

# SECTION REVIEW



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## CIVIL LITIGATION

**WHAT IS A CERTIFIED LIFE CARE PLANNER? DO I NEED ONE FOR MY CASE?****BY SARAH MALLOY, CLCP, CCM, OTR/L**

Do you need to identify future medical and non-medical needs and costs of an individual? Then you need a life care planner. Life care planners are called upon by the referring attorney to evaluate a person's current and future medical and other needs given that person's physical, mental or cognitive condition. Cases where life care planners are used include personal injury, medical malpractice, workers' compensation and family law.

Based upon life care planning standards of practice and empirically based methodology developed by the International Academy of Life Care Planners, published in 2015 by the International Association of Rehabilitation Professionals, the expert typically performs the following tasks:

- Reviews and completes a medical summary of all available medical, therapy and related records;
- Completes a home evaluation of the individual;
- Outlines future probable medical and non-medical care needs, along with their costs and associated vendors, and identifies possible complications;
- Provides scientific, evidenced-based support for the life care plan projections; and
- Functions as an expert witness, if needed.

The life care planner's findings are outlined in a detailed narrative report with a spreadsheet of items and associated costs that is typically identified as the tables of the life care plan (LCP). According to Everett G. Dillman (2019) in "The Role of the Economist in Life Care Planning," published in *Life Care Planning and Case Management*, Fourth Edition, the LCP should only include relevant marginal costs to the injury that occurred or conditions that the injury exacerbated. It should not include costs due to comorbid or unrelated conditions. Depending on the state

or the approach of the retaining party, the LCP costs could be projected to present value by a forensic economist or accountant over the plaintiff's life expectancy and contain appropriate offsets.

Clinically, the LCP becomes a "road map" or rehabilitation or intervention plan for the individual affected and his or her family, and also assists attorneys in determining the value of future care. LCPs aid the attorney when entering into negotiations with the opposing counsel by providing a detailed, scientifically supported document based upon methodologically gathered data.

To ensure that the expert has met the minimum qualifications to be admitted in your case, consider retaining a Certified Life Care Planner (CLCP). CLCPs are health care professionals from a variety of backgrounds, including occupational therapists, physical therapists, rehabilitation counselors and nurses. These professionals have a minimum requirement of three years of field experience in their respective designations, although the majority of them far exceed that minimum. They receive a minimum of 120 postgraduate hours of training at a recognized training program. Among other requirements, they develop a life care plan that is peer-reviewed. Upon completing the training program, CLCPs must pass a standardized board certification exam administered by the International Commission on Health Care Certification (ICHCC).

Adherence to professional, ethical and practice standards is a pivotal part of credentialing. CLCPs are held to professional and ethical standard by the ICHCC and its governing board for the duration of their certifications. Passing the exam that demonstrates a minimum level of competency is insufficient. Certificants must also demonstrate that they obtain and retain knowledge in contemporary and emerging areas of practice. Therefore, maintenance of the certification is required with 80 hours of continuing education credits

**SARAH MALLOY, CLCP, CCM, OTR/L**, is the owner of Malloy Life Care Planning. She holds national certifications as a Certified Life Care Planner and Certified Case Manager, and is a registered and licensed occupational therapist with more than two decades of experience working with adults in the rehabilitation field.



every five years. In addition to the CLCP certification, these health care professionals also maintain certifications/licensures related to their respective disciplines. Many of these individuals maintain additional certifications.

Another job of the CLCP is to perform a peer review and work product critique of the LCP of an opposing life care planner. Given the importance of outlining all appropriate needs of the individual, a CLCP's role in this situation is to ensure that the opposing life care planner and LCP follow the acceptable standards of practice and established methodology, within the life care planner's scope of practices. In this situation, the role of the LCP is based on findings and conclusions from evidence s/he collects, within the available records specific to the individual, and grounded upon the treatment practice guidelines and literature.

The CLCP, possessing the necessary credentials and professional background, provides the attorney with a thoroughly researched, clear, concise and detailed report outlining future care needs and associated costs. A CLCP can then function as a qualified expert witness by testifying to what is outlined in the report and supporting its efficacy. The CLCP is a credentialed asset to any case requiring identification of future medical and non-medical care needs and associated costs. ■



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## COMPLEX COMMERCIAL LITIGATION

**A FRESH START: SELLING FREE AND CLEAR OF DISPUTED OWNERSHIP CLAIMS IN BANKRUPTCY**

BY CHRISTOPHER M. CONDON

“Fresh start” is a term typically used to describe the benefits an individual debtor receives when discharged of his or her debts in bankruptcy. The discharge settles the debtor’s liabilities and ends pursuit by and disputes with creditors. There is no equivalent corporate discharge, but the bankruptcy process can provide a “fresh start” for a corporation’s assets, which may be sold free and clear of disputed claims and interests to be utilized by a new non-debtor acquirer.

Increasing creditor leverage, resulting both from revisions to the Bankruptcy Code and market forces, has increased the use of asset sales as a means of reorganization in Chapter 11. A bankruptcy sale will typically be approved if the decision of the debtor to sell is supported by “reasonable,” “proper” or “sound” business judgment, a rule commonly referred to as the “business judgment test.” *In re Genesys Research Inst. Inc.*, No. 15-12794-JNF, 2016 Bankr. LEXIS 2376 (Bankr. D. Mass. June 24, 2016) at \*62. “A debtor’s business decision to sell should be approved unless it is shown to be so manifestly unreasonable that it could not be based upon sound business judgment, but only on bad faith, or whim or caprice.” *In re Cadkey Corp.*, 317 B.R. 19, 22-23 (D. Mass. 2004).

A Chapter 11 sale is a powerful tool. It provides an expedient and efficient substitute for the traditional bankruptcy plan process, especially where the debtor’s assets are in decline but have value if they can be uncoupled from the failing business. Assets are conveyed quickly upon a motion by the debtor. At closing, the buyer receives the benefit of both a bill of sale and a federal court order, which provide the buyer with protections not available outside of bankruptcy. Principal among those protections is the release of claims and interests associated with the assets, which claims and interests attach to the proceeds of the sale. *See, e.g., In re DVI Inc.*, 306 B.R. 496, 504-05 (Bankr. D. De. 2004) (collecting cases).

The sale power is not without limits. In order to approve a sale, the bankruptcy court must determine that there is good business reason for the sale and that the sale adheres to the substantive protections of Chapter 11.

*Mission Prod. Holdings Inc. v. Old Cold LLC (In re Old Cold LLC)*, 879 F.3d 376, 383 (1st Cir. 2018). The debtor must also demonstrate that the “transaction has a proper business justification” and is not designed to circumvent or evade the Chapter 11 sale process. *In re GMC*, 407 B.R. 463, 491 (Bankr. S.D.N.Y. 2009). Bankruptcy courts have limited jurisdiction and can typically only authorize sales of assets of the bankrupt debtor, or “property of the bankruptcy estate.” *See, e.g., DeGiacommo v. Travers (In re Traverse)*, 753 F.3d 19, 27-28 (1st Cir. 2014).

Creditors or other parties-in-interest may object or attempt to forestall a sale by claiming that the debtor does not own what it is trying to sell. Legitimate disputes as to ownership arise frequently in intellectual property disputes, where, as a for instance, technology may be determined to be dominant or subservient to other patented technology. Litigation of such disputes is inevitably lengthy and costly. Fully adjudicating such a dispute prior to a sale closing would almost certainly erode the benefits of the bankruptcy sale process and either drain or exhaust the resources of an already financially distressed seller.

To avoid these costly and time-consuming disputes that inevitably delay the bankruptcy process, Section 363(f)(4) of the Bankruptcy Code allows a debtor to “sell property under subsection (b) or (c) . . . of this section free and clear of any interest in such property of an entity other than the estate, only if . . . (4) such interest is in *bona fide* dispute.” 11 U.S.C. § 363(f)(4). While the statute’s only precondition is that such a dispute exists, in the 2004 *Rodeo Canyon* case, the Ninth Circuit ruled that courts cannot authorize a sale under Section 363(f) until an ownership dispute is resolved. *In re Rodeo Canyon Dev. Corp.*, 362 F.3d 603 (9th Cir. 2004), withdrawn and superseded, 126 Fed. Appx. 353 (9th Cir. Mar. 8, 2005). The opinion is of limited precedential value given that it was later withdrawn by the court when the parties to the matter filed a stipulation stating that certain operative facts upon which the opinion was based were incorrect. Regardless, it has been repeatedly cited for the proposition that “[a] bankruptcy court may not allow the sale of property as ‘property of the estate,’ without first determining whether the debtor in

**CHRISTOPHER M. CONDON**

is a shareholder at Murphy & King. His practice focuses on commercial insolvency, reorganization and related litigation.



fact owned the property.” *Id.* at 608-09. Thus, under *Rodeo Canyon* and its progeny, any third party could hold estate assets hostage by merely questioning whether such assets are property of the estate.

