

Counsel fee award cancels beneficiaries' estate share

Judge: no evidence to support fiduciary claim vs. personal rep

By: Eric T. Berkman December 1, 2016



Estate beneficiaries who unsuccessfully sued the estate's personal representative after she used her power of attorney to amend distribution percentages could be liable for attorneys' fees in an amount that would ultimately wipe out their individual interests in the estate, a Probate & Family Court judge has decided.

Plaintiff Patricia Giroux, the estate's personal representative, executed an amended beneficiary schedule, while the decedent was still living, that gave Giroux a 60 percent interest in his realty

trust while reducing the interests of the defendant beneficiaries. She apparently did so per the wishes of the decedent.

When Giroux filed in Probate Court for a declaration that she could control the trust while the decedent was still alive, the defendants counterclaimed, alleging that she breached her fiduciary duty by changing the schedule of beneficiaries and that she had exercised undue influence on the decedent.

Judge Katherine A. Field rejected the defendants' counterclaim on summary judgment for failure to offer any supporting evidence, after which Giroux moved for legal fees and costs pursuant to G.L.c. 215, §45.

The defendants argued that the fee — which would, in effect, cancel out their combined \$144,000 inheritance and which did not involve a finding of bad faith — was unreasonable.

But Field disagreed.

"The Court need not find bad faith to make an award under §45 and a party whose conduct has triggered litigation may be ordered to pay the expenses resulting from that litigation," she wrote. "Here, if attorney's fees and costs are not shifted, the shares of the estate and trust to [Giroux] will be significantly diminished, while the shares of the defendants ... will only be affected slightly."

The 18-page decision is *Giroux v. Laranjo, et al.*, Lawyers Weekly No. 15-007-16. The full text of the ruling can be ordered here.

'No basis'

Plaintiff's counsel David J. Correia of Swansea said the ruling serves as a reminder that bad feelings and anger are no basis for a lawsuit.

"It's not unusual for individuals to make supercilious claims in hopes that they'll get some kind of settlement offer," Correia said. "In my view, those sorts of claims should be resisted sometimes more frequently than they really are."

Correia's son and co-counsel, Eric D. Correia, said the decision reinforces the fact that, at least in Probate Court, there is an exception to the American Rule that all parties bear their own fees and costs.

"All too often, some litigants or attorneys who don't focus on probate litigation forget about this statute and proceed under the assumption that there's no possibility that attorneys' fees will be awarded against them," he said.

The younger Correia also said it is unusual to see beneficiaries lose their entire share of an estate to a fee award, but that was part of the judge's reasoning.

"[The defendants] were creating attorneys' fees that exceeded the amount in controversy," he said. "If a fee wasn't awarded against the losing parties, our client and [another beneficiary who remained neutral] would have seen their own inheritances significantly decreased because of fees expended defending the plan. So it was a matter of equity."

Mark E. Swirbalus, a Boston attorney whose practice focuses on probate and fiduciary litigation, said §45 is designed specifically for situations such as the one in *Giroux*.

"The decision may be noteworthy in the sense that there was this much litigation over an estate where the assets were relatively limited. But at the same time, I think the judge's rationale was that if the contesting parties caused that amount of fees to be incurred, that should be the amount of fees awarded against it," he said.

Consequently, Swirbalus said, the ruling is a reminder to attorneys that if they are representing beneficiaries who intend to challenge an estate plan, that challenge comes with substantial risk.

In fact, many judges, when meeting with lawyers and parties at a pre-trial or case management conference, will put it right out on the table that the losing party is at risk of a fee award being levied against him or her, Swirbalus said.

The defendants were originally represented by Darrow Everett, a Rhode Island firm that filed the defendants' counterclaim and opposition to the plaintiff's motion for summary judgment.

Sean M. Murphy of Brockton, who took over the case at the summary judgment stage, said that while he and his clients were disappointed by the decision, the real problem lies with the Supreme Judicial Court's 2010 decision in *Estate of King*, which provided for fee shifting under §45 even when a claim is not frivolous or made in bad faith.

"The court can consider shifting fees if it would prevent distorting the decedent's otherwise valid estate plan," he said. "I understand why it's there, but there should at least be some sort of showing that one side shouldn't have brought the litigation at all."

Without such a showing, Murphy said, the framework puts a damper on parties' petitioning rights.

