## REPORT OF THE AD HOC MASSACHUSETTS UNIFORM TRUST CODE COMMITTEE

*Updated Post-Enactment*

### Introduction

In 2000, the Uniform Law Commission promulgated for consideration by the states a Uniform Trust Code (the "Uniform Code") with the stated objective of providing states with precise, comprehensive and easily accessible guidance on trust law questions. This was the first attempt to achieve national codification of the law of trusts, and the Uniform Code has already been adopted in twenty-three other states and the District of Columbia. According to the Uniform Law Commission, the increasing use of trusts, nationally and internationally, for family estate planning and commercial transactions has led to an increasing number of day-to-day questions involving trusts, and across a number of jurisdictions. The Uniform Code is an attempt to codify the common law rules comprehensively and uniformly, and in some cases to include innovative provisions thought to improve upon the common law. Most of the Uniform Trust Code consists of default rules. They apply only if the terms of the trust fail to address or insufficiently cover a particular issue (see Section 105). The exceptions that cannot be overridden are set forth in Section 105(b).

Of course, there is no shortage of common law regarding trusts in Massachusetts. Massachusetts also has statutory law relating to trusts, though no comprehensive codification. Over the years, the Commonwealth also codified several laws that relate to trusts, including the Uniform Statutory Rule Against Perpetuities (enacted in 1989), the Massachusetts Prudent Investor Act in 1998, the Massachusetts Principal and Income Act in 2005, and the Massachusetts Uniform Probate Code (the "Probate Code") in 2009. The drafters of those laws used Uniform acts as the starting point for their deliberations.

In 2005, discussion about the possible enactment of the Uniform Code in Massachusetts led to formation of an ad hoc committee to review the Uniform Code. The Ad Hoc Massachusetts Trust Code Committee (the "Committee") included representatives of the bar from private practice, financial institutions and private trustee offices, and met monthly from March 2005 through February 2008 to review the Uniform Code in detail. The Committee's objectives were to review the Uniform Code and to determine if Massachusetts should adopt legislation to update trust law. The Committee understood that this review could lead to:

- Recommending adoption of the Uniform Code without changes;
- Revising provisions of the Uniform Code and recommending adoption of the Committee's revised version;

- Recommending adoption of selected provisions of the Uniform Code which the Committee believed necessary to modernize Massachusetts trust law; or

- Recommending that no legislation was needed.

The Committee proceeded to review each section of the Uniform Code, comparing it to present Massachusetts law, considering its possible usefulness, and making changes to the Uniform Code provisions thought helpful in case of ultimate adoption, while all the time reserving until the end what its recommendation would be. In particular, the Committee (1) evaluated current Massachusetts law, preserving it where it was thought superior to the Uniform Code and (2), in some cases, rebalanced the power between the beneficiaries, the trustee and the settlor where the Committee disagreed with the balance the Uniform Code had achieved.

After the Committee concluded its review, the Committee unanimously recommended that Massachusetts adopt the Massachusetts Uniform Trust Code. The Committee felt that having all trust law in one place would be valuable. Since current law is scattered and subject to varying interpretation, a codification of law was favored. In addition, where there is some uncertainty as to the law or there has not been a case on point, trustees and beneficiaries will not have to wait for the legal process to finalize the law if a comprehensive code is enacted. Having a code also means that an encyclopedic knowledge of case law is less necessary to "know the law."

Subsequent to the Committee's recommendation, Massachusetts adopted the Probate Code, Chapter 521 of the Acts of 2008. Several provisions in Article VII of the new Probate Code overlap with provisions of the proposed Massachusetts Uniform Trust Code. Consistent with the recommendation of the Uniform Law Commission, the Committee recommends repealing most of Article VII of the Probate Code. In general, the Massachusetts Uniform Trust Code contains similar and in some cases more desirable provisions than those in Article VII. Certain provisions from Article VII of the Probate Code not already in the Massachusetts Uniform Trust Code have been incorporated so they will not be lost. The Committee believes it would be advantageous to have all the statutory trust law provisions in the same place in the new Massachusetts Uniform Trust Code.

**Update**

Since the Committee issued the original version of this Report in October 2009, members of the Committee met with representatives of the Boston Bar Association, the Massachusetts Bar Association, members of the Bar, members of the Boston trustee community and the Honorable Chief Justice Paula M. Carey of the Probate and Family Court Department and members of her staff. As a result of the input the Committee received, it issued a revised version of this report in March 2010 making some minor changes to the suggested Code, and issued a Supplemental Report in June 2011 recommending some additional changes. The Supplemental Report was driven by two things. First, in January 2011 An Act Relative to Trusts for the Care of Animals, Chapter 430 of the Acts of 2010, was signed into law. That Act, now codified in G.L. c. 203,

§ 3C, is similar to Section 408 of the proposed Trust Code. The Committee, after consulting with key supporters of the Act, recommended incorporating the new law into Section 408 with a minor technical change relating to the Rule Against Perpetuities. Second, the Probate and Family Court Department offered comments on the proposed Trust Code aimed at better integrating it with the Probate Code.

Although members of the Committee participated in meetings with key legislators, the lobbying effort was lead by a broader group that included Chief Justice Carey and members of the staff of the Boston Bar Association, the Massachusetts Bar Association and the Massachusetts Bankers Association. On June 28, 2012, both the House and Senate passed S. 2128 as amended by H. 4223, sending An Act Further Regulating the Probate Code and Establishing a Trust Code to Governor Patrick's desk. On July 8, 2012 the Governor signed the bill and the Massachusetts Uniform Trust Code became law. Chapter 140 of the Acts of 2012.

### Massachusetts Uniform Trust Code and Comments

What follows is the text of the Massachusetts Uniform Trust Code (the "Code") as enacted as chapter 203E of the General Laws, with the Committee's comments on each section of the Code, including an explanation of how the Code differs from the Uniform Code. The Committee recommended leaving the original section numbering in place from the Uniform Code, following the approach taken with the Probate Code. Sections that were eliminated are now entitled "Reserved." Although the official comments to the Uniform Code are helpful to understand its provisions, due to the changes made to the Uniform Code to create the Massachusetts Code and the commentary contained in this Report, the Committee specifically declined to adopt the official comments to the Uniform Code.

## CHAPTER 203E

## MASSACHUSETTS UNIFORM TRUST CODE

## ARTICLE 1

## GENERAL PROVISIONS AND DEFINITIONS

**Section 101. Short title**

**This chapter shall be known and may be cited as the Massachusetts Uniform Trust Code.**

COMMENT

The Committee believes that the Code is sufficiently consistent with the Uniform Code that the title should include the word "Uniform."

**Section 102. Scope**

**This chapter applies to express trusts, charitable or non-charitable, of a donative nature and trusts created pursuant to a judgment or decree that requires the trust to be administered in the manner of an express trust.**

COMMENT

The Committee revised Section 102 to provide that the Code will apply only to trusts of a donative nature, making clear that the Code will not apply to business trusts or other non-donative trust arrangements.