More recently, two Massachusetts bankruptcy courts have considered and rejected the logic of *Rodeo Canyon* and adopted the majority view regarding the authority under Section 363(f)(4). *In re Genesys Rsch. Inst. Inc.*, Case No. 15-12794-JNF, 2016 WL 3583229 (Bankr. D. Mass. June 24, 2016); *In re IDL Dev. Inc.*, Case No. 18-14808 (Bankr. D. Mass. June 14, 2019). In both *Genesys* and *IDL*, the court recognized the very real problem of adjudicating a disputed claim of ownership in estate property prior to conducting a sale, and ruled that the debtor has the burden only to demonstrate that there was a *bona fide* dispute with respect to the debtor’s interest in the property, not to prevail in the ownership dispute prior to the sale. The *Genesys* court stated, “[s]ection 363(f)(4) does not contemplate or require that the court resolve or determine any dispute about ownership before a sale hearing, but rather requires only an examination of whether there is an objective basis for either a factual or legal dispute about ownership.” *Id.* at \*20 (emphasis added). Indeed, “[t]he purpose of § 363(f)(4) is to permit property of the estate to be sold free and clear of interests that are disputed by the representative of the estate so that liquidation of the estate’s assets need not be delayed while such disputes are being litigated.” *Id.* at \*19 (internal quotations omitted). This burden to demonstrate a *bona fide* dispute is significantly lower than the burden to resolve the ownership dispute itself. Section 541(a)(1) of the Bankruptcy Code prescribes property of the bankruptcy estate as encompassing “all legal or equitable interests of the debtor in property

## MISSION PRODUCT HOLDINGS V. TEMPNOLOGY: WHAT REJECTION MEANS UNDER THE BANKRUPTCY COURT

BY DEREK DOMIAN

In *Mission Product Holdings v. Tempnology LLC*, 139 S. Ct. 1652 (2019), the U.S. Supreme Court answered what it means for a debtor to “reject” an executory contract under Section 365 of the Bankruptcy Code. The issue arose in the context of a trademark licensing agreement. The licensor, which had filed for bankruptcy, sought to terminate the licensee’s trademark rights by rejecting the license agreement under Section 365(a). The Supreme Court (Kagan, J.) held that the debtor’s rejection of the license did not terminate the licensee’s trademark rights. More broadly, the Supreme Court held that a rejection under Section 365 of the Bankruptcy Code functions as a breach of contract, but not as the rescission of that contract.

The Supreme Court’s holding thus rejected the view that a breach of contract in the bankruptcy setting means something different from a breach of contract in the common law setting. Section 365(g) of the Bankruptcy Code states that the “rejection of an executory contract” — a contract that neither party has finished performing — “constitutes a breach of such contract.” Under the common law, the non-breaching party has a choice: it may treat the contract as terminated and seek damages

— a paltry remedy in bankruptcy where recovery is often cents on the dollar — or it may continue the contract — here, the continued use and enjoyment of trademark rights under the license agreement. In other words, in the world outside of bankruptcy, a party cannot create its own rescission remedy by breaching the contract. If rescission does not occur in the real world, the Supreme Court asked, why should it occur in bankruptcy?

The debtor offered several arguments. It first pointed to other provisions in Section 365 of the Bankruptcy Code that make clear the counterparty’s retention of rights “notwithstanding rejection” and argued that, beyond these specific (and inapplicable) provisions, the ordinary consequence of rejection should be the termination of these rights. The Supreme Court rejected this argument as overlooking the history of these particular provisions, histories that expressed multiple legislative interventions to prevent rescission, not endorse it, thus supporting the general rule that rejection does not mean rescission under Section 365. The debtor then argued that trademark law imposes on a licensor the duty to monitor and exercise quality control over the goods and services sold under a license, an onerous burden anathema to the re-

**DEREK DOMIAN** is a business litigator with Goulston & Storrs. His practice focuses on complex commercial, real estate and professional liability matters.



lief a debtor should find under the Bankruptcy Code. The Supreme Court rejected this argument as an attempt to equate the debtor’s power of rejection with avoidance, “the exceptional cases in which trustees (or debtors) may indeed unwind pre-bankruptcy transfers that undermine the bankruptcy process.” The Supreme Court noted that the Bankruptcy Code seeks to limit the avoidance power, not unleash it at the discretion of trustees or debtors. The ultimate goal of reorganization is not the tail that wags the Bankruptcy Code.

Rejection is universal. According to the Supreme Court, so are the consequences of breach of contract. A breach in the bankruptcy world does not give the debtor a power or prerogative that a breaching party does not have in the real world. Rejection hurts, wherever it happens. ■

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### A FRESH START CONTINUED FROM PAGE 3

as of the commencement of the case.” Bankruptcy courts typically take a broad view in determining whether the debtor has something to sell. The “threshold” determination is satisfied so long as “the disputed property is or could become property of the bankruptcy estate.” *In re Robotic Systems Inc.*, 322 B.R. 502, 508 (Bankr. D. N.H. 2005) (emphasis provided). “In fact, every conceivable interest of the debtor, future, nonpossessory, contingent, speculative and derivative is within the reach of Section 541.” *Wood v. Premier Capital Inc.*, 291 B.R. 219, 224 (1st Cir. B.A.P. 2003) (internal quotations omitted).

As the *Genesys* court explained, the “evi-

dentiary record required to support a finding of a bona fide dispute for purposes of § 363(f) depends upon a case-by-case consideration of: (i) the procedural posture of the case, (ii) the need to expedite the sale, and (iii) the nature of the basis for determining that a dispute exists.” 2016 WL 3583229 at \* 20 (internal quotations omitted). The party asserting an interest in property being sold, not the bankrupt debtor, “has the burden of showing the validity and extent of its interest.” *Id.* at 21. A *bona fide* dispute may be established in the context of a contested sale motion and does not require extensive discovery that might otherwise be associated with litigation of the underlying disputed claims of the parties. The disputed assets may then be sold free and

clear of such interest, with the interest attaching to the proceeds of the sale, rather than the buyer’s ongoing business.

Bankruptcy sales can be desirable for both the buyer and the seller. The buyer can acquire clean title to a bankruptcy company’s assets supported by a bankruptcy court order determining the purchased assets to be free and clear of disputed claims. Section 363(f)(4) provides a mechanism to sell free and clear of disputed ownership interests, which is a significant tool to quickly and efficiently convey assets to a willing buyer to restart the debtor’s business without the burden of the ownership litigation. ■



## THE SJC PROVIDES FURTHER GUIDANCE ON ANTI-SLAPP MOTIONS

BY CATHERINE M. SCOTT

On Sept. 23, 2019, the Supreme Judicial Court (SJC) issued its second decision in *Blanchard v. Steward Carney Hospital Inc.*, 483 Mass. 200 (2019) (*Blanchard II*), and further explained its newly augmented standard for filing an “anti-SLAPP” motion under Massachusetts law, G.L. c. 231, § 59H. By way of background, the Legislature enacted the anti-SLAPP statute to counteract “SLAPP” or “strategic lawsuits against public participation,” which are “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 167-168 (1988). The anti-SLAPP statute provides a procedural remedy for early dismissal of these disfavored lawsuits, which is a special motion to dismiss that can be brought prior to engaging in discovery and is intended to dispose of claims that are based solely on a party’s exercise of its right to petition. *Id.*

The court first issued a decision outlining its augmented standard in *Blanchard v. Steward Carney Hospital Inc.*, 477 Mass. 141 (2017) (*Blanchard I*). In *Blanchard I*, nine of the nurses who formerly worked in the adolescent psychiatric unit of Steward Carney Hospital brought suit for defamation (among other things) against the hospital and William Walczak, former president of the hospital, for statements he made to the *Boston Globe* and other employees concerning the reasons for those nurses’ termination. 477 Mass. at 144-145. The hospital filed an anti-SLAPP motion seeking early dismissal of the nurses’ defamation claims, which was denied in the trial court and appealed as a matter of right. *Id.* at 142-143.

Upon further consideration, the SJC issued a new standard for dismissal pursuant to an anti-SLAPP motion in *Blanchard I* and remanded the matter to the lower court for further consideration under the new standard.

*Id.* at 161.