"That's the problem I find with the *King* decision and the statute in general; it allows any fiduciary who goes through litigation to threaten that if you lose you'll get nothing and he or she will get everything," Murphy said.

"There are a lot of reasons someone may lose or give up a fight that don't necessarily mean they didn't have a valid claim. There are a thousand reasons court cases go different ways. But to say that just because you lost you bear all the cost — that's really unfair to litigants."



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Estate dispute

Giroux was the personal representative of the estate of Joseph Peixoto and first successor beneficiary for a realty trust of which Peixoto was the lifetime beneficiary.

The trust's initial schedule of beneficiaries listed Giroux as having a 50 percent interest with four other beneficiaries receiving interests varying from 8 to 26 percent.

In May 2012, Peixoto revised the schedule, replacing the beneficiaries with five other people, who were each assigned a 20 percent interest.

That same year, Peixoto was diagnosed with ALS and his health began to decline.

In June 2013, Peixoto gave Giroux power of attorney over his estate and executed a will in which he changed his estate distributions.

At some point, Peixoto apparently requested that the schedule of beneficiaries be changed again. It was amended to give Giroux a 60 percent share and to designate her as successor trustee for the trust while allocating a 10

percent interest apiece to Joseph H. Rose and defendants Maria Bernadette Laranjo, Maria Antoinette Reis and Maria Lourdes Amaral.

Giroux, in her capacity as Peixoto's attorney in fact, executed the changes on Sept. 23, 2013. She apparently did so at the direction of the estate's lawyer, James F. Rogers, because Peixoto was not physically able to execute the changes himself.

Peixoto died on Sept. 29, 2013.

On March 6, 2015, Giroux filed a complaint in Probate Court seeking a declaratory judgment on the issue of whether a nominee trust's successor beneficiary could control the trust while the lifetime beneficiary was still alive.

The defendants, whose combined interest in the trust totaled approximately \$144,000, filed a counterclaim alleging that Giroux had breached her fiduciary duty and exerted undue influence on Peixoto, resulting in the change to the schedule of beneficiaries.

Giroux moved for summary judgment, which Field granted this past March after finding no evidence to support the counterclaim beyond a conclusory statement that Giroux benefited from the transaction.

The plaintiff then moved to recover \$137,500 in attorneys' fees and costs that the estate had apparently incurred defending against the claim.

Fee award

Field found the plaintiff's fee request justifiable under the circumstances.

The judge noted that §45 gives the Probate Court broad discretion to shift fees in the context of trusts and estates "as justice and equity may require."

And as the SJC found in *King*, no showing of bad faith is required to order a party whose conduct has triggered litigation to pay legal costs the other side incurs as a result, Field said.

That means the statute can be used to "rectify" situations in which one party was subject to ongoing litigation to the detriment of beneficiaries of an estate plan, the judge continued, saying *Giroux* was such a case.

"If no litigation had occurred, the defendants' combined inheritance would have totaled \$144,087.01," Field observed. "Since litigation did occur, and if the fees are not shifted, the defendants will still receive a combined total inheritance of \$95,912.61, which is less \$48,174.40, shared equally amongst eight individuals."

On the other hand, the plaintiff's share in the estate and trust would decrease from \$288,174.03 without litigation, to \$191,825.20 if no fee shifting were to occur. That would saddle the plaintiff with a personal loss of \$96,348.83 as a result of litigation required to defend against the defendants' action.

But by shifting the fees, the beneficiary shares that Giroux and Rose, the neutral beneficiary, receive would reflect figures more in line with what they would have received had the litigation not occurred, Field said.

Meanwhile, the judge rejected any assertion that the fee was excessive, finding the \$375 an hour charged by the plaintiff's lawyers to be within the typical range given the experience and expertise.

Giroux v. Laranjo, et al.

THE ISSUE Could estate beneficiaries who unsuccessfully sued the personal representative after she used her power of attorney to change the distribution percentages be ordered to pay attorneys' fees in an amount that would ultimately wipe out their individual interests in the estate?

DECISION Yes (Probate & Family Court)

LAWYERS David J. Correia and Eric D. Correia, of Correia & Correia, Swansea; Joseph F. DeMello of Taunton (plaintiff)

Sean M. Murphy of Brockton (defense)

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