**Section 103. Definitions.**

**In this chapter the following words shall, unless the context clearly requires otherwise, have the following meanings:-**

**"Action", with respect to an act of a trustee, includes a failure to act.**

**"Ascertainable standard", a standard relating to an individual's health, education, support or maintenance.**

**"Beneficiary", a person who has a present or future beneficial interest in a trust, vested or contingent.**

**"Charitable trust", a trust, or portion of a trust, created for a charitable purpose described in subsection (a) of section 405.**

**"Environmental law", a federal, state or local law, rule, regulation or ordinance relating to protection of the environment.**

**"Interests of the beneficiaries", the beneficial interests provided in the terms of the trust.**

**"Jurisdiction", a geographic area, including a state or country.**

**"Person", an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity.**

**"Property", anything that may be the subject of ownership, whether real, personal, legal, equitable or any interest therein.**

**"Qualified beneficiary", a beneficiary who, on the date the beneficiary's qualification is determined:**

**(i) is a distributee or permissible distributee of trust income or principal; or**

**(ii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.**

"Revocable", a trust that is revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

"Settlor", a person, including a testator, who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

"Spendthrift provision", a term of a trust which restrains transfer of a beneficiary's interest.

"State", a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States, including an Indian tribe or band recognized by federal law or formally acknowledged by a state.

"Terms of a trust", the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

"Trust instrument", an instrument that contains terms of the trust, including any amendments thereto.

"Trustee", an original, additional or successor trustee or a co-trustee.

COMMENT

The Committee modified and deleted certain definitions:

"Ascertainable standard" has been defined without reference to specific Internal Revenue Code provisions including subsequent amendments, to conform with Massachusetts legislative practice.

"Beneficiary" has been modified to exclude holders of powers of appointment.

Definitions of conservator and guardian were eliminated to avoid conflicts with definitions elsewhere in Massachusetts law.

The definition of "power of withdrawal" is eliminated as unclear and unnecessary.

"Qualified beneficiary," an important definition in the Code determining those beneficiaries entitled to notice, is limited to those currently eligible to receive distributions of income or principal, and to those who would be entitled to receive income and principal if the trust then terminated. This rewriting eliminated from the definition of "qualified beneficiaries" entitled to notice any intermediate tier of successive income or principal beneficiaries who would be eligible to receive distributions if the prior income interests terminated but the trust did not terminate.

The definition of "spendthrift restriction" is modified to remove from the definition the concept that such a restriction must address both voluntary and involuntary alienation. This change is necessary because existing spendthrift restrictions under Massachusetts law may limit just involuntary alienation. Under the Code, however, a spendthrift restriction in any instrument executed after its effective date must restrain both voluntary and involuntary alienation.

The definition of "trust instrument" was rewritten to eliminate its restriction to an instrument executed by the settlor.

**Section 104. Knowledge**

**(a) Subject to subsection (b), a person shall have knowledge of a fact if the person:**

**(1) has actual knowledge of it;**

**(2) has received a notice or notification of it; or**

**(3) from all the facts and circumstances known to the person at the time in question, has reason to know it.**

**(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.**

COMMENT

This section, unchanged by the Committee, defines the requirements for imputation of knowledge to an organization. The section both binds and relieves large organizations from being imputed with knowledge. The organization is bound by notice when the information reaches an employee having responsibility to act for the trust, or when it would have reached the employee if the organization had exercised due diligence.

**Section 105. Default and mandatory rules**

**(a) Except as otherwise provided in the terms of the trust, this chapter shall govern the duties and powers of a trustee, relations among trustees and the rights and interests of a beneficiary.**

**(b) The terms of a trust shall prevail over any provision of this chapter except:**

(1) the requirements for creating a trust;

(2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

(3) the requirement that a trust have a purpose that is lawful and not contrary to public policy;

(4) the power of the court to modify or terminate a trust under sections 410 to 416, inclusive;

(5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust, as provided in article 5;

(6) the power of the court under section 702 to require, dispense with or modify or terminate a bond;

(7) the power of the court under subsection (b) of section 708 to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;

(8) the effect of an exculpatory term under section 1008;

(9) the rights under sections 1010 to 1013, inclusive, of a person other than a trustee or beneficiary; and

(10) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

COMMENT

In general, the rules of the Code are default rules, subject to modification by the settlor in the instrument. However, this section identifies certain provisions of the Code that are mandatory. The Committee deleted from this section subsections (8) and (9) which would have prevented a settlor from relieving a Trustee of notice and information requirements found in Section 813. The Committee also deleted references to limitations periods and subject matter jurisdiction of the court.

**Section 106. Common law of trusts; principles of equity**

**The common law of trusts and principles of equity shall supplement this chapter, except to the extent modified by this chapter or any other general or special law.**

COMMENT

This section clarifies that the Code is not intended to replace the common law of trusts in Massachusetts except where the Code modifies it.

**Section 107. [Reserved]**

COMMENT

The Committee deleted Section 107 which defined the governing law for interpreting the meaning and effect of the terms of a trust, preferring current Massachusetts law as interpreted by the courts.

**Section 108. Principal place of administration**

**(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration shall be valid and controlling if:**

**(1) a trustee's principal place of business is located in, or a trustee is a resident of, the designated jurisdiction; or**

**(2) all or part of the administration occurs in the designated jurisdiction.**

**(b) Without precluding the right of a court to order, approve or disapprove a transfer, the trustee may, but has no affirmative duty to, transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.**

**(c) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than 60 days before initiating the transfer. The notice of proposed transfer shall include:**

**(1) the name of the jurisdiction to which the principal place of administration is to be transferred;**

**(2) the address and telephone number at the new location at which the trustee can be contacted;**

**(3) an explanation of the reasons for the proposed transfer;**

**(4) the date on which the proposed transfer is anticipated to occur; and**

**(5) the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.**

**(d) The authority of a trustee under this section to transfer a trust's principal place of administration shall terminate if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.**

COMMENT

The Committee modified this section. The Committee specifically removed the duty of a trustee to evaluate if the trust was being administered in an appropriate place by deleting subsection (b) and made the decision of a trustee whether to transfer of the place

of trust administration permissive, not mandatory. A trustee may still petition the courts with respect to this decision.

**Section 109. Methods and waiver of notice**

**(a) Notice to a person under this chapter, or the sending of a document to a person under this chapter, shall be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document shall include first-class mail, personal delivery or delivery to the person's last known place of residence or place of business.**

**(b) Notice required under this chapter, or a document required to be sent under this chapter, need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.**

**(c) Notice under this chapter, or the sending of a document under this chapter, may be waived by the person to be notified or sent the document.**

**(d) Notice of a judicial proceeding, authorized by this chapter to be brought by petition in the probate and family court department of the trial court, shall be given as provided in section 1-401 of chapter 190B. Notice of any other judicial proceeding shall be given as provided in the applicable procedural rules.**

COMMENT

The Committee eliminated an electronic message as a permissible means of notice. Subsection (d) ties in with section 201(d) and clarifies that trust proceedings under the Code will utilize the notice provisions of the Probate Code.

**Section 110. Others treated as qualified beneficiaries**

**(a) Whenever notice to qualified beneficiaries of a trust is required under this chapter, the trustee shall also give notice to any other beneficiary who has sent the trustee a request for notice.**

**(b) A charitable organization expressly designated to receive distributions under the terms of a charitable trust shall have the rights of a qualified beneficiary under this chapter if, on the date the charitable organization's qualification is being determined, the charitable organization:**

**(1) is a distributee or permissible distributee of trust income or principal; or**

**(2) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.**

**(c) A person appointed to enforce a trust created for the care of an animal or another non-charitable purpose, as provided in sections 408 and 409, shall have the rights of a qualified beneficiary under this chapter.**

COMMENT

The Committee modified the provisions of this section so that a charitable beneficiary that would take only after the termination of a prior interest would not be treated as a "qualified beneficiary" until it had a current right to distributions. The Committee deleted a provision that would have given the Attorney General the rights of a qualified beneficiary. The Committee declined to change current Massachusetts law regarding the role and rights of the Attorney General with respect to charitable trusts.