Under the new *Blanchard I* standard, at the threshold stage, the moving party (usually the defendant) must establish by a preponderance of the evidence that the allegations in the lawsuit are “solely based on [the moving party’s] own petitioning activities.” *Blanchard II*, 483 Mass. at 203. Under the newly augmented *Blanchard II* standard, once this threshold is met, the burden shifts to the non-moving party (usually the plaintiff) to demonstrate that dismissal is not required through one of two routes: (1) by establishing by a preponderance of the evidence that the moving party’s petitioning activity was, in essence, a “sham”; or (2) by establishing “such that the motion judge may conclude with fair assurance ... that its suit [is] ‘colorable’; and that the suit was not ‘brought primarily to chill the moving party’s legitimate exercise of its right to petition,’ i.e., that [the lawsuit is] not retaliatory.” *Id.* at 203-204.

In *Blanchard II*, the lower court reconsidered the hospital’s anti-SLAPP motion under the new framework and again denied the motion. 483 Mass. at 201. The SJC affirmed the denial of the motion again, but took the time to explain how lower courts should analyze anti-SLAPP motions under the new framework. *Id.*

The newly issued framework to defeat an anti-SLAPP motion set forth in *Blanchard I* has caused the lower courts significant confusion, as the court provided little guidance as to how courts should determine whether the plaintiff’s lawsuit was “brought primarily to chill the moving party’s legitimate exercise of its right to petition.” 483 Mass. at 204. Recognizing this potential confusion, the *Blanchard II* court outlined several factors that could be used to make such a determination, including, but not limited to, the following: (1) “whether the case presents as a ‘classic’ or ‘typical’ SLAPP suit, i.e., whether it is a lawsuit [] directed at individual citizens of

**CATHERINE “CAT” M. SCOTT** is currently an associate at Freeman Mathis & Gary LLP. She specializes in employment, professional liability and commercial litigation.



modest means for speaking publicly against development projects”; (2) whether the lawsuit was commenced close in time to the petitioning activity; (3) whether the anti-SLAPP motion was filed promptly; (4) the centrality of the challenged claim in the context of the litigation as a whole, and the relative strength of the nonmoving party’s claim; (5) evidence that petitioning activity was, in fact, chilled; and (6) whether the damages requested by the nonmoving party, such as attorneys’ fees, would burden the moving party’s exercise of the right to petition. *Id.* at 206-207 (internal quotations and citations omitted). The court recognized that in conducting this analysis, “these factors are not exhaustive; that no single factor is dispositive; and that not every factor will apply in every case.”

Though there is still significant legal ground to cover in understanding the SJC’s augmented framework, the court’s decision in *Blanchard II* provides some much-needed guidance to lawyers and judges alike. The more stringent standard will make these anti-SLAPP motions more difficult to win, but the intent of the court’s decision in *Blanchard II* was to weed out those lawsuits meant to chill petitioning activity, and allow those that are legitimate to move forward. Whether that occurs remains to be seen once the courts begin applying the *Blanchard II* factors to newly filed anti-SLAPP motions. ■



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## SETTLEMENT AND ASSIGNMENT AGREEMENTS AND THE THREAT OF 'UNDERLITIGATION'

BY MICHAEL BROWN

A recent Supreme Judicial Court (SJC) decision offers guidance for situations in which a defendant settles a case and assigns its insurance rights to the plaintiff. Settlement agreements are encouraged as a matter of general policy. However, must an insurer be bound by the terms of such an agreement, even if not a party? What happens when the parties are engaged in “underlitigation,” a collusive arrangement where the parties refrain from introducing evidence that would destroy insurance coverage? What recourse does the insurer have to challenge the settlement amount?

The case of *Commerce Insurance Company vs. Justina S. Szafarowicz, et al.* (131 N.E.3d 782 (Oct. 1, 2019)) analyzes these issues. In a long, but clear opinion, Chief Justice Ralph D. Gants reaffirmed the SJC policy of encouraging settlement agreements, while also providing clear protections for insurers and methods of challenging agreements that might prejudice liability carriers.

### THE UNDERLYING WRONGFUL DEATH ACTION

The case arises from a wrongful death action. David Szafarowicz was struck and killed by a car driven by Matthew Padovano. The decedent's estate sued Padovano, who tendered the claim to his family's auto liability insurer, Commerce Insurance Company.

Commerce agreed to defend the claim, and paid its compulsory policy limits of \$20,000, but reserved its rights to deny an additional \$480,000 in indemnification obligations if it was determined that the accident was caused by an intentional act, and thus not an “accident,” as defined by the policy.

Commerce also filed a separate declaratory judgment action to determine whether the policy provided coverage for the estate's claim. Meanwhile, Commerce attempted to intervene in the wrongful death case. It cited to a criminal proceeding against Padovano arising out of the same accident, and evidence from that proceeding that Padovano's actions were intentional, as opposed to accidental. Commerce claimed that neither party had incentive to introduce that evidence because they both “would prefer that insurance coverage exist for this loss.”

### UNDERLITIGATION

The judge denied Commerce's request to intervene, but also recognized the unfairness

of “underlitigation,” which in this case meant that the plaintiff refrained from introducing evidence of the defendant's intentional conduct, offering instead evidence of mere negligence. As a result, the defendant's insurer would not be able to disclaim coverage on grounds that the policy did not cover intentional conduct.

The judge identified competing interests. On one hand, underlitigation is inherently unfair to the insurer, which is forced to cover claims based on cherry-picked facts. On the other, the Padovanos would be unable to defend themselves without insurance proceeds. In the end, the Superior Court reached a solution: Commerce could overcome the unfairness of underlitigation by bringing a subsequent declaratory judgment action. In that setting, it could examine whether the issue of negligent versus intentional conduct was fairly litigated and, if not, could re-litigate the issue.

### THE DECLARATORY JUDGMENT ACTION

That is exactly what Commerce did. The judge in the declaratory judgment action reviewed all the evidence related to the underlying case — not just the evidence produced in that case — and concluded that Padovano's actions were intentional. As a result, the Commerce policy did not cover the claims in the underlying case.

### SETTLEMENT AGREEMENT AND ASSIGNMENT OF RIGHTS

While the court was making its coverage determination, the estate and the Padovanos entered into a settlement agreement, which included an assignment of rights. They did not obtain Commerce's assent. As part of the agreement, Padovano stipulated to “gross negligence” and the parties agreed that damages would be determined at a jury-waived proceeding. Further, the estate agreed to not seek damages or enforce any judgment against the Padovanos beyond the Commerce insurance proceeds, and the Padovanos assigned all their insurance rights to the estate.

Commerce objected to the settlement, but a judge overruled the objection. After the jury-waived assessment of damages hearing, the judge determined damages in the amount of \$7,669,254.41. Included in this was \$2,201,744.41 in prejudgment interest.

Even though the court decided that the Commerce policy did not provide coverage for the wrongful death claim, Commerce would still be required to pay postjudgment

**MICHAEL BROWN** is a commercial litigator at Adler Pollock & Sheehan PC in Boston. He counsels businesses and insurance carriers in risk management, insurance coverage matters, and formal disputes.



interest on the \$20,000 in compulsory limits. The interest alone would exceed the policy limits. Commerce filed a petition for interlocutory review, and the SJC transferred the appeal on its own motion.

### CHALLENGING THE JUDGMENT

On appeal, the SJC addressed whether Commerce could challenge the judgment when (1) its objection to the settlement agreement was overruled, and (2) there was a substantial risk of underlitigation.

The SJC first addressed the Commerce policy's “consent to settle” clause, which provided that “[i]f any person covered under this policy settles a claim without our consent, we will not be bound by that settlement.” The court acknowledged that, while “consent to settle” clauses are usually enforced if the insurer can show that it was prejudiced by the settlement, this is not the case where the insurer is defending under a reservation of rights. It is a well-settled principle that, in such cases, an insurer relinquishes the right to control its insured's defense.

When an insurer reserves the right to deny indemnification, the insured has the right to protect itself by entering into a settlement agreement. Such an agreement is enforceable against the parties to the settlement but, as the SJC pointed out, is not necessarily enforceable against the insurer.

The mere existence of a settlement agreement does not create indemnification obligations where none were present in the first place. In this case, Commerce had obtained a declaration that its policy did not cover the claims in the wrongful death case because Padovano's actions were deemed to be intentional. Therefore, there was no coverage for the claim and Commerce was not bound to pay the \$7.7 million judgment. This left the court to decide whether Commerce was still responsible for postjudgment inter-



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## 'UNDERLITIGATION' CONTINUED FROM PAGE 6

est on the \$20,000 compulsory insurance payment.

