 2010, 12:30-2:00 pm
Boston Bar Association - 16 Beacon Street, Boston

An annual event not to be missed, the Trusts and Estates Section Mid-Year Review covers recent federal and state case law, legislation and tax law matters. This year's Mid-Year review will touch on carry-over basis, gifting in 2010, PTIN registration requirements, federal tax cases, Massachusetts case law, and legislative updates.

Estate Planning for Same Sex Couples
Friday, January 21, 2011, 12:30-1:30 pm
Boston Bar Association - 16 Beacon Street, Boston

Shari Levitan, Holland & Knight LLP, will discuss estate planning issues that arise in the representation of same-sex couples.

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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 **Adrienne M. Penta** at adrienne.penta@bbh.com or **Kerry Spindler** at kspindler@goulstonstorrs.com to pursue this further.