

# INSIDE THE LAW

Summer 2016

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## AIRBNB RENTALS POSE NOVEL ISSUES FOR CONDOMINIUMS

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Airbnb and other similar web-based services provide an increasingly popular alternative to hotel accommodations by connecting travelers with local owners or occupants who want to earn extra revenue by renting out their home or perhaps just a room in their home on a short-term basis. Travelers like it because they can rent anything from fully furnished luxury homes to spartan rooms at rates that are typically far below those of traditional hotels. Owners like it because they are able to generate more income than they would if their property were leased on an annual basis. Much as Uber has turned private vehicle owners into cabbies, Airbnb is making innkeepers of many homeowners. While this type of short-term rental service raises a host of legal issues in Massachusetts and beyond, it poses particularly thorny issues for condominium associations.

While my condominium unit might offer a choice location close to the hospitals for a visiting physician or the family members of a sick patient, you can bet that my neighbors won't be happy about a constant parade of strangers roaming the building, using the gym or perhaps parking in the visitors' parking spots. This type of transient use not only results in increased traffic, but diminishes a condominium's sense of community and reduces security for all occupants of the building. Oftentimes, the renters are not aware of the condominium rules or simply flout them, because they are only there for a short time. Meanwhile, the other residents see their residential condominiums take on the appearance of a bed and breakfast.

The problems go beyond annoying your neighbors. A quick Google search will bring up tales of rentals gone bad with wild parties being thrown, guests being dropped off by the busload, squatters who won't leave, extreme damage being done to the common facilities of condominiums, and even murder. What can condominiums do to prevent or control this kind of short-term leasing?

First, condominium associations need to review their legal documents. Most typical condominium documents contain language limiting the use of units to residential purposes. Many bylaws will contain restrictions on leasing units, either prohibiting leasing entirely or requiring leases to be of a six-to-12-month

minimum term. Often, there is specific language prohibiting transient or hotel-like use. If the legal documents contain language controlling this kind of use, the condominium may deal with Airbnb rentals through its normal compliance channels. That means penalties may be imposed and/or court action taken in order to compel compliance, and the cost of getting caught can be expensive. As reported by the Boston Globe, one Back Bay condominium recently fined a unit owner \$9,700 for renting his unit through Airbnb in violation of the condominium's leasing restrictions.

If the condominium documents do not contain language prohibiting this kind of leasing, the bylaws can be amended to clarify when owners can sublet units or to expressly forbid the kind of short-term rentals offered on Airbnb altogether. The difficulty with this approach is that such amendments typically require a high level of approval by the unit owners. In Massachusetts, restrictions limiting the use of units must be in the master deed or bylaws and cannot simply be imposed by the trustees as a rule or regulation. Accordingly, a formal amendment would need to be approved by the requisite percentage of unit owners as called for within the condominium's legal documents.



*Treating a unit as a bed and breakfast raises new risks for the owner, the condominium association and the insurance companies underwriting those risks.*

Finally, it is important to determine whether the use of the unit complies with local municipal ordinances. If commercial uses are prohibited in a residential zone, then a hotel-type use might be prohibited by local zoning, and enforcement could be sought through the municipality.

Other reasons to prohibit short-term leasing in the condominium context include concerns about insurance and mortgage ramifications. Treating a unit as a bed and breakfast raises new risks for the owner, the condominium association and the insurance companies underwriting those risks. If there is an accident

involving an Airbnb guest, an insurance company could deny the claim on the basis that the insured property was converted to a rental property. Furthermore, most mortgages contain a provision stating that the mortgaged property will remain the borrower's principal residence and not be used as an investment property. Unit owners might be violating their mortgages by converting their units into rental properties. Finally, a short-term rental can trigger sanctions for FHA-approved condominiums. The eligibility of FHA projects is determined based on strict compliance with FHA rules, and any short-term rental can jeopardize project eligibility.

Home rental services such as Airbnb are booming in popularity but, as they grow, they clash with traditional rules. The hotel industry has objected, arguing that these rentals circumvent health and tax laws, and municipalities are struggling with how to regulate them. In condominiums, the friction caused by frequent move-ins and move-outs and unfamiliar faces heightens safety concerns and erodes the feeling of community. These are complex issues facing condominium trustees, and they are unlikely to disappear.