The SJC undertook a similar analysis with regard to underlitigation as the Superior Court had done, balancing the risk of collusion against the policy considerations that encourage settlement agreements. The court concluded that an insurer who defends a claim under a reservation of rights is bound by the amount of a judgment arising from a prejudgment settlement/assignment agreement where (1) the insurer is given notice of the settlement/assignment agreement and an opportunity to be heard by the court before judgment enters; (2) the insurer contests the judgment; and (3) the insured, after hearing, meets his or her burden of showing that the settlement is reasonable in amount.

Further, the court held that a "reasonable" settlement amount cannot exceed the limits of insurance coverage, since any recovery under the assignment agreement will come from the insurer. In this case, because no reasonableness review had been conducted, the SJC remanded the case for a review on the reasonableness of the settlement/assignment agreement.

### CONCLUSION

This case illustrates how an insurer can challenge underlitigation in certain situations. It also shows that, while settlement and assignment agreements are useful, they cannot unfairly expose an insurer to liability that exceeds its policy limits.

This case should act as a warning to counsel to carefully assess the recoverability of judgments. In the absence of a defendant who can personally pay a large judgment, or other extraneous circumstances, such as Chapter 176D liability against the insurer, settlement and assignment agreements should be kept within the limits of any applicable insurance policy. ■

## CCL HOSTS 'LITIGATING BUSINESS TORTS' PANEL DISCUSSION



On Oct. 23, 2019, the Complex Commercial Litigation Section Council hosted a panel discussion at Sherin & Lodgen LLP on "Litigating Business Torts." The panel featured Judge Karen Green of the Massachusetts Superior Court, who will begin serving a term on the Business Litigation Session in 2020. Judge Green was joined on the panel by attorneys Aliki Sofis of Quinn Emanuel Urquhart & Sullivan LLP and Joshua Lewin of Bowditch & Dewey LLP, and damages expert Michael Gordon of StoneTurn. The panel was moderated by Section Council member Ryan McManus of Hemenway & Barnes LLP. The lively discussion focused on the unique considerations that arise when litigating business tort cases, how to present a client's position as a compelling narrative, and how to try complex business disputes to a jury. The discussion was followed by a reception for the panelists and attendees hosted by Sherin & Lodgen.

## FIFTH ANNUAL COMPLEX COMMERCIAL LITIGATION CONFERENCE

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## JUVENILE &amp; CHILD WELFARE LAW

## EXPANDING ABUSE PREVENTION ORDER (209A) JURISDICTION TO THE JUVENILE COURT

BY CRISTINA F. FREITAS, DEBBIE F. FREITAS AND ALEXANDRA ROARK

The abuse prevention law in Massachusetts allows anyone who has been harmed or threatened with harm to seek an abuse prevention, restraining, or protective court order (a “209A”) against a family member or spouse, someone whom they were living with or dating seriously, or the parent of a mutual child. The law currently provides that the petitioner can seek this order in the Superior, Probate and Family, District, or Boston Municipal court departments of the Trial Court. The law also provides that if the petitioner is in a serious dating relationship, they must file in the District, Probate, or Boston Municipal courts. What the law does not currently provide for is Juvenile Court jurisdiction. Specifically, the Juvenile Court should be given exclusive jurisdiction over 209As anytime the youth is a respondent, and concurrent pendant jurisdiction when a minor is listed as a protected party in the 209A application and there is an open Juvenile Court child welfare case.

The case for providing the Juvenile Court with exclusive jurisdiction over 209As where the youth is a respondent is downright compelling. Twenty-seven years ago, the commissioner of probation, in partnership with the Department of Public Safety, implemented the Registry of Civil Restraining Orders. The first of its kind in the nation, the registry contained same-day information accessible to judicial and law enforcement agencies regarding the issuance and enforcement of restraining orders. For the first time, the registry captured all adolescent restraining orders issued in Massachusetts courts. Two years later, in 1994, the Office of the Commissioner of Probation analyzed the data collected in its study, “Young Adolescent Batterers: A Profile of Restraining Order Defendants in Massachusetts.” In this groundbreaking study, the commissioner found that in the first 10 months of the registry’s operation, 757 restraining orders were requested against juveniles between the ages of 11 and 17 across the state. The study identified and analyzed patterns in the demographics of the juvenile respondents

by age, gender, pattern of violence in terms of previous court involvement, conditions of the order issued, and what the respondent/petitioner relationship was. The study found that over half of the respondents in adolescent restraining orders had a prior delinquency or adult arraignment (at the time, 17-year-olds were prosecuted as adults), and one-quarter had three or more prior delinquency or adult arraignments, but only 19 percent were under probation supervision at the time the order was issued. More than 50 percent of petitioners in adolescent restraining order cases were those who were currently or were previously in a dating relationship with the juvenile, while nearly 45 percent were the juvenile’s relatives or parents. Indeed, 79 percent of all familial abuse cases in the registry involved a child against a parent, followed by sibling-on-sibling abuse, and more than two-thirds of the orders issued involved incidents that occurred at the home of the juvenile or petitioner.

Not surprisingly, the study concluded that an adolescent restraining order should be used as a red flag for future interpersonal violence by juveniles, and that the “time of the issuance of the restraining order should be a time for intervention.” The study went so far as to recommend pre-restraining-order education for school-aged children and training for personnel in the courts, law enforcement, social services and schools. The recommended goal of providing adolescent restraining order intervention at the time of issuance closely parallels that of the Juvenile Court in general: to prevent future antisocial or violent behavior through the provision of services, while also reducing the stigmatization of being labeled a batterer. What the report did not address, and what the Legislature has not addressed over the last 27 years, is why the Juvenile Court does not have jurisdiction over adolescent-involved restraining order cases.

Since its inception, the Juvenile Court has built its foundation on understanding adolescent brain development and providing services in order to change the trajectory of youth who violate the law, run away, or disobey their parents, or who are abused

**CRISTINA F. FREITAS** is a partner at Freitas & Freitas LLP in Lowell, where she represents parents and children in the child welfare and juvenile justice systems. She has been in practice since 2010.



**DEBBIE F. FREITAS** is a partner at Freitas & Freitas LLP in Lowell, where she represents parents and children in the child welfare and juvenile justice systems. She has been in practice since 2010.



**ALEXANDRA ROARK** is a supervising staff attorney in the Trial Panel Support Unit of the Children and Family Law (CAFL) division of the Committee for Public Counsel Services (CPCS) in Boston. She has been in practice since 1994. The opinions expressed herein are her own and not that of her agency.



or neglected by their parents. By maintaining a workforce of well-trained and experienced judges, probation officers, clerks, attorneys and social workers, the court allows adolescents to access necessary resources and increased support, and to realize positive behavioral changes. The numbers speak for themselves: in 2013, Massachusetts raised the age of adult criminal jurisdiction from 17 to 18 years old, diverting thousands of 17-year-olds to the Juvenile Court rather than the District Court. Despite that influx, juvenile crime has steadily decreased. Many studies have attributed that decrease to the Juvenile Court’s commitment to diverting youth into effective, community-based services, and the unique, developmentally appropriate approach the court takes.

Support for providing the Juvenile Court with concurrent pendant jurisdiction over cases where the child is not a respondent, but

CONTINUED ON PAGE 9

**ABUSE PREVENTION**  
**CONTINUED FROM PAGE 8**

rather a protected party (as listed by the petitioner), when there is an open child welfare case is equally persuasive. Each year, countless children are included in restraining orders between parents dealing with domestic violence issues. However, when the Department of Children and Families takes custody from the feuding parents through Juvenile Court proceedings, all of the parties must return to the District Court to modify those restraining orders to allow for supervised visitation. This is truly a disservice to the children, as it is the Juvenile Court judge who heard all of the testimony at the emergency custody hearing and is in the best place to modify the restraining order to comport with the best interests of the children and the specific circumstances of the family.