**Section 111. Non-judicial settlement agreements**

**(a) For purposes of this section, "interested persons" shall mean persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.**

**(b) Except as otherwise provided in subsection (c), interested persons may enter into a binding non-judicial settlement agreement with respect to any matter involving a trust.**

**(c) A non-judicial settlement agreement shall be valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.**

**(d) Matters that may be resolved by a non-judicial settlement agreement shall include:**

**(1) the interpretation or construction of the terms of a trust;**

**(2) the approval of a trustee's report or accounting;**

**(3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;**

**(4) the resignation or appointment of a trustee and the determination of a trustee's compensation;**

**(5) transfer of a trust's principal place of administration; and**

**(6) liability of a trustee for an action relating to the trust.**

**(e) Any interested person may request that the court approve a non-judicial settlement agreement to determine whether the representation, as provided in article 3, was adequate and to determine whether the agreement contains terms and conditions the court could have properly approved.**

COMMENT

This section of the Code encourages the non-judicial resolution of disputes. Such a resolution, however, may only include terms and conditions that a court could approve. For example, a nonjudicial settlement may not be used for an action otherwise illegal, or to terminate a trust in a manner not authorized by the Code. If there are minors and

others who cannot participate, it will be possible to use the virtual representation procedures of Article 3 to achieve the Agreement. Subsection (d) is a non-exclusive list of matters which may be agreed to in a non-judicial settlement agreement. The section does not precisely define the "interested persons" whose consent is required to achieve a binding agreement, but the trustee's consent would ordinarily be required.

**Section 112. Rules of construction**

**The rules of construction that apply in the commonwealth to the interpretation of and disposition of property by will shall also apply, as appropriate, to the interpretation of the terms of a revocable trust and the disposition of the trust property. For the purposes of this section, a "revocable trust" shall mean a trust that is: (1) revocable by the settlor until the time of the settlor's death; (2) created or amended by the settlor after the effective date of this chapter; and (3) was intended to dispose of the settlor's property at death, whether under will or otherwise and whether the trust was funded at the time of the settlor's death.**

COMMENT

In the Uniform Code this section made applicable to all trusts the rules of construction applicable to wills. The Committee revised this section to provide that such rules of construction should apply only to "revocable trusts", defined as trusts intended to be will substitutes. Enactment of the Probate Code has made most rules of construction applicable to wills, trusts and other governing instruments alike, although there are still a handful of rules applicable only to wills. This section will apply those rules to revocable trusts as well, so long as the revocable trusts were executed or amended after the effective date of the Code.

**Section 113. Qualification of foreign trustee**

**A foreign corporate trustee shall qualify as a foreign corporation doing business in the commonwealth if it maintains the principal place of administration of any trust within the commonwealth. A foreign co-trustee shall not be required to qualify in the commonwealth solely because its co-trustee maintains the principal place of administration in the commonwealth. Unless otherwise doing business in the commonwealth, local qualification by a foreign trustee, corporate or individual, shall not be required for the trustee to receive distribution from a local estate, to hold, invest in, manage or acquire property located in the commonwealth or to maintain litigation. Nothing in this section shall affect a determination of what other acts require qualification as doing business in the commonwealth.**

COMMENT

This provision comes from Article VII of the Probate Code; it is included here to preserve it, because the current provision will be repealed upon enactment of the Code.

ARTICLE 2

JUDICIAL PROCEEDINGS

Section 201. Role of court in administration of trust

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

(b) A trust shall not be subject to continuing judicial supervision unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

(d) A proceeding brought under this chapter in the probate and family court department of the trial court to appoint or remove a trustee, to approve the resignation of a trustee, to review and settle accounts of a trustee or concerning any other matter relating to the administration of a trust may be initiated by filing a petition and giving notice to interested parties, as provided in section 109. A decree or judgment shall be valid only to those who are given notice of the proceeding.

COMMENT

This section provides the court has no continuing supervision of a trust unless its jurisdiction is invoked by an interested person or as provided by law. This section is consistent with the jurisdictional provisions of the Article VII of the Probate Code, which it will replace. Those provisions were new to Massachusetts law when the Probate Code was enacted, freeing testamentary trusts from court supervision. Subsection (d) clarifies that proceedings authorized under the Code that are brought in the Probate Court may be brought by petition, the same way proceedings may be brought in probate matters pursuant to the Probate Code.

Section 202. Jurisdiction over trustee and beneficiary

(a) By accepting the trusteeship of a trust having its principal place of administration in the commonwealth or by moving the principal place of administration to the commonwealth, the trustee submits personally to the jurisdiction of the courts of the commonwealth regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust with its principal place of administration in the commonwealth shall be subject to the jurisdiction of the courts of the commonwealth regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of the commonwealth regarding any matter involving the trust.

(c) This section shall not preclude other methods of obtaining jurisdiction over a trustee, beneficiary or other person receiving property from the trust.

COMMENT

This section provides personal jurisdiction over the trustee and jurisdiction over beneficiaries with respect to trust matters. Other methods of obtaining jurisdiction are not eliminated by this section. This provision is similar to the provisions of Article VII of the Probate Code, which it will replace.

**Section 203. Trust proceedings; dismissal of matters relating to foreign trusts**

**The court shall not over the objection of a party, entertain proceedings under section 201 involving a trust registered or having its principal place of administration in another state, unless: (1) all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration; or (2) the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of a party to submit to the jurisdiction of the state in which the trust is registered or has its principal place of administration or the court may grant a continuance or enter any other appropriate order.**

COMMENT

Section 203 of the Uniform Code (relating to subject matter jurisdiction) was deleted by the Committee. This provision comes from Article VII of the Probate Code; it is included here to preserve it, because the current provision will be repealed upon enactment of the Code.

**Section 204. Venue**

**A trust shall be subject to the jurisdiction of the probate and family court department of the trial court of the commonwealth in the county where its principal place of administration is located. The principal place of administration of a testamentary trust shall be deemed to be the location of the court of the commonwealth in which the will creating the trust was granted informal or formal probate. Unless otherwise designated in the trust instrument, the principal place of administration of an inter vivos trust shall be the trustee's usual place of business where the records pertaining to the trust are kept or at the trustee's residence if the trustee has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, shall be: (1) the usual place of business of the corporate trustee if there is but 1 corporate co-trustee; (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but 1 such person and no corporate co-trustee; or (3) the usual place of business or residence of any of the co-trustees as agreed upon by them.**

COMMENT

The Committee replaced Section 204 of the Uniform Code (regarding venue) with this provision from Article VII of the Probate Code, which covers the same subject and is more complete. This section is not intended to eliminate concurrent jurisdiction of other

courts that exists under current Massachusetts law.

