Extrinsic evidence allowed to prove testator's intent

Disputed will signed by conservator who lacked authority

Eric T. Berkman (https://masslawyersweekly.com/author/ericberkman/) / April 5, 2024 / ...

(mailto:?subject=Extrinsic evidence allowed to prove testator's intent&body=The Appeals Court has ruled that extrinsic evidence could be used to prove the validity of a will signed by the testator's conservator under the conservator's mistaken belief that his... You can read the content in details following link https%3A%2F%2Fmasslawyersweekly.com%2F2024%2F04%2F05%2Fextrinsic-evidence-allowed-to-prove-testators-intent%2F)

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The Appeals Court has ruled that extrinsic evidence could be used to prove the validity of a will signed by the testator's conservator under the conservator's mistaken belief that his appointment gave him the power to do so.

Writes reversal for panel

The conservator, David D. Parker Jr., prepared the document — which purported to leave half of decedent Jean Olson's estate to a pair of charities while distributing the other 50 percent to four nephews and two nieces-in-law — in consultation with Olson several months before her death.

Parker's appointment decree directed him to establish a financial and estate plan for Olson but did not expressly authorize him to sign a will.

One of Olson's nephews, objector Anthony Lewandowski, challenged the will, arguing that it was invalid under G.L.c. 190B, §2-502(a), which requires that a will be signed by the testator or by someone else in their name.

A Probate & Family Court judge agreed and dismissed the petition, rejecting Parker's argument that an exception in the statute applied in the case. The exception allows the use of extrinsic evidence to prove a testator intended an unsigned document to be his or her will.

The Appeals Court reversed.

Polls

Do you agree with calls for U.S. Supreme Court Justice Sonia Sotomayor to retire during President Joe Biden's current term?

- Yes, Donald Trump appointing her successor could worsen the imbalance between Republican and Democratic appointees on the court.
- No, justices should make their own retirement decisions independent of political considerations.

VOTE

View Results

"[I]n the specific circumstances of this case — where a separate statute (the conservatorship statute) allows conservators with court authorization to execute wills on behalf of other persons, and the conservator here acted on the belief that he had such authorization — the language creating the exception to §2-502(a) is best construed to permit the use of extrinsic evidence to establish that the unsigned document is a valid will," Judge Sookyoung Shin wrote for the court. "A contrary reading would risk allowing a good faith mistake of the conservator … to override Olson's testamentary intent."

The 18-page decision is ***In the Matter of the Estate of Olson***, Lawyers Weekly No. 11-023-24 (https://masslawyersweekly.com/2024/03/22/wills-and-trusts-signature-conservator/).

'Clearly recognized the folly'

Lewandowski's attorney, Matthew H. Beaulieu of Rochester, said his client was disappointed with the decision and was considering seeking further review.

"While the Appeals Court clearly recognized the folly of completely dispensing with signature and witness requirements, the court appears to be adopting a judicial harmless error exception notwithstanding the fact that the Legislature rejected such a provision," Beaulieu said. "The risk of fraud, abuse or exploitation, albeit reduced, remains significant."

Brian K. Lee of Boston, who represented the conservator, could not be reached for comment prior to deadline.

But Harry M. Haytayan Jr., a probate litigator in Waltham, said the decision shows that the court's chief concern was getting at the testator's intent.

"Sometimes the statutory framework enables a trial judge to do that efficiently and other times it doesn't," he said. "In this case, the statutory framework was insufficient to achieve the ultimate objective of testamentary intent, so what the court did was rely on the conservatorship statute and limit the holding to that statute, giving the conservator essentially an 'out' to get another opportunity to prove to the court that the testator intended that the document be her will."

Boston attorney Donna A. Mizrahi said the decision shows how critical it is for conservators to review which specific powers are granted by law and pay close attention to those that require court approval and those that do not.

To the extent there is ambiguity in a court order about the scope of a fiduciary's authority, best practice is to clarify the issue with the court — although it is not always easy or practicable to do so.

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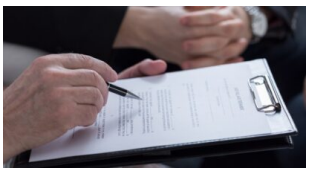

Extrinsic evidence allowed to prove testator's intent

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She also said that while the conservator conceded that his appointment did not empower him to create a will for the testator, there might be an argument that the language of the appointment, which directed that "a financial and an estate plan be established for Olson," did, in fact, confer such power.

"To the extent there is ambiguity in a court order about the scope of a fiduciary's authority, best practice is to clarify the issue with the court — although it is not always easy or practicable to do so," Mizrahi said.