If you are a unit owner considering offering your unit as a short-term rental on Airbnb, be sure to review your condominium documents to ensure there are no applicable restrictions, contact your insurance company to make sure you are fully covered, require a security deposit and mandate that your guests abide by all condominium rules and regulations. If you are a trustee, review your condominium documents to determine whether adequate controls are in place or need to be proposed. Airbnb is changing how property is being rented, and until the law catches up with the technology, condominium trustees and unit owners need to be prepared. **FT**

*Home rental services such as Airbnb are booming in popularity but, as they grow, they clash with traditional rules.*



## THE DO'S AND DON'TS OF DIVORCE

By Marisa W. Higgins, Esq.

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*If you are contemplating divorce, make sure you follow these rules to improve both the process and the outcome.*

*If you know others who are contemplating divorce, do them a big favor and share these rules with them.*

### DO'S

- **DO** make copies of all relevant financial documents, including income tax returns, loan applications, wills and trusts, mortgage statements, credit card statements, bank statements, retirement statements, insurance policies, investment accounts and pay stubs. Keep all documents in a safe place.
- **DO** make a list of all assets and personal property with approximate values.
- **DO** inventory any bank boxes or safe deposit boxes, preferably with witness(es) present.
- **DO** obtain your credit report.
- **DO** change your pass codes on e-mail accounts, social media sites and cell phones.
- **DO** make a realistic budget for your life after the divorce.
- **DO** keep a calendar detailing the time you and your spouse spend with the children if parenting time is at issue.
- **DO** find a lawyer whom you trust and then follow his/her advice.
- **DO** comply with court orders.

### DON'Ts

- **DON'T** allow emotion to cloud your judgment when making important decisions about your case.
- **DON'T** cancel any life, auto, homeowners' or health insurance for your spouse unless the court permits or authorizes otherwise.
- **DON'T** intentionally violate any court orders.
- **DON'T** send your spouse hostile or inappropriate text messages, e-mails, photos or voicemails.
- **DON'T** post on social media any negative statements about your spouse and don't share information about your divorce or any new relationship on social media.



*DON'T put your children in the middle of the divorce process. Remember, this divorce is difficult enough for them without having to choose sides between their parents.*



- **DON'T** open any new credit accounts in your spouse's name or jointly with your spouse.
- **DON'T** hide assets or misrepresent your income or debt. Doing so will only increase your legal fees, lengthen the divorce process, cause you serious financial repercussions and undermine your credibility with the judge.
- **DON'T** sell or give away assets while the divorce is pending unless your spouse agrees in a written form.
- **DON'T** speak negatively about your spouse to your children or within earshot of your children.
- **DON'T** argue with your spouse while your children are present.
- **DON'T** put your children in the middle of the divorce process. Remember, this divorce is difficult enough for them without having to choose sides between their parents.
- **DON'T** use the children as messengers.
- **DON'T** make false accusations about your spouse to gain an advantage in the divorce.
- **DON'T** assume your divorce outcome will be the same as those of your friends, colleagues and others who have shared their divorce stories with you. Remember, each divorce has its own set of facts and circumstances.
- **DON'T** draft your own separation agreement without having it reviewed by an attorney who can explain the legal ramifications to you.
- **DON'T** get stuck in the past. If you are having a hard time moving forward, speak with a qualified therapist who can help you deal with the divorce. Using your attorney as a therapist is never cost-effective. **FT**

## FLETCHER TILTON WINS PRECEDENT-SETTING MEDICAID TRUST CASE

*April 2016* – Fletcher Tilton attorneys obtained a favorable and landmark decision from the appeals court in the case of Roche v Thorn, also reported as Heyn v Office of Medicaid. This case arose from the denial of MassHealth long-term care benefits to the firm's client, Mrs. Everlenna Roche. Mrs. Roche, a resident of a long-term care facility prior to her death, had been a recipient of benefits for several years. In 2013, MassHealth suddenly terminated her benefits, claiming that the corpus of her irrevocable income trust was a countable asset. This change in position by MassHealth jeopardized Mrs. Roche's careful estate planning and her long-term care. The Board of Hearings upheld the denial, and Fletcher Tilton attorneys pursued appeals at both the Superior Court and Appeals Court.