**Section 205. Petition for transfers of trust property the disposition of which depends upon the death of an absentee**

**(a) If a trustee holds trust property the disposition of which depends upon the death of an absentee whose death has not been determined, the trustee, or any person who would be interested in the trust property if the absentee were dead may on or after the day 5 years after the date of the absentee's disappearance petition the court having jurisdiction of the trust for an order that the trust property be disposed of to the persons it would have been distributed to under the trust if the absentee had died on that day.**

**(b) The court may direct the petitioner to report the results of a reasonably diligent search for the absentee in any manner that may seem advisable, including any or all of the following methods:**

**(1) by inserting in a periodical of general circulation a notice requesting information from any person having knowledge of the whereabouts of the absentee;**

**(2) by notifying law enforcement officials, public welfare agencies and registers of deaths in appropriate locations of the disappearance of the absentee; or**

**(3) by engaging the services of an investigator.**

**The costs of any search so directed shall be paid from the trust property.**

**(c) After a search described in subsection (b) has been completed to the satisfaction of the court, notice of the hearing on the petition shall be given as provided in section 1-401 of chapter 190B.**

**(d) If after the hearing the court finds that the facts warrant a presumption of death, the court shall enter an appropriate order of disposition of the trust property and any undistributed net income.**

COMMENT

This provision comes from Article VII of the Probate Code; it is included here to preserve it, because the current provision will be repealed upon enactment of the Code.

## ARTICLE 3

## REPRESENTATION

**Section 301. Representation: basic effect**

**(a) Notice to a person who may represent and bind another person under this article shall have the same effect as if notice were given directly to the other person.**

(b) The consent of a person who may represent and bind another person under this article shall be binding on the person represented unless the person represented objects to the representation before the consent becomes effective.

(c) Except as otherwise provided in section 602, a person who, under this article, may represent a settlor who lacks capacity may receive notice and give binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this article with respect to the termination or modification of a trust under subsection (a) of section 411.

COMMENT

This section and the ones that follow provide virtual representation for notice and consent for both nonjudicial settlements and judicial proceedings. Virtual representation was a change in Massachusetts law brought with the Probate Code. These provisions are consistent with the laws of many other states and with the Probate Code. In many instances the need for guardians ad litem will be eliminated.

**Section 302. Representation by holder of general testamentary power of appointment**

To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default or otherwise, are subject to the power.

COMMENT

This section deals with the power of a holder of a general testamentary power of appointment to bind permissible appointees and takers in default, absent a conflict of interest. Revocable trusts and presently exercisable general powers of appointment are covered by Section 603.

**Section 303. Representation by fiduciaries and parents**

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) a conservator may represent and bind the estate that the conservator controls;

(2) a guardian may represent and bind the ward or protected person if a conservator has not been appointed;

(3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) a trustee may represent and bind the beneficiaries of the trust;

**(5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and**

**(6) a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed.**

COMMENT

The Committee believes that subsections (2) and (6) create powers that are new to Massachusetts law. Conservators may represent and bind minor wards (or guardians of minor wards if no conservator has been appointed), agents with authority may bind their principal, trustees may represent and bind the beneficiaries of the trust, personal representatives may represent and bind persons interested in the estate, and a parent may represent and bind the parent's minor or unborn child if no conservator has been appointed.

**Section 304. Representation by person having substantially identical interest**

**Unless otherwise represented, a minor, incapacitated or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.**

COMMENT

The Committee believes that Section 304 includes concepts that were new to Massachusetts law prior to the adoption of the Probate Code. This section provides for virtual representation of substantially identical interests. An older sibling can sign for minor siblings, for instance, or for a sibling whose identity or location is unknown. Once again, the conflict of interest limitation is an important safeguard.

**Section 305. Appointment of guardian ad litem**

**(a) If the court determines that an interest is not represented under this article or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem to receive notice, give consent and otherwise represent, bind and act on behalf of a minor, incapacitated or unborn individual or a person whose identity or location is unknown. A guardian ad litem may be appointed to represent several persons or interests.**

**(b) A guardian ad litem may act on behalf of the individual represented with respect to any matter arising under this chapter, whether or not a judicial proceeding concerning the trust is pending.**

**(c) In making decisions, a guardian ad litem may consider general benefit accruing to the living members of the individual's family.**

COMMENT

Section 305 sets forth situations where the court may appoint a guardian ad litem. The court can facilitate the use of virtual representation by appointing a representative to act for and bind the interests of unrepresented persons or those for whom the court concludes the other available representation might be inadequate. Subsection (c) provides an important change to current Massachusetts law by providing that the representative may decide not to advocate zealously solely for the person he or she represents, but may consider general family benefit as well. The Committee replaced the term "representative" from the Uniform Code with the term "guardian ad litem" because that term is well understood under Massachusetts law.

## ARTICLE 4

## CREATION, VALIDITY, MODIFICATION AND TERMINATION OF TRUST

### Section 401. Methods of creating trust

**A trust may be created by:**

**(1) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;**

**(2) declaration by the owner of property that the owner holds identifiable property as trustee; or**

**(3) exercise of a power of appointment in favor of a trustee.**

COMMENT

This section states familiar ways of creating a trust, but is not an exclusive list of methods.

### Section 402. Requirements for creation

**(a) A trust shall be created only if:**

**(1) the settlor has capacity to create a trust;**

**(2) the settlor indicates an intention to create the trust;**

**(3) the trust has a definite beneficiary or is:**

**(A) a charitable trust;**

**(B) a trust for the care of an animal, as provided in section 408; or**

**(C) a trust for a non-charitable purpose, as provided in section 409;**

**(4) the trustee has duties to perform; and**

(5) the same person is not the sole trustee and sole beneficiary.

(b) A beneficiary shall be definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class shall be valid. If the power is not exercised within a reasonable time, the power shall fail and the property subject to the power shall pass to the persons who would have taken the property had the power not been conferred.

COMMENT

The requirements for creation of a Trust are on the whole standard. The section makes reference to trusts for animals, specially provided for in Section 408, and trusts for noncharitable purposes provided for in Section 409. The Committee noted that the same person can be both sole trustee and present beneficiary of a valid trust, as long as there are successive beneficial interests.

**Section 403. Trusts created in other jurisdictions**

**A trust not created by will shall be validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which, at the time of creation:**

**(1) the settlor was domiciled, had a place of abode or was a national;**

**(2) a trustee was domiciled or had a place of business; or**

**(3) any trust property was located.**

COMMENT

Trusts that are created elsewhere will be respected as validly created by Massachusetts, parallel to the considerations respecting validity of foreign wills.

**Section 404. Trust purposes**

**A trust may be created only to the extent its purposes are lawful and not contrary to public policy.**

COMMENT

The Committee has eliminated from this section the requirement that the trust purposes must be "possible to achieve," and also eliminated a sentence that "a trust and its terms must be for the benefit of its beneficiaries" as trusts are an interrelationship between the settlor, the beneficiaries and the trustee.

**Section 405. Charitable purposes; enforcement**

**(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes or other purposes which are beneficial to the community.**

**(b) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary and do not provide a method to select such a purpose or beneficiary, the court may select 1 or more charitable purposes or beneficiaries. The selection shall be consistent with the settlor's intention to the extent it can be ascertained.**

**(c) The settlor of a charitable trust may maintain a proceeding to enforce the trust.**

COMMENT

This section gives the settlor of a charitable trust the right to bring a proceeding to enforce the trust, a right not available under present Massachusetts law.

The Committee broadened subsection (b) to provide that as long as the instrument provides a method of selecting a charitable beneficiary, selection of a beneficiary or beneficiaries does not default to the court.

**Section 406. Creation of trust induced by fraud, duress or undue influence**

**A trust shall be void to the extent its creation was induced by fraud, duress or undue influence.**

COMMENT

The Committee notes that this section continues present Massachusetts law, in that it voids the trust only to the extent its creation was induced by fraud, duress or undue influence. Only the provisions brought about by the wrongful conduct are invalidated, not the entire document.