Given the significant amount of time the Juvenile Court spends each day listening to family violence cases, whether it be a delinquency case stemming from an alleged sibling assault or a care and protection case with allegations of child-witnessed domestic violence, the Juvenile Court is best positioned to negotiate these tense situations in the context of child-involved restraining orders as well. The change to the statute would be minimal, but the benefit would be immense for the juvenile, the juvenile's family and the community at large. Indeed, with the addition of exclusive Juvenile Court jurisdiction for adolescent respondents and concurrent pendant jurisdiction for child-involved 209As, the Legislature could not only position juveniles to receive more effective, developmentally appropriate services, it could also increase future community and family safety by addressing concerning behavioral patterns before these youth reach adulthood, and could provide family-specific relief in domestic violence cases where children are involved as a protected party. ■





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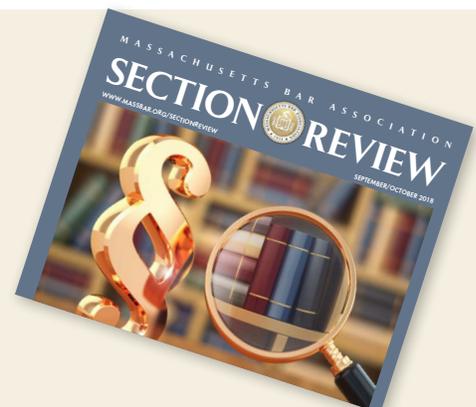


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## PROBATE LAW

**eWILLS: A BRIEF SUMMARY OF CURRENT STATUTORY LAW AND HOW IT MIGHT IMPACT MASSACHUSETTS PROBATE PRACTICE**

BY KAREN L. WITHERELL

As technology progresses, so do all aspects of our lives, even in the fairly traditional world of trust and estate law. One of these changes has been a shift toward the reliance upon electronic documents, and specifically electronic signatures, in law and business. An electronic will, also commonly called an “eWill,” is a will that has been written, signed and stored using an electronic medium, such as a digital format. This is different from a will that has been generated using an online service provider and then executed as a paper document.

The use of an electronic document as a will is not an entirely new concept. Over the years, there has been case law both abroad and in the United States that has permitted probate of electronic documents (text messages, documents on computer discs and the like) that do not fit the traditional definition of a will. A common theme among the cases was the application of the “harmless error doctrine” by the court. Under the harmless error doctrine, a will may be accepted for probate even if it does not comply with statutory law relating to execution when there is clear and convincing evidence that the testator in question intended the document to serve as her will.

Following on the heels of the harmless error doctrine cases, states began enacting statutory law related to eWills. In 2001, Nevada was the earliest state to enact eWill statutes (subsequently amended in 2017). On July 1, 2018, Indiana’s eWill statutes went into effect. In June 2019, Arizona’s eWill statutes went into effect. Most recently, in July 2019, Florida enacted eWill statutes that went into effect on Jan. 1, 2020. Following this trend, the Uniform Law Commissioners approved and recommended for enactment the Uniform Electronic Wills Act (UEWA) in July 2019.

**BRIEF OVERVIEW OF SIMILARITIES AND DIFFERENCES AMONG THE STATES****The Execution of the eWill**

All of the states that currently have eWill statutes require that the eWill be “signed” by the testator as part of the execution, specifi-

cally that the testator affirmatively apply her electronic signature to the document. What is required in addition to the “signing” varies somewhat from state to state. For example, in Arizona and Indiana, the execution of an eWill requires that the document also be “signed” by two attesting witnesses who must be in the physical presence of the testator during the execution. In contrast, Florida’s law permits the witnessing of the testator’s signature by two witnesses who are not in the testator’s physical presence so long as there is audio-video communication between the witnesses and the testator and the execution is overseen by a notary public.

In Nevada, the eWill can be considered properly executed if, in addition to the testator’s electronic signature, it contains:

- An “authentication characteristic” of the testator (specifically, a characteristic that is unique to the testator and is capable of measure and recognition in electronic records — for example, a fingerprint or a retinal scan); or
- Signatures of two attesting witnesses (who do not need to be in the physical presence of the testator so long as there is audio-video communication during the signing); or
- The electronic signature and the electronic seal of the notary public.

The UEWA requires that an eWill be signed by the testator and provides options to the future enacting states for electronic signatures of two witnesses or an electronic notarization. As with any uniform act, the UEWA will likely be personalized by each state that enacts it.

**Self-Proving**

Corresponding to laws regarding traditional paper and ink wills, the states that have enacted eWill statutes have also included methods by which the eWill can be made self-proving. For example, Nevada and Arizona provide for an eWill to be self-proving if:

- Self-proving declarations or attestations of the attesting witnesses are incorporated as part of, attached to, or logically associated

**KAREN L. WITHERELL**

is a partner with the law firm of Bove & Langa in Boston. Witherell specializes in estates and trusts law, including domestic and international work, philanthropy, business succession planning, special needs planning, prenuptial agreements and wealth preservation.



- with the eWill; and
- The eWill designates a qualified custodian to maintain custody of the electronic record of the eWill; and
- Before being offered for probate or being reduced to a certified paper original that is offered for probate, the eWill was at all times under the custody of a qualified custodian.

**Custodian — Who Can Qualify**

Each of the eWill states requires that the eWill be maintained in the custody of a “custodian” (the UEWA is silent as to the custodian of eWills). Whether a person or entity qualifies as a custodian varies from state to state. In Indiana, the custodian may be any adult whom the testator authorizes in writing to act in such capacity, but may not be: (i) the testator who executed the eWill, (ii) an attorney, (iii) a person who is named in the eWill as a personal representative of the testator’s estate, or (iv) a person who is named or defined as a distributee in the eWill.

In Nevada, the custodian may not be an heir of the testator, a beneficiary of the estate, or a devisee under the eWill. Similarly, in Arizona, the custodian cannot be related to the testator by blood, marriage or adoption and cannot be a devisee under the eWill or be related by blood, marriage or adoption to a devisee under the eWill.

In Florida, the custodian must be domiciled in and a resident of Florida or, if an entity, the custodian must be incorporated, organized, or have its principal place of business in Florida. Surprisingly, Florida has not included any prohibitions on an interested party of the estate serving as a custodian.

## eWILLS CONTINUED FROM PAGE 10

### SPECIAL CONSIDERATIONS AND ETHICAL ISSUES WITH EWILLS

#### Protecting At-Risk Individuals

With any legal document, there is a concern that a vulnerable individual will be taken advantage of by unscrupulous persons. This concern is heightened in the case of an eWill where no one may be in the physical presence of the testator during the execution. It can be much harder to determine the testator's mental state and understanding when each party to the signing is participating remotely through an audio-visual connection compared to an in-person signing conference.

To help address the concerns surrounding potential abuses, all of the current eWill statutes and the UEWA include an additional requirement of one or more of the following: (i) witnesses, (ii) an electronic notary and (iii) an authentication characteristic of the testator. Florida has taken the additional step of requiring "vulnerable adults" to have the witnesses physically present for any signing. This additional requirement may help the witnesses better assess the competency of the testator than they would be able to do via an audio-visual connection.

In addition to the execution requirements, the qualified custodian is required to store additional documentation as part of the electronic record. For example, in Nevada and Arizona this includes, in part, an audio-video recording of the testator, attesting witnesses and notary public, as applicable, taken at the time each party placed his or her electronic signature on the eWill. This additional required documentation will help provide evidence as to the validity of the execution of the eWill and the competency of the testator, if such is ever questioned in the future.

#### Storage of eWills in a Secure Manner

One of the first things that comes to mind with an eWill is the potential of the document being altered, intentionally or unintentionally, during storage or otherwise destroyed.

Nevada, Indiana, Arizona and Florida all specifically require the custodian of the eWill to maintain the electronic record in a protected manner. Arizona's statute states that the custodian shall maintain the electronic record in such a way as to protect the electronic record from destruction, alteration or unauthorized access, and in a manner that

detects any change to an electronic record. Florida additionally requires that custodians post and maintain a blanket surety bond of at least \$250,000 to secure performance of duties, and that they maintain liability insurance to cover any losses sustained by people storing electronic records with them (such policy must cover at least \$250,000 of losses in the aggregate).

Statutory requirements are all very well and good, but the systems used for the storage of the electronic documents must be regularly updated to keep pace with changes in technology and advances in cybercrime. As the use of eWills becomes more common and protective requirements more stringent, there will be a question of whether a custodian, who is not a large company in the business of providing custody for electronic records, will be able to provide adequate safeguards.

#### Revocation of an eWill

The simplest way to revoke an eWill is to execute a new eWill or traditional paper will that affirmatively revokes the prior eWill. There is the question, however, as to whether or not it is possible to revoke an eWill via a physical act given that electronic documents may never truly be "destroyed."

When it comes to physical revocation of an eWill, there is less consensus among the states. Both Nevada's and Arizona's statutes provide that a testator can direct a custodian to destroy the eWill. Such direction is to be in writing and signed by the testator with the same formalities of a will execution. Florida simply provides that the revocation by the testator or another at the testator's direction can be achieved by deleting, canceling, rendering unreadable, or obliterating the eWill or codicil with the intent, and for the purpose, of revocation as proved by clear and convincing evidence.

Indiana is the clearest with regard to these technological issues and provides detailed instructions for revoking both an eWill held by the testator and an eWill held by a third-party custodian.

#### Probating an eWill

Although electronic filing has become more and more commonplace, the Massachusetts probate court system still requires that the hard-copy original of the will be filed with the court as part of the probate opening process. Happily, Massachusetts attorneys seeking to probate an eWill will not necessarily have to figure out how to get the electronic

formats to interface with the computer systems of the probate courts. All of the eWill states and the UEWA provide for the production of a certified hard copy of the electronic record that may then be submitted for filing. Such a certified hard copy of the electronic record is intended to stand in the place of a traditional hard-copy original will.

#### ENFORCEABILITY OF EWILLS IN MASSACHUSETTS

Per M.G.L. c. 190B, Section 2-506, a written will is valid if it is executed in compliance with Section 2-502 [execution of wills statute] or if its execution complies with the law at the time of execution of the place where the will is executed, or with the law of the place where, at the time of execution or at the time of the death, the testator is domiciled, has a place of abode, or is a national. Massachusetts, therefore, will accept for probate a written will validly executed under the laws of another jurisdiction. It is arguable that an eWill validly executed in a jurisdiction with eWill statutory law should be accepted by the Massachusetts probate court for probate in Massachusetts pursuant to M.G.L. c. 190B, Section 2-506 and the principle of full faith and credit.

Until eWills become more commonplace, there will likely be some questions each time one is presented for probate outside of an eWill jurisdiction. For further clarity, counsel could seek an opinion from the court of the jurisdiction where the eWill was executed as to whether all execution requirements were met. This opinion could then be submitted with the certified hard copy to provide the probate court with additional evidence for the determination of the validity of the eWill.

#### CONCLUSION

Although eWills may seem like a radical new concept, as a society we have become increasingly reliant upon the use of electronic documentation for business and financial transactions. It is important as trust and estate practitioners that we continue to keep ourselves informed as to the use of eWills in other states. With the high mobility of modern society, it is only a matter of time before we will encounter eWills in our practice, regardless of whether or not Massachusetts chooses to enact an eWill statute in the future. ■



## THE END OF THE CLAWBACK QUANDARY — IRS ISSUES FINAL REGULATIONS §20.2010-1

BY JENNIFER Z. FLANAGAN

The uncertainty surrounding tax treatment of gifts made after Dec. 31, 2017, and before Jan. 1, 2026, has finally come to an end. The Internal Revenue Service issued final regulations in November, amending Regs. §20.2010-1 to provide special rules that account for the higher basic exclusion amount in effect for the years 2018 through 2025. In T.D. 9884, which became effective on Nov. 26, 2019, the IRS clarified that gifts made during this time period will not be “clawed back” into the estate of a decedent dying after Dec. 21, 2025, even if the lifetime gifts exceed the lower exemption amount effective Jan. 1, 2026.

The Tax Cuts and Jobs Act of 2017 (TCJA) amended section 2010(c)(3) of the Internal Revenue Code to increase the basic exclusion amount (BEA) from \$5 million to \$10 million (adjusted for inflation) for decedents dying and gifts made after Dec. 31, 2017, and before Jan. 1, 2026. Like many of the individual tax changes in the TCJA, this increased BEA will sunset on Jan. 1, 2026, and the BEA will revert to \$5 million, adjusted for inflation.

With the enormous difference between the BEA during the period 2018 through 2025 (the “increased BEA period”) and the BEA beginning in 2026, advisers have questioned whether the lower BEA could retroactively deny a taxpayer the full benefit of the higher exclusion amount for gifts made during the increased BEA period. For example, if Luke makes a \$9 million gift in 2020 when the BEA is \$11.58 million and dies in 2028 when the BEA is (let’s assume) \$6.58 million, would the additional \$5 million lifetime gifts be pulled back into Luke’s taxable estate? The final regulations confirm that Luke’s “excess” \$5 million gift will not be clawed back into his estate, and taxpayers may make large gifts during the increased BEA period without being penalized when the BEA reverts to \$5 million, adjusted for inflation.

The final regulations added a new paragraph (c) in Regs. §20.2010-1, “Special Rule in the Case of a Difference Between the Basic Exclusion Amount Applicable to Gifts and That Applicable at the Donor’s Date of

Death.” The regulations set forth various rules that must be followed to take full advantage of the benefits and provide new examples to illustrate the rules. Some of the more important points to keep in mind are:

- The special rule is a “use or lose” benefit. Consider the following two examples, assuming that Mary, a single woman, has \$20 million of assets and makes a gift in 2020 when the BEA is \$11.58 million. Also assume a \$6.58 million BEA at Mary’s death.

- If Mary makes a gift of her entire \$11.58 million BEA, she will remove that amount from her estate. On her death, even though Mary’s lifetime gifts will exceed the \$6.58 million BEA in the year of her death, she will not pay any tax on the “excess” gift. The full value of Mary’s estate will be subject to estate tax because she has no remaining BEA, but she will have removed the full \$11.58 million from her taxable estate.
- Now assume Mary makes a gift of \$6.58 million in 2020. She will not use all of her available BEA in 2020, but at her death there will be no more BEA available to use against her estate. The credit to be applied will be based on the \$6.58 million BEA in the year of Mary’s death. She cannot reach back and claim the additional \$5 million of BEA that was available when she made the lifetime gift.
- The application of a decedent’s deceased spousal unused exclusion (DSUE) and BEA is subject to ordering rules. Regs. §20.2010-1(c)(1)(ii) require that a taxpayer first utilize his DSUE against a gift before applying his own BEA. Assume the same facts as above except now Mary is married to Kevin. Kevin predeceases Mary, having used none of his BEA. Kevin’s personal representative made the portability election and now Mary has Kevin’s DSUE amount of \$11.58 million in addition to her own BEA of \$11.58 million. Mary makes a gift of \$11.58 million. The ordering rules require that Mary first apply the DSUE amount to the gift, resulting in the full use of Kevin’s DSUE amount.

**JENNIFER Z. FLANAGAN**

is a partner with Vacovec, Mayotte & Singer LLP specializing in trusts and estates law for domestic and international clients. She is a member of the Massachusetts Bar Association’s Probate Law Section Council.



On Mary’s death, the credit to be applied will be based on \$18.16 million (DSUE of \$11.58 million plus Mary’s BEA of \$6.58 million). Hence, she has only her \$6.58 million BEA amount available to allocate to her estate.

For married couples who may have the means to make large gifts but are unable to utilize both of their BEAs, be aware that splitting gifts may defeat the tax benefits provided by the special rule. For example, assume Bill and Jane are married, have a \$30 million estate, and are at a point in their lives when they can make a gift of \$11.58 million. Also assume that the BEA in 2026 is \$6 million.

- If Bill and Jane split the gift, they will each use \$5.79 million of their BEA. Together, they have transferred \$11.58 million free of gift and estate tax. If Bill’s death occurs in 2026, however, only \$210,000 of his BEA will remain to apply against his estate. Jane’s BEA will also be significantly reduced.
- If, instead, Bill makes the gift of \$11.58 million, then on his death, he will have no BEA remaining to apply against his estate. Jane, however, will still have her entire BEA to apply against lifetime gifts or her estate. Together, they can transfer over \$17.58 million free of gift and estate tax.

With the clarification provided by the final regulations, advisers can now confidently advise their clients that careful use of the higher exemptions between now and the end of 2025 can provide significant tax savings for clients with the means to make large gifts. ■



## HOW TO OWN YOUR VACATION HOME

BY SHEILA B. GIGLIO

Do you own a vacation home? If yes, do you own it alone or with others? Are you thinking of buying a vacation home? Will you be inheriting a vacation home?

Many of us fall in love with an existing vacation spot or the vacation home that has been enjoyed by family over a long period of time and dream of ownership. Whether you already own a vacation home or will acquire one by purchase or inheritance in the future, you should consider your ownership options, and then meet with your adviser to implement the form of ownership that works best for you. In all of these examples, if set up correctly, the property should pass at your death immediately without the need for probate.

### A LIMITED LIABILITY COMPANY

Consider placing your property interest into a limited liability company (LLC) to limit your exposure to any lawsuits involving the property to the value of the assets held in the LLC. If you intend to rent the property, think about the costs involved if a renter or their guest falls off your deck and is seriously injured. While the tax details of this form of ownership are beyond the scope of this article, a single-member LLC does not require a separate income tax filing. In addition, a simple operating agreement to the LLC can outline rules for the use of the property and

the responsibility for various fees and expenses associated with the property. Who opens and closes the property? Is there a cost for family member use? Who gets to use the property and when? An operating agreement adds clarity and prevents conflict when several family members intend to use a vacation property. Finally, if you are not a Massachusetts resident, but own vacation property in Massachusetts, transferring the property to an LLC may protect it from the Massachusetts estate tax.

### A TRUST

There are potential estate tax advantages to owning your vacation property in a revocable or irrevocable trust that should be discussed with your attorney or tax adviser. In addition to the potential tax advantages, ownership in a trust will allow you to determine how the property will be administered and distributed in the event of your incapacity or death. Do you want the property to pass to your children at your death? Can they afford the upkeep and taxes? If not, do you want those costs to be paid from other trust assets? If you decide now, you can prevent conflict and confusion when you are no longer able to control those decisions.

### A NOMINEE TRUST

If you have concerns about privacy and want the ease of changing the nature of own-

**SHEILA B. GIGLIO** is a partner in the Trust and Estates Department at Conn Kavanaugh Rosenthal Peisch & Ford. She focuses her practice on estate planning, the administration of trusts and estates, and on resolving legal conflicts within her practice area.



ership over time via a schedule of beneficiaries rather than by deed, you should consider owning title to your vacation home in a nominee trust. With this specialized type of trust, you can privately designate an owner of the property on an unrecorded schedule of beneficiaries and change the ownership without recording a deed. The beneficial owner can be your personal revocable trust, an LLC, or named individuals.

### CONCLUSION

A vacation property can provide years of fun and deep experiences for family and friends, but the underlying emotional attachment may make it a touchstone for potential conflict. Take control and make an ownership decision that works best for you now to avoid arguing and dissention later. ■



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## SPENDTHRIFT TRUSTS: SOME RECENT LESSONS IN ASSET PROTECTION

BY PATRICIA L. DAVIDSON AND  
LEAH A. KOFOS

Creditors can be vultures. But in fairness, no one likes to be stiffed. A lot of people don't pay their bills; some debtors can't and some debtors don't play by the rules. And some debtors may have the fortuity of a trust, including a so-called spendthrift trust. In such situations, creditors may try to recover assets from a debtor/beneficiary's trust, including assets presumably protected by the spendthrift trust.

Under the Massachusetts Uniform Trust Code, G.L. c. 203E, § 505(a)(2), a spendthrift clause in a trust generally insulates trust assets from creditors' claims in two ways. First, it protects a beneficiary from a creditor trying to satisfy prior debts from the debtor's beneficial interest in a trust. Second, it protects the beneficiary from accumulating debt that otherwise could be satisfied by the debtor's beneficial interest in the trust.

Spendthrift trusts typically give the trustees very specific guidance or limitations about how to make distributions to the beneficiary. Spendthrift provisions endeavor to preserve assets for future beneficiaries and are typically implemented when a beneficiary has a history of fiscal imprudence or other vulnerability (e.g., substance abuse, marital problems or mental health challenges) that puts trust assets at risk.

But sometimes, a spendthrift provision does not offer the protection the grantor intended. Whether or not a spendthrift trust will clip the wings of the vulture . . . er . . . creditor . . . is often a complicated, fact-specific analysis. Three recent court decisions help to explain how spendthrift trusts can and cannot work in Massachusetts.

In *Levitan v. Rosen*, 95 Mass. App. Ct. 248 (2019), the Appeals Court found that a spendthrift provision governing a spouse's right of withdrawal from a family trust did not protect estate assets from inclusion in the

marital estate in the case of a divorce. In this case, the wife withdrew funds from a trust established by her father in accordance with her right of withdrawal. The court determined that these withdrawals were considered distributions from the trust and were therefore subject to application of the spendthrift provision. Consequently, the spendthrift provision prohibited creditors, including her spouse, from receiving any portion of the trust. However, even though the right of withdrawal was governed by the spendthrift clause, the court found that the trust's distributions to the wife were not a mere expectancy. As a result, the court determined that the entire value of the trust was subject to equitable distribution upon divorce, regardless of the spendthrift clause.

In *De Prins v. Michaelis*, 342 F. Supp. 3d 199 (D. Mass. 2018), the District Court found that the spendthrift provision of the trust did not protect the trust assets in the debtor's self-settled, irrevocable trust. The court found that regardless of the presence of a spendthrift provision, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. The court reasoned that in a self-settled trust, even though the beneficiary did not actually receive any distributions from the trust, the trustee could have distributed the full amount of the trust. Therefore, the court found that a creditor could reach the full amount of the trust.

In *Calhoun v. Rawlins*, 93 Mass. App. Ct. 458 (2018), the Appeals Court distinguished between a spendthrift trust and a trust funded by divorce. The court determined that a trust funded by a divorce settlement is considered a self-settled trust and is therefore reachable by that beneficiary's creditors because the beneficiary is the person receiving distributions as a result of the settlement agreement. The trust is not a spendthrift trust created by a third party as a gift. Furthermore, like in *De*

**PATRICIA L. DAVIDSON** is a partner at Mirick O'Connell in the Probate, Trust and Fiduciary Litigation Group and the Business and General Litigation Group. Her practice focuses on helping families resolve issues involving wills, trusts and real estate; disputes involving family and closely held businesses; and litigation of complex business issues that arise out of breach of fiduciary duty claims, breach of contract claims, shareholder disputes, corporate dissolutions, trade secret issues and real estate matters.



**LEAH A. KOFOS** is an associate in Mirick O'Connell's Trusts and Estates Group. She focuses her practice in estate planning, estate and trust administration, guardianships and conservatorships, and elder law.



*Prins*, the Calhoun court reiterated that a self-settled or discretionary trust cannot be used to protect assets from creditors because the grantor created a discretionary trust for his own benefit. The creditors can thus reach the maximum amount, which the trustee could distribute to the beneficiary or use for his benefit.

Spendthrift provisions are useful planning devices to preserve assets and shield trust assets from creditors and, indeed, beneficiaries themselves. However, not all purported spendthrift trusts accomplish their intended goals, particularly when the settlor seeks to use spendthrift provisions to dodge his own liabilities. Drafters must take great care to consider individual circumstances — and maybe encourage settlors and beneficiaries to satisfy their financial obligations in the first place. ■



## TROUBLING CONCERNS RAISED BY *LEVITAN V. ROSEN*

BY STEVEN D. WEIL

In *Levitan v. Rosen*, 95 Mass. App. Ct. 248 (2019), the Appeals Court held that in the context of a divorce proceeding, a wife's beneficial interest in a trust established by her father was a marital asset subject to equitable division pursuant to G.L. c. 208, § 34, but that a spendthrift provision in the trust precluded the Probate Court from assigning any portion of the wife's interest to the husband. As explained below, the Appeals Court's decision raises some troubling concerns for couples seeking clarity on how beneficial interests in trusts will be treated in divorce disputes.

### 1. The Appeals Court overlooked the applicable provisions of Florida's version of the Uniform Probate Code.

The Appeals Court considered the main issue in *Levitan* to be whether the wife's share of the trust was includable in the marital estate for purposes of equitable division pursuant to G.L. c.208, § 34. The wife argued it was not due to a spendthrift provision that required the trustee to withhold distributions that did not benefit the wife exclusively. The husband argued that the wife's beneficial interest was a marital asset insofar as the wife had an unrestricted right of withdrawal giving her access to five percent of the trust principal, annually. The trial judge ruled that the wife's right of withdrawal was not governed by the spendthrift provision and was therefore includable in the marital estate.

In reversing the trial judge's ruling, the Appeals Court relied primarily on the language of the trust provisions. The court applied longstanding principles of Florida law governing the interpretation of trusts, and Florida's public policy favoring the enforcement of spendthrift provisions. Analyzing the language of the right of withdrawal and the language of the spendthrift provision, the court ultimately found that the spendthrift provision was broader in scope than found by the trial judge and precluded the trustee from making any distributions to the husband, including those involving the wife's annual right of withdrawal.

The Appeals Court rejected the trial judge's reliance on a Florida Court of Appeals case and a case decided by the U.S.

District Court of Appeals for the Eleventh Circuit, both of which invalidated spendthrift provisions in trusts because those trusts were self-settled

for the settlor's benefit. In other words, the Appeals Court limited the holdings of those cases to preventing a settlor from creating a trust for his own benefit in order to shield his assets from creditors.

The Appeals Court's decision is troubling because it makes no mention of the applicable provision of Florida's version of the Uniform Trust Code, which governed the interpretation of Florida trusts at the time of the divorce. The creditors' rights provision of the Florida Trust Code invalidates spendthrift provisions and permits creditors, including husbands, to reach trust assets to the extent a beneficiary may exercise a right of withdrawal over them, notwithstanding the existence of a spendthrift provision in the trust. The Florida Code expressly provides for several instances where this is the case that are not limited to self-settled trusts. See Sections 736.0502, 736.0503 and 736.0505. Section 736.0503 carves out an exception for child support, alimony and maintenance orders. Section 736.0502 provides that a power of appointment overrules and cannot be limited by the terms of a spendthrift provision. Finally, Section 736.0505 carves out an exception for creditors to the extent of a beneficiary's right of withdrawal. This last exception to the enforcement of spendthrift provisions fits the circumstances of the *Levitan* case. Accordingly, the Florida Trust Code expands on the holding of the caselaw distinguished by the Appeals Court rather than limits it. Yet, there is no mention of the creditors' rights provisions in the Florida Trust Code anywhere in the Appeals Court's decision.

### 2. The Appeals Court stretched the bounds of the commonly held view in Massachusetts that interests in wholly discretionary trusts are not generally included in marital estates.

After ruling that the spendthrift provision precluded the trial judge from assigning any portion of the wife's interest in the trust to the husband, the Appeals Court then ruled that the wife's entire beneficial interest in the trust should be considered a marital asset subject to equitable division under § 34, including the wife's interest in receiving wholly discretionary distributions. In overruling the trial judge's decision on this issue, the Appeals Court discussed a body of caselaw reviewed most recently in the *Pfannenstiehl* case (*Pfannenstiehl v. Pfannenstiehl*, 475 Mass. 105 (2016)) that supports the view that interests in discretionary trusts are generally

**STEVEN D. WEIL** is a partner at Doherty, Dugan, Cannon, Raymond & Weil PC, where he specializes in family law and civil litigation. He is a member of the Massachusetts Bar Association's Family Law Section Council. Weil served as trial counsel to the husband in *Levitan v. Rosen*.



treated as expectancies and too remote for inclusion in a marital estate. The commonly held view is that discretionary interests in a trust are not present and enforceable due to the fact that the beneficiary must rely on the trustee's exercise of discretion, the beneficiary does not have a present right to use the trust principal, and the beneficiary cannot compel distributions.

The Appeals Court arrived at its ruling by contrasting the wife's interest in the *Levitan* trust with trust interests in cases like *Pfannenstiehl* in which the beneficiary class was generational and open-ended in nature. Since the trust interest in the *Levitan* trust was fixed, unchanging and for her benefit, the Appeals Court did not view it as too remote for inclusion. This ruling and others like it cause uncertainty among estate planners who are seeking to protect a beneficiary's trust assets using the vehicle of a discretionary trust. The *Pfannenstiehl* case holds that trust interests that are not subject to an ascertainable standard of distribution, and which involve open-ended beneficiary classes, are mere expectancies, not marital assets. In other cases, the Appeals Court has included discretionary trust interests in a marital estate, where a beneficiary either has some right to access the principal (like in *Levitan*), or where there is a high degree of certainty that the beneficiary will come into possession of the trust assets. The decision in *Levitan* will likely be used by other non-beneficiary spouses to argue that beneficial interests in wholly discretionary trusts are considered marital assets. It has become very difficult to determine to what degree discretionary interests in trusts are generally still too remote for inclusion in a marital estate.

### 3. The Appeals Court's remand of the case raises difficult questions for the Trial Court.

The Appeals Court remanded the case to



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the Trial Court, stating that because the trial judge did not include the wife's entire trust share in the marital estate when assigning property under § 34, the property division must be vacated and remanded. The Appeals Court further directed that in light of the spendthrift provision, the wife's trust share must be distributed exclusively to her. Only the question of determining the proper division of the remaining assets, in this case the husband's 401(k) account, was remanded to the trial judge.

The trial judge initially ruled that the wife would retain her annual right to withdraw five percent of the trust principal. Since the trial judge also ruled that the rest of the wife's interest (i.e., her interest in receiving discretionary distributions) was not a marital asset, the wife had already been awarded her entire trust interest, valued at approximately \$1.67 million. The trial judge awarded the husband his 401(k) account, valued at approximately \$128,000, as it was the only other substantial asset in the marital estate. Accordingly, the remand of this issue appears unnecessary, since, according to the Appeals Court, the wife is to retain approximately 93 percent of the marital estate in the form of her beneficial interest in the trust. Given the

disproportionality of this division, there is a question as to the need to remand this aspect of the case.

In addition, the Appeals Court vacated and remanded the trial judge's child support order because of the intertwined nature of the property division and the child support determinations. In determining child support, the trial judge allowed the wife to keep her entire trust interest, but he treated the wife's right to withdraw five percent of the trust principal as income to her for child support purposes. In its remand of the child support order, the Appeals Court questioned the trial judge's treatment of the wife's annual right to withdraw five percent of the trust principal as income. As grounds, the Appeals Court noted the established view that the practice of awarding one spouse a marital asset as part of an equitable division, and then considering it a source of income for purposes of imposing support obligations (i.e., double dipping), while not prohibited, is seemingly unjust.

Achieving equitable property divisions and fashioning support obligations in cases where one party must receive a largely disproportionate division of the marital estate because a non-assignable beneficial interest in a trust is the largest or only marital asset poses a difficult task for a trial judge. In hindsight, the trial judge's initial judgment seems

to have anticipated problems with dividing the wife's beneficial interest in the trust. Rather than rule that some portion of the wife's trust interest be assigned to the husband, a ruling that the Appeals Court subsequently and expressly prohibited, the trial judge allowed the wife to keep her entire trust interest, but ruled that her right to withdraw five percent of the trust principal would be considered an income stream to her. In light of the provisions of the Florida Trust Code that permit a husband to reach trust assets, the previously established view that interests in discretionary trusts are generally treated as expectancies, and the absence of any counterbalancing assets for the husband, it seems as though the trial judge undertook a careful look at the equities of the situation in determining that the wife's right of withdrawal would be considered income to her for purposes of calculating child support. The trial judge issued a judgment that allowed the wife to keep her interest in the trust, as the grantor likely intended, and, at the same time, balanced the equities of the parties in setting a child support order that reflected the wife's receipt of the lion's share of the marital estate, as well as the parties' resulting financial circumstances. ■



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**NO CAUSE OF ACTION FOR DIMINISHED VALUE IN MASSACHUSETTS****BY JOSEPH NETT**

An attorney representing a client for damages related to a car accident has a multitude of claims and issues to resolve. These range from personal injury protection, bodily injury, property damage, potential uninsured motorist and “diminished value” claims. Until this year, there was still a question of whether one could pursue a third-party claim against an at-fault party for the diminished value of their car due to the stigma of it being in an accident. This is no longer the case. In the recent United States District Court of Massachusetts decision, *Martins v. Vt. Mut. Ins. Co.* (2019), the court ruled that inherent diminution of value claims by third parties are not covered by the standard Massachusetts automobile insurance policy. Therefore, Massachusetts attorneys now need to be wary of pursuing such a “diminished value” claim because no clear cause of action exists.

Unlike many other states, the Supreme Judicial Court of Massachusetts has long held that inherent diminished value in first-party automobile claims is not covered by the standard Massachusetts automobile policy. Further,

the Massachusetts Division of Insurance, in an advisory opinion dated April 26, 2002, expressly stated that the Massachusetts standard policy for automobiles did not cover “diminution of value” or “inherent diminished value.” As such, pursuing a first-party claim against your client’s insurer for diminished value has long been a futile endeavor.

In coming to the conclusion that third-party claims are also not valid, the court in *Martins* examined some key principles of Massachusetts law. Most importantly, the court concluded that the law of Massachusetts does not permit recovery of damage in a tort action for the inherent diminished value of personal property. Further, the court also found it persuasive that the Massachusetts commissioner of insurance had never taken the position that inherent diminished value damages were recoverable. Lastly, the court held that it would create an “anomaly in Massachusetts insurance coverage ... if a third party could recover damages for inherent diminution in value — but the insured himself could not.”

Even if diminished value claims were not expressly forbidden, this decision reflects the other issues with such claims. Specifically, if a claimant’s motor vehicle is already

**JOSEPH NETT** is an associate attorney with Brand & Tapply LLC. He specializes in insurance coverage and insurance fraud.



fully repaired through their property damage claim, then they have already legally been fully compensated. Moreover, it is arguable that a diminished value claimant has not truly suffered damage when they bring their claim because — unless they have already sold their vehicle for a loss — no damage has been suffered and they lack standing. Additionally, measuring the diminished value from a motor vehicle solely being in an accident is difficult and often leads to a battle of the experts. For these reasons, the current trend of many states, including Massachusetts, is to not allow for the recovery of diminished value. Therefore, be careful before spending the money and resources to hire an expert and bring a diminished value claim, as the current state of Massachusetts law does not allow for such a cause of action. ■

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