In a landmark ruling issued by the Appeals Court on April 15, 2016, the unfavorable decisions of both the Board of Hearings and the Superior Court were reversed. In finding that the assets of the trust were not countable in determining Mrs. Roche's eligibility for benefits, the Appeals Court rejected MassHealth's claim that the investment powers extended to the trustee would have allowed the trust's income beneficiary to access trust principal through the purchase of an annuity. The Court also summarily rejected several of the agency's other arguments in favor of treating the trust as a countable asset, including the agency's claim that the grantor's right to substitute trust assets with those of equivalent value and the grantor's power to appoint trust assets to her issue somehow rendered the assets of the trust countable. Attorneys from the Massachusetts Chapter of the National Academy of Elder Law Attorneys submitted an amicus brief in support of this case, which was noted by the Court.

*The decision restores clarity and consistency to the process and will have a positive impact on clients across the Commonwealth.*



According to Frederick M. Misilo, Jr., Chairperson of the Elder Law and Special Needs Practice Group, and Chairperson of the Trust and Estate Department, “This case required deep knowledge in the area of trust law, asset protection strategies and MassHealth planning. Our attorneys demonstrated extraordinary competence in their handling of this case.”



*Patrick Tinsley, Esq.,  
lead Fletcher Tilton  
litigator in the case.*

The decision, which was highly anticipated by the trusts and estates and elder law planning communities, “restores clarity and consistency to the process and will have a positive impact on clients across the Commonwealth as they plan for their affairs in anticipation of a long-term care nursing home placement,” according to the lead Fletcher Tilton litigator on the case, Patrick Tinsley.

Fletcher Tilton President, Richard C. Barry, Jr., Esq. commented that “this decision not only helps Massachusetts residents breathe easier but, by compelling

the state to abide by its own rules, it speaks to the very foundation of a free society. We are proud of our fine work in this case because it continues the firm’s nearly 200-year legacy of excellence, and highlights our expertise in the fields of estate planning and elder law.” **FT**

## MASSACHUSETTS SUPREME JUDICIAL COURT EXPANDS STANDING TO INTERVENE IN GUARDIANSHIP PROCEEDINGS

In a case with broad implications to guardianship law in Massachusetts, the Supreme Judicial Court recently ruled that a person who has a demonstrated interest in the welfare of a person subject to guardianship has a right to intervene in the guardianship to modify the limits of the guardian’s authority. As Legal Counsel to the Arc of Massachusetts, Attorney Frederick M. Misilo, Jr., Chair of Fletcher Tilton’s Trust and Estate Department and Practice Group Leader of the Special Needs and Elder Law Practice Group, filed an Amicus Brief in the case of Guardianship of B.V.G. and urged the Massachusetts Supreme Judicial Court to adopt this ruling.

The Court ruled that a person subject to a guardianship has a broad right of advocacy to advance his or her liberty interest in a limited guardianship. In this case, a maternal grandfather sought to rekindle his relationship with his granddaughter, a young woman with an intellectual disability. The young

woman also expressed an interest in rekindling the relationship. The biological father and guardian of the young woman refused to permit any contact between the grandfather and the young woman, prohibiting any physical contact and communication between the two, even via social media. The grandfather filed a petition in Probate Court to limit the guardianship in order to permit him to have contact with his granddaughter. The Probate Court ruled that the grandfather did not have standing under the Uniform Probate Code to intervene, and dismissed the grandfather’s petition. The grandfather appealed.

*The SJC recently ruled that a person who has a demonstrated interest in the welfare of a person subject to guardianship has a right to intervene...*



A subsidiary legal issue presented was whether an interested party in a guardianship proceeding is required to show that the person under guardianship was inadequately represented in order to intervene. In his amicus brief, Attorney Misilo, on behalf of the Arc of Massachusetts, Inc. argued that once a person meets the standing requirement of an “interested party” in a guardianship proceeding that person has a right, as a matter of law, to intervene to advance the liberty interests of the person subject to guardianship, and need not make a showing of inadequate representation. The Massachusetts Supreme Judicial Court also adopted this argument in its ruling.