**Section 407. Evidence of oral trust**

**Except as required by statute, a trust need not be evidenced by a trust instrument. The creation of an oral trust and its terms shall be established by clear and convincing evidence.**

COMMENT

This section generally states present Massachusetts law. The Committee notes that at one time stock in the Boston Braves was held in an oral trust, as the Supreme Judicial Court recognized in *Rugo v. Rugo*, 325 Mass. 612 (1950). The Committee approves the requirement of the heightened standard of clear and convincing evidence for the establishment of an oral trust and its terms.

Section 408. Trust for care of an animal

(a) A trust for the care of animals alive during the settlor's lifetime shall be valid. Unless the trust instrument provides for an earlier termination, the trust shall terminate upon the death of the animal or, if the trust was created to provide for the care of more than 1 animal alive during the settlor's lifetime, upon the death of last surviving animal.

(b) Except as otherwise expressly provided in the trust instrument, no portion of the principal or income shall be converted to the use of the trustee, other than reasonable trustee fees and expenses of administration, or to any use other than for the benefit of covered animals.

(c) A court may reduce the amount of property held by the trust if it determines that the amount substantially exceeds the amount required for the intended use and the court finds that there will be no substantial adverse impact in the care, maintenance, health or appearance of the covered animal. The amount of the reduction shall pass as unexpended trust property in accordance with subsection (d).

(d) Upon reduction or termination, the trustee shall transfer the unexpended trust property in the following order:

(1) as directed in the trust instrument;

(2) to the settlor, if living;

(3) if the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will or codicil; or

(4) to the settlor's heirs in accordance with chapter 190B.

(e) If a trustee is not designated by the trust instrument or no designated trustee is willing or able to serve, the court shall name a trustee. The court may order the transfer of the property to another trustee if the transfer is necessary to ensure that the intended use is carried out. The court may also make other orders and determinations as the court deems advisable to carry out the intent of the settlor and the intended use of the trust.

(f) The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument, by the person having custody of an animal for which care is provided by the trust instrument, by a remainder beneficiary or by an individual appointed by the court upon application of an individual or charitable organization.

(g) The settlor or other custodian of an animal for whose benefit a trust was created may transfer custody of the animal to the trustee at or subsequent to the creation of the trust.

(h) Any trust created under this section shall be subject to sections 2-901 to 2-906, inclusive, of chapter 190B, and the common law rule against perpetuities; provided, however, that the life or lives in being shall be measured based on the animal or animals alive at the time of the settlor's

**death or when the trust becomes irrevocable. The measuring lives shall be those of the beneficiary animals, not human lives.**

COMMENT

This section authorizes the creation of trusts for animals. To avoid the common law conclusion that such trusts were invalid because there was no person capable of enforcement, the settlor in the terms of the trust, otherwise the court, is authorized to appoint a person to enforce the trust. Because trusts for animals are sometimes overfunded, provision is made for distributing any excess. This provision incorporates the current G.L. c. 203, § 3C into the Code. Although the current statute exempts pet trusts from the Rule Against Perpetuities altogether, this provision takes a slightly different approach and specifies that the animal or animals for whom the trust is being administered shall be considered the measuring life or lives for purposes of the Rule. Paragraph (h) applies only to trust instruments executed after the effective date of the Code. St. 2012, c. 140, § 62.

**Section 409. Non-charitable trust without ascertainable beneficiary**

**Except as otherwise provided in section 408, or by another general or special law, the following rules shall apply:**

**(1) A trust may be created for a non-charitable purpose without a definite or definitely ascertainable beneficiary or for a non-charitable but otherwise valid purpose to be selected by the trustee.**

**(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.**

**(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Property not required for the intended use shall be distributed to the settlor, if then living, otherwise to the settlor's successors in interest, unless the terms of the trust provide otherwise.**

COMMENT

This section authorizes so-called "purpose trusts" which are noncharitable trusts without an identifiable beneficiary. This is a change of Massachusetts law. The Committee deleted a term limit of twenty-one (21) years from subsection (1) of the Uniform Code. The Committee expressly decided not to adopt perpetual trusts. The common law rule against perpetuities will apply to trusts authorized under Section 409 (trusts with stated or reasonably inferred measuring lives will be governed by the common law rule, and trusts without such measuring lives will be limited by the ninety year statutory rule against perpetuities with "wait and see," or a termination provision included in the trust).

**Section 410. Modification or termination of trust; proceedings for approval or disapproval**

**(a) in addition to the methods of termination prescribed by sections 411 to 414, inclusive, a trust shall terminate if it is revoked or expires under its terms, no purpose of the trust remains to be achieved or the purposes of the trust have become unlawful, contrary to public policy or impossible to achieve.**

**(b) A proceeding to approve or disapprove a proposed modification or termination under sections 411 to 416, inclusive, or a trust combination or division under section 417, may be commenced by a trustee or beneficiary and a proceeding to approve or disapprove a proposed modification or termination under section 411 may be commenced by the settlor.**

COMMENT

This section lists the circumstances where termination of the trust is automatic. The following Sections 411 through 415 list situations where termination requires some action, either by the court, the trustee, or the beneficiaries. Subsection (b) of this section provides that court action to approve or disapprove a proposed modification or termination under Sections 411 through 415 may be commenced by a trustee or a beneficiary, and a proceeding to approve or disapprove modification or termination of a non-charitable trust by consent under Section 411 may be brought by the settlor. The Committee eliminated from this section a provision in the Uniform Code giving the settlor of a charitable trust the power to maintain a proceeding to modify the trust under Section 413.

**Section 411. Modification or termination of non-charitable irrevocable trust by consent**

**(a) If, upon petition, the court finds that the settlor and all beneficiaries consent to the modification or termination of a non-charitable irrevocable trust, the court may approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust.**

**(b) A non-charitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A non-charitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.**

**(c) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:**

**(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and**

**(2) the interests of a beneficiary who does not consent will be adequately protected.**

COMMENT

Section 411 clarifies the opportunities for trust modification or termination where certain parties consent to the modification or termination. Sections (a) and (b) are consistent with current Massachusetts law. *See Claflin v. Claflin*, 149 Mass. 19 (1889).

The Committee changed the Uniform Code section to retain current Massachusetts law that a spendthrift provision is a material purpose of a trust. The Committee also deleted a provision in the Uniform Code that would have allowed trust distribution upon termination to be based upon beneficiary agreement.

The Committee made two other changes in subsection (a), deleting a provision which would have allowed agent assent for incompetent settlors, and deleting a provision that application of the section would be limited to trusts created after the enactment of the Code.

Finally, subsection (e) provides that if all beneficiaries do not consent, the court may still approve the proposed modification or termination if the court is satisfied that the interests of nonconsenting beneficiaries are adequately protected.

**Section 412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively**

**(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification shall be made in accordance with the settlor's probable intent.**

**(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.**

COMMENT

Subsection (a) is a change in Massachusetts law. This provision authorizes the court to modify even the dispositive provisions of a trust on account of unanticipated circumstances or impractability. This clearly extends to all trusts by statute the concept of substantive deviation that has long been the law with regard to charitable trusts in Massachusetts, and that has started to gain acceptance in the courts. Subsection (b) relating to modification of administrative terms restates current Massachusetts law. The Committee deleted subsection (c) that would have allowed the trustee of such a terminated trust to distribute the trust property "in a manner consistent with the purposes of the trust". Presumably in connection with the decision, the court will determine how the property should be distributed if the Trust is unclear.

**Section 413. [Reserved]**

COMMENT

The Committee deleted Section 413 of the Uniform Code relating to the doctrine of cy pres, leaving existing law in place.