Eric D. Correira of Swansea described *Olson* as a case of "bad facts making bad law."

"The decedent's wishes are well documented, the conservator appeared to act in good faith and had no personal stake in the will, and the beneficiaries were primarily respected charities," Correira said. "It is understandable that the court would want to help correct the conservator's mistake of not getting court approval before signing the will, but these types of decisions open the door for future arguments over what should have remained a black and white issue: that a conservator needs court authority before making a will on behalf of an incapacitated person."

Will contest

The Probate Court appointed Parker as Olson's conservator in July 2017.

The appointment gave him "all the powers and duties authorized to a conservator for a protected person" under G.L.c. 190B, §5, the conservatorship statute.

A further order incorporated into the decree directed that a "financial and estate plan" be established for Olson with the assistance of the conservator and "other expert financial/estate planners."

According to affidavits from the conservator, he could not locate a will or other document expressing Olson's testamentary wishes and hired an attorney to determine if a guardian ad litem was required.

That attorney apparently confirmed that a decree expanding Parker's authority to create an estate plan was unnecessary because Olson was represented by independent legal counsel.

Parker hired a second attorney to draft an estate plan for Olson and met with her multiple times to discuss how she wanted to divide her estate.

At one meeting, attended by both attorneys, Olson apparently said she wanted to make major bequests to Boston Children's Hospital and the Masonic Lodge in Brockton because of services they had provided her and her family.

After those wishes were memorialized in a draft will, the conservator apparently met with Olson for nearly two hours in October 2018 to discuss the draft, particularly provisions that would distribute 33 percent shares to Children's and the Masonic Lodge.

Following the discussion, Olson decided to reduce those bequests to 25 percent each.

On Oct. 23, 2018, the conservator executed the document, which left 25 percent to both Children's and the lodge while leaving 11 percent to each of her four nephews and 3 percent to both of her nieces-in-law.

Parker signed the document, which was witnessed and notarized, in his own name as conservator.

Olson died on May 6, 2019, terminating Parker's conservatorship.

In the Matter of the Estate of Olson (https://masslawyersweekly.com/2024/03/22/wills-and-trusts-signature-conservator/)

THE ISSUE: Could extrinsic evidence be used to prove the validity of a will signed by the testator's conservator under the conservator's mistaken belief that his appointment gave him the power to do so?

DECISION: Yes (Appeals Court)

LAWYERS: Brian K. Lee of Nutter, Boston (conservator)

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Matthew H. Beaulieu of Beaulieu, Saunders & Kostin, Rochester (objector)

When Parker petitioned to probate the document as Olson's will, Lewandowski and another nephew objected on grounds that the will was not signed by Olson or in her name, as required by §2-502(a), and that powers granted to Parker by the conservatorship decree did not include the power to make a will for her.

Judge Edward F. Donnelly Jr. granted the objectors' motion for summary judgment, concluding that language in §2-502(a), which according to the conservator allowed extrinsic evidence to be used to override the statute's signature requirement, did not, in fact, do so.

The conservator appealed.

Judgment reversed

The Appeals Court looked to the language at issue in §2-502(a), which states that "except as provided in subsection (b)," a will must be signed by the testator or someone else acting in the testator's name at their direction.

Subsection (b), in turn, states: "Intent that the document constitute the testator's will can be established by extrinsic evidence."

"We do not agree with the conservator that the '[e]xcept as provided in subsection (b)' language is unambiguous and must be construed to permit, without limitation, the use of extrinsic evidence to prove that an unsigned or unwitnessed document is a will," Shin wrote.

Still, she said, given the interplay between §2-502(a) and the conservatorship statute, extrinsic evidence was appropriate to prove Olson's intent under the unique circumstances of this case.

"Although the decree here did not authorize the conservator to make a will, were Olson still living, the court could have later conferred that power on the conservator and approved the 2018 document as Olson's will after a substituted judgment hearing," Shin said. "In this situation, where a substituted judgment hearing cannot be held because Olson's death terminated the conservatorship, we think it aligns with … 'common sense and sound reason' for the court to consider extrinsic evidence to determine whether the 2018 document comports with Olson's testamentary intent."

In drawing that conclusion, Shin emphasized that the conservator had no direct financial interest in probate of the purported will, and he acted in good faith in believing he had authority to execute it.

"Allowing a conservator's good faith mistake to potentially defeat a decedent's testamentary wishes would contravene the [Massachusetts Uniform Probate Code's] purpose 'to discover and make effective the intent of a decedent in distribution of the decedent's property' without materially serving the other enumerated purposes," Shin wrote.

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