As a result of this ruling, persons who have a demonstrated relationship or interest in the welfare of a person who is subject to guardianship will be able to go the Court in order to attempt to modify a guardianship decree if they can demonstrate that such a modification is in the best interest of, or is consistent with, the wishes of the person subject to a guardianship. **FT**



# FIRM NEWS

## ATTORNEY ALEX RODOLAKIS APPOINTED TRUSTEE OF CAPE COD COMMUNITY COLLEGE



BARNSTABLE – Governor Charlie Baker appointed Fletcher Tilton attorney Alex Rodolakis to the Cape Cod Community College Board of Trustees.

“Lieutenant Governor Polito and I congratulate the trustees on their new roles and thank them for their willingness to step forward and serve the Commonwealth,” said Governor Charlie Baker.

## WORCESTER POLYTECHNIC INSTITUTE (WPI) HONORS ATTORNEY WARNER FLETCHER



(Honorees l-r) David Schwaber, Laurie Leshin, Warner Fletcher, and Reshma Saujani

Worcester Polytechnic Institute (WPI) recently honored Warner S. Fletcher, WPI trustee emeritus, with an honorary doctorate of humane letters.

Mr. Fletcher’s dedicated service to WPI is just one component of his overall contributions to Worcester. He is a trustee of many charitable foundations and non-profit organizations in the region including the George I. Alden Trust,

The Stoddard Charitable Trust, the Fletcher Foundation and the Greater Worcester Community Foundation. Mr. Fletcher has also been a tireless advocate for WPI’s Worcester Community Project Center, which sets students to work on solving real problems for the city and its residents.

## ATTORNEY PETER BARBIERI ELECTED TO THE HOLLISTON BOARD OF ASSESSORS



Attorney Peter R. Barbieri recently was elected to the Holliston Board of Assessors for the seventh time, continuing to serve the community in which he lives.

Attorney Barbieri specializes in many aspects of commercial and residential real estate, including real estate abatements, municipal approvals and land use law. He assists individuals, families and businesses in transactions ranging from the purchase of a first home to securing complex local and state approvals for major commercial developments.

## DON'T MISS OUR FALL SEMINARS. REGISTER TODAY!

### MEDICAID & LONG TERM ELDER CARE PLANNING

Tuesday, September 20, 2016 OR  
 Wednesday, September 28, 2016  
*Time:* 8:30-11:30 a.m.  
*Speaker:* Frederick Misilo, Jr., Esq.  
*Location:* Beechwood Hotel  
 Worcester, MA

### HOW TRUSTS CAN BENEFIT YOUR HEIRS

Wednesday, November 2, 2016  
*Time:* 8:30-11:30 a.m.  
*Speaker:* Dennis Gorman, Esq., CPA  
*Location:* Beechwood Hotel  
 Worcester, MA

### SECOND HOME SEMINAR

Wednesday, October 19, 2016  
*Time:* 8:30-11:30 a.m.  
*Speaker:* Frederick Misilo, Jr., Esq.  
*Location:* Resort & Conference  
 Center at Hyannis, MA

OR  
 Wednesday, November 9, 2016  
*Time:* 8:30-11:30 a.m.  
*Speaker:* Dennis Gorman, Esq., CPA  
*Location:* Verve Crowne Plaza  
 Natick, MA

*All seminars listed are complimentary and include a breakfast buffet.*

**For details and registration, go to [www.flechertilton.com/seminars-events](http://www.flechertilton.com/seminars-events)**

# Fletcher Tilton<sup>PC</sup>

Attorneys at law

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### **FALL SEMINARS** (see pg. 10)

Sept. 20 | MEDICAID & LONG  
Sept. 28 | TERM ELDER CARE  
PLANNING

Oct. 19 | SECOND HOME  
SEMINAR

Nov. 2 | HOW TRUSTS  
Nov. 9 | CAN BENEFIT  
YOUR HEIRS

PRESORTED  
STANDARD  
U.S. POSTAGE  
PAID  
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