**Section 414. Modification or termination of uneconomic trust**

**(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value of less than $200,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.**

**(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.**

**(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.**

**(d) This section shall not apply to an easement for conservation or preservation.**

**(e) Action may be taken under this section regardless of any spendthrift or similar protective provision.**

COMMENT

The Committee increased the maximum market value for application of this termination provision for small trusts from $50,000 to $200,000, and added a provision (subsection (e)) that action may be taken under this section notwithstanding any spendthrift or similar protective provision. The court is given authority in its discretion to terminate trusts over the $200,000 figure if it determines trust administration is uneconomic. This provision enhances present law by permitting a trustee to terminate an uneconomic trust without a court proceeding. It should be noted that a trustee must exercise this authority in good faith in the best interests of the beneficiaries and not solely to rid itself of small trusts.

**Section 415. Reformation to correct mistakes**

**The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that the settlor's intent or the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.**

COMMENT

This Section permits modification even if there is no ambiguity. Action requires the heightened standard of clear and convincing evidence of a mistake. The Committee modified the language of the Uniform Code provision, making a minor change that

Committee understands has been endorsed by the Joint Editorial Board for Uniform Trusts and Estates Acts. This section applies the doctrine to testamentary trusts as well as inter vivos trusts, following Restatement of Property (Third) § 12.1. This provision is consistent with present Massachusetts practice with respect to inter vivos trusts, and clarifies that the same principles apply to testamentary trusts, where the Supreme Judicial Court has been less willing to apply modification principles. In *Flannery* v. *McNamara*, 432 Mass. 665 (2000), the court stated flatly that reformation of wills is prohibited in Massachusetts, and it distinguished prior cases where it had reformed testamentary trusts—*Shawmut Bank, N.A.* v. *Buckley*, 422 Mass. 706 (1996), and *Putnam* v. *Putnam*, 366 Mass. 261 (1974)—on the grounds that (1) those decisions permitted reformation of a will in the narrow circumstance of achieving favorable federal estate tax treatment; (2) those decisions did not look to extrinsic evidence; and (3) the parties were in agreement that the instrument should be reformed.

**Section 416. [Reserved]**

COMMENT

The Committee deleted Section 416 of the Uniform Code, which specifically authorizes a court to modify a trust to achieve the settlor's tax objectives, even if the reformation is retroactive. Aside from retroactive reformation, it was not clear to the Committee that this provision permits any relief in addition to that permitted under Section 415. As to retroactive reformation, it is not clear that a modification made after a taxable event, even if retroactive, would avoid adverse tax consequences.

**Section 417. Combination and division of trusts**

**After notice to the qualified beneficiaries, a trustee may combine 2 or more trusts into a single trust or divide a trust into 2 or more separate trusts, if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trusts.**

COMMENT

This is an important change to Massachusetts law given the common need to divide trusts for tax reasons as well as reasons of administrative convenience.

## ARTICLE 5

## CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

**Section 501. Rights of beneficiary's creditor or assignee**

**To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.**

COMMENT

This section only applies where there is no spendthrift provision. The first sentence restates current Massachusetts law. The second sentence authorizes the court to limit the award to the creditor based upon equitable principles, for example, consideration of the needs of the beneficiary.

**Section 502. Spendthrift provision**

**(a) A spendthrift provision shall be valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.**

**(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, shall be sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.**

**(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.**

COMMENT

This section changes current Massachusetts law. To be a valid spendthrift clause under this provision, it must prohibit both voluntary and involuntary transfers. Current Massachusetts law permits a settlor to prohibit involuntary transfers while permitting voluntary ones. The Committee felt Massachusetts should conform to the more common rule reflected in the Uniform Code. The new rule will be effective only with respect to instruments executed after the effective date of the Code. St. 2012, c. 140, § 63.

**Section 503. [Reserved]**

COMMENT

The Committee deleted Section 503, which would have changed Massachusetts law by creating spendthrift exceptions for certain preferred creditors, including children, spouses and former spouses with court orders against the beneficiary for support. The section also would have continued prior Massachusetts law creating an exception for a judgment creditor who had provided services for the protection of a beneficiary's interest in the trust.

**Section 504. [Reserved]**

COMMENT

The Committee deleted Section 504, which, according to the official comments to the Uniform Code, would have changed Massachusetts law relating to the "ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the trustee's discretion is subject to a standard."

Section 505. Creditor's claim against settlor

(a) Whether or not a trust contains a spendthrift provision, the following rules shall apply:

(1) During the lifetime of the settlor, the property of a revocable trust shall be subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit and, if a trust has more than 1 settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution. Trust property shall not be considered distributable to or for the settlor's benefit solely because the trustee has the discretion under the terms of the trust to reimburse the settlor for any tax on trust income or capital gain that is payable by the settlor under the law imposing such tax; no creditor or assignee of the settlor of an irrevocable trust shall be entitled to reach any trust property based on the discretionary authority described in this sentence.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death shall be subject to claims of the settlor's creditors, the expenses of the settlor's funeral and disposal of remains and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, expenses and allowances.

COMMENT

Subsection (a)(1) sets out the traditional rule that the assets of a revocable trust are subject to the claims of the settlor's creditors during the settlor's lifetime. Subsection (a)(2) provides that the settlor's creditors may reach the maximum amount that may be distributed to or for the settlor's benefit from an irrevocable trust. The Committee added a provision that trust property should not be considered distributable to the settlor solely because of authorization to reimburse the settlor for any tax paid on ordinary income or capital gain earned by a grantor trust. This addition, based on N.Y. E.P.T.L. § 7-3.1, is intended to ensure that a discretionary right of reimbursement does not cause a grantor trust to be subject to the claims of the settlor's creditors, which would cause estate inclusion under the rationale announced in Rev. Rul. 2004-64.

Subsection (a)(3) applies after the settlor's death, subject to the settlor's right to direct the source from which liabilities will be paid, to authorize recovery from the assets of a trust revocable at the date of the settlor's death for claims of the settlor's creditors, funeral expenses of the settlor and statutory allowances to the extent the probate estate is inadequate. Many trusts already contain provisions on this subject. The Committee eliminated costs of administration of the settlor's estate from the scope of this provision.

The Committee deleted subsection (b), which would have changed current Massachusetts law relating to creditor rights against property subject to powers of withdrawal and with respect to lapsing, released or waived powers of withdrawal.

Section 506. Overdue distribution

(a) In this section, "mandatory distribution" shall mean a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. "Mandatory distribution" shall not include a distribution subject to the exercise of the trustee's discretion even if: (1) the discretion is expressed in the form of a standard of distribution; or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

COMMENT

This section prevents a trustee from defeating a beneficiary's creditors by delaying required distributions beyond a reasonable administrative period.

Section 507. Personal obligations of trustee

Trust property shall not be subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

COMMENT

This section makes clear that trust property is protected against claims of the trustee's personal creditors. This is consistent with current Massachusetts law.

## ARTICLE 6

## REVOCABLE TRUSTS

Section 601. [Reserved]

COMMENT

The Committee deleted Section 601 of the Uniform Act. The Committee thought it would be better not to make any change to current Massachusetts law as to a person's capacity to create, amend or revoke a revocable trust. The eliminated section would have provided that the standard should be the same as that used to determine capacity to make a will.

Section 602. Revocation or amendment of revocable trust

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust.

(b) If a revocable trust is created or funded by more than 1 settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;

(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(c) The settlor may revoke or amend a revocable trust:

(1) by complying with a method provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method, by any method manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) A settlor's powers with respect to revocation, amendment or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust and the power.

**(f) A trustee who does not know that a trust has been revoked or amended shall not be liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.**

COMMENT

This section changes current Massachusetts law. Section 602 reverses the present Massachusetts presumption as to the revocability of a trust. Under this new provision, a trust is revocable unless the instrument specifically provides otherwise. This change is applicable only to instruments executed after the effective date of the Code. St. 2012, c. 140, § 64.

Committee modified the Uniform Code to limit amendment or revocation by complying with the terms of the instrument (rather than by "substantial" compliance as provided for in the Uniform Code) or, if the terms of the trust do not provide a method, by any other method manifesting clear and convincing evidence of the settlor's intent. The Committee deleted a provision that would have allowed modification or termination of a revocable trust by a settlor's later executed will.

The Committee revised subsection (3)(e) to provide that a revocation or amendment executed by an agent acting under a durable power of attorney is effective only if the action is authorized under the terms of both the trust instrument and the power

of attorney.

The Committee deleted Uniform Code subsection (3)(f) relating to guardians and conservators exercising settlor powers, preserving current Massachusetts law.

**Section 603. Settlor's powers; powers of withdrawal**

**(a) While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries shall be subject to the control of the settlor and the duties of the trustee shall be owed exclusively to the settlor.**

**(b) During the period the power may be exercised, the holder of a non-lapsing power of withdrawal shall be treated, for purposes of this section, as if the holder of the non-lapsing power of withdrawal were the settlor of a revocable trust to the extent of the property subject to the power.**

COMMENT

The Committee adopted subsection (a) with the Uniform Code's optional language limiting the subsection's applicability to situations where the settlor has capacity to revoke the trust. This is current Massachusetts law. The Committee revised the Uniform Code's subsection (b) only to treat as a settlor of a revocable trust for the purposes of the section the holder of a non-lapsing withdrawal power (as opposed to any withdrawal power during the time that the power was outstanding).

**Section 604. Limitation on action contesting validity of revocable trust; distribution of trust property**

**(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:**

**(1) 1 year after the settlor's death; or**

**(2) 60 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, the trustee's name and address and the time allowed for commencing a proceeding.**

**(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee shall not be subject to liability for doing so unless:**

**(1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or**

**(2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within 60 days after the contestant sent the notification.**

**(c) A beneficiary of a trust that is determined to have been invalid shall be liable to return any distribution received.**

COMMENT

This section provides a time limit for contesting the validity of a revocable trust after the settlor's death. The Committee thought this an important provision. The Committee shortened the limitation periods from three years to one year from the settlor's death if no notice is given. The Committee also shortened the limitation period where notice is given as provided in subsection (a)(2) 120 days to 60 days following notice.

These periods do not need to cause any delay in distribution of the trust. Under subsection (b) the trustee may distribute trust property after the settlor's death in accordance with the terms of the trust, and is protected in doing so, unless the trustee knows of a pending lawsuit challenging the validity of the trust or has been notified of a potential judicial challenge (which is actually brought within 60 days of the notice).

Note that under subsection (c), a beneficiary of what turns out to be an invalid trust is required to return any distribution received. The question of whether interest or income restitution is required is not addressed by the Code.

## ARTICLE 7

## OFFICE OF TRUSTEE

### Section 701. Accepting or declining trusteeship

**(a) Except as otherwise provided in subsection (c), a person designated as trustee shall accept the trusteeship:**

**(1) by substantially complying with a method of acceptance provided in the terms of the trust; or**

**(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee or otherwise indicating acceptance of the trusteeship.**

**(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation shall be deemed to have rejected the trusteeship.**

**(c) A person designated as trustee without accepting the trusteeship may:**

**(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and**

(2) inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

COMMENT

Subsection (a) restates current Massachusetts law. Subsections (b) and (c) were adopted without change from the Uniform Code. Subsection (c) permits preliminary action without that act constituting acceptance to (1) preserve trust property (provided that the potential trustee then rejects the trusteeship within a reasonable time) or (2) inspect or investigate trust property to consider potential liability under environmental law or other purposes. The Committee believes that the 'good Samaritan" potential trustee should be protected and that subsection (c) does not create any mandatory obligation and that no liability should attach to the decision to preserve or investigate or not to pursue those actions.

**Section 702. Duty to provide bond**

**In the case of a testamentary trust, a trustee shall furnish a bond for the performance of the trustee's fiduciary duties and a surety shall be required unless waived by the terms of the trust or found by the probate and family court department of the trial court to be not necessary to protect the interests of the beneficiaries. On petition of the trustee or other interested person the probate court may excuse a requirement of bond, reduce the amount of the bond, release the surety or permit the substitution of another bond with the same or different sureties. If the instrument creating the trust exempts the trustee from furnishing a bond or limits the amount thereof, or the probate court determines that the bond is insufficient, the probate court may, if it concludes that a bond is necessary or that a bond of a larger amount is necessary, require the furnishing of such bond. The terms and conditions of the bond shall be as set forth in section 3-606 of chapter 190B.**

COMMENT

The Committee initially deleted Section 702 of the Uniform Code because Massachusetts law adequately addressed bonds. However, the Probate Code revised the rules for bonds in Article VII, and because those provisions will be repealed upon adoption of the Code, the bond provisions of the Probate Code have been moved to Section 702 to preserve them. This provision clarifies that the terms and conditions of the bond of a testamentary trustee are the same as those specified for the bond of a personal representative under section 3-606 of the Probate Code.

**Section 703. Co-trustees**

**(a) Co-trustees who are unable to reach a unanimous decision may act by majority decision.**

**(b) If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust.**

**(c) A co-trustee shall participate in the performance of a trustee's function unless the co-trustee is unavailable to perform the function**

because of absence, illness, disqualification under other laws or other temporary incapacity or the co-trustee has properly delegated the performance of the function to another trustee.

(d) If a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other laws or other temporary incapacity and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

(e) Except as otherwise provided in subsection (f), a trustee who does not join in an action of another trustee shall not be liable for the action.

(f) Each trustee shall exercise reasonable care to:

(1) prevent a co-trustee from committing a breach of trust; and

(2) compel a co-trustee to redress a breach of trust.

COMMENT

This section is a change to current Massachusetts law with respect to private trusts. It reverses the presumption that trustees must act unanimously unless otherwise provided in the instrument. This presumption has always been the law in Massachusetts with respect to charitable trusts, and now applies to all trusts unless otherwise directed in the instrument. The rule applies where co-trustees are unable to reach a unanimous decision, implying that the trustees must confer and attempt to reach a conclusion, and that two trustees cannot simply act alone without the third trustee. This change is made only prospectively; subsection (a) applies only to trust instruments executed after the effective date of the Code. St. 2012, c. 140, § 65.

Subsection (c) restates the general rule that a co-trustee must participate in the trustee function. The Committee deleted subsection (e) from the Uniform Code which would have prevented delegation under some circumstances. Subsection (f) provides that a trustee should use reasonable care to prevent a co-trustee from committing a breach of trust, and to compel a co-trustee to redress a breach of trust. The Committee removed the word "serious" before "breach of trust" in subsections (f) and (g) because the Committee felt the "serious breach of trust" standard was too lenient. Having declined to include the "serious" standard in subsection (g), it was deleted as being meaningless. Thus, there is no protection for a dissenting trustee where the majority acts in breach of trust.

**Section 704. Vacancy in trusteeship; appointment of successor**

(a) A vacancy in a trusteeship shall occur if:

(1) a person designated as trustee rejects the trusteeship;

(2) a person designated as trustee cannot be identified or does not exist;

(3) a trustee resigns;

(4) a trustee is disqualified or removed;

(5) a trustee dies; or

(6) a guardian or conservator is appointed for an individual serving as trustee.

(b) If 1 or more co-trustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship shall be filled if the trust has no remaining trustees.

(c) A vacancy in a trusteeship that is required to be filled shall be filled in the following order of priority:

(1) by a person designated by the terms of the trust to act as successor trustee;

(2) by a person appointed by unanimous agreement of the qualified beneficiaries; or

(3) by a person appointed by the court.

(d) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

COMMENT

The Committee initially deleted Section 704 of the Uniform Trust Code relating to successor trustee provisions to preserve current Massachusetts law. Current Massachusetts law is now found in the Probate Code, in Article VII of that statute. Because the successor trustee provisions in Article VII will be repealed upon enactment of this Code, the provisions have now been inserted here.

**Section 705. Resignation of trustee**

**(a) A trustee may resign:**

**(1) upon at least 30 days' notice to: (i) the settlor and all co-trustees of the trust, in the case of a revocable trust, and (ii) the qualified beneficiaries and all co-trustees of the trust, in the case of any other trust; or**

**(2) with the approval of the court.**

**(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.**

**(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee shall not be discharged or affected by the trustee's resignation.**

COMMENT

Under current Massachusetts law, a trustee may not resign from a trust without an affirmative power in the trustee to resign unless a court approves the resignation. Most trust instruments permit trustees to resign without judicial approval. The Committee wanted to make it easier for trustees to resign in the absence of specific authorization, particularly for trustees of revocable trusts. The Committee modified subparagraph (a)(1) as to who must receive notice of a resignation

**Section 706. Removal of trustee**

**(a) The settlor, a co-trustee, or a beneficiary may request the court to remove a trustee or a trustee may be removed by the court on its own initiative.**

**(b) The court may remove a trustee if:**

**(1) the trustee has committed a serious breach of trust;**

**(2) there is a lack of cooperation among co-trustees that substantially impairs the administration of the trust;**

**(3) because of unfitness, unwillingness or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or**

**(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust and a suitable co-trustee or successor trustee is available.**

**(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under subsection (b) of section 1001 as may be necessary to protect the trust property or the interests of the beneficiaries.**

COMMENT

The Committee favored the ability to remove trustees where the qualified beneficiaries were in unanimous agreement. Many trusts, particularly older trusts, do not contain removal powers. Subsection (b)(4) is a change of Massachusetts law. A corporate reorganization or merger of an institutional trustee is not itself a material change of circumstances if it does not affect the service provided to the individual trust account.

**Section 707. Delivery of property by former trustee**

**A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee or other person entitled to it.**

COMMENT

Section 707 restates current Massachusetts law. The Committee deleted subsection (a) of the Uniform Code, not wanting to create an affirmative duty while handing off the trusteeship. A trustee has powers necessary to protect the property when leaving office in order to deliver it to a successor.

**Section 708. Compensation of trustee**

**(a) If the terms of a trust do not specify the trustee's compensation, a trustee shall be entitled to compensation that is reasonable under the circumstances.**

**(b) If the terms of a trust specify the trustee's compensation, the trustee shall be entitled to be compensated as specified, but the court may allow more or less compensation if:**

**(1) the duties of the trustee are substantially different from those contemplated when the trust was created; or**

**(2) the compensation specified by the terms of the trust would be unreasonably low or high.**

COMMENT

This provision is consistent with present Massachusetts law. Note that the beneficiaries may set trustee compensation under a non-judicial agreement under Section 111(d)(4).

**Section 709. Reimbursement of expenses**

**(a) A trustee shall be entitled to be reimbursed out of the trust property, with interest as appropriate, for:**

**(1) expenses that were properly incurred in the administration of the trust; and**

**(2) expenses that were not properly incurred in the administration of the trust, to the extent necessary to prevent unjust enrichment of the trust.**

**(b) An advance by the trustee of money for the protection of the trust shall give rise to a lien against trust property to secure reimbursement with reasonable interest.**

COMMENT

This provision is consistent with present Massachusetts law.

## ARTICLE 8

## DUTIES AND POWERS OF TRUSTEE

**Section 801. Duty to administer trust**

**Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with this chapter.**

COMMENT

This Section restates current Massachusetts law.

**Section 802. Duty of loyalty**

**(a) A trustee shall administer the trust solely in the interests of the beneficiaries.**

**(b) Subject to the rights of persons dealing with or assisting the trustee as provided in section 1012, a sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests shall be voidable by a beneficiary affected by the transaction unless:**

**(1) the transaction was authorized by the terms of the trust;**

**(2) the transaction was approved by the court;**

**(3) the beneficiary did not commence a judicial proceeding within the time allowed by section 1005;**

**(4) the beneficiary consented to the trustee's conduct, ratified the transaction or released the trustee in compliance with section 1009; or**

**(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became a trustee.**

**(c) A sale, encumbrance or other transaction involving the investment or management of trust property shall be presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:**

**(1) the trustee's spouse;**

**(2) the trustee's descendants, siblings, parents or their spouses;**

**(3) an agent or attorney of the trustee; or**

(4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction not concerning trust property, in which the trustee engages in the trustee's individual capacity, shall be a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(e) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee shall not be presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of chapter 203C. In addition to compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee shall at least annually notify the persons entitled under section 813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

(f) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries.

**(g) This section shall not preclude the following transactions, if fair to the beneficiaries:**

**(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;**

**(2) payment of reasonable compensation to the trustee;**

**(3) a transaction between a trust and another trust, decedent's estate or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;**

**(4) a deposit of trust money in a regulated financial service institution operated by the trustee; or**

**(5) an advance or loan by the trustee of money to the trust for a proper trust purpose.**

COMMENT

The duty of loyalty to the interests of the beneficiaries is among the most fundamental and important of the duties of the trustees. This section sets forth rules of voidability of transactions involving conflict of interest. The Committee deleted from subsection (b)(5) a reference to a person "contemplating" becoming a trustee. The Committee also deleted subsection (d) from the Uniform Code provision, relating to transactions between trustee and beneficiary not concerning trust property. Although the Committee deleted from the list of transactions in subsection (c) presumed to be affected

by a conflict those with an agent or attorney of the trustee, or a corporation or other entity in which the trustee had an interest that might affect the trustee's best judgment, they were restored by the legislature.

Subsection (e) provides an exception to the duty of loyalty for investment in a corporate trustee's proprietary investment vehicles organized as investment companies or investment trusts, in accordance with widespread statutory enactments. Note that this exception is only with respect to the duty of loyalty and leaves open the question whether such an investment complies with prudent investor responsibilities. The second sentence of subsection (f) of the Uniform Code was deleted as it limited its applicability to corporations where the trust was the sole shareholder. The Committee deleted subsection (i) of the Uniform Code as potentially dangerous and unlikely to be used.

**Section 803. Impartiality**

**If a trust has 2 or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests.**

COMMENT

This section restates current Massachusetts law.

**Section 804. Prudent administration**

**A trustee shall administer the trust as a prudent person would, considering the purposes, terms and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.**

COMMENT

The Committee conformed this section to the terms of the Massachusetts Prudent Investor Act, deleting "distributional requirements" from the trustee's required considerations.

**Section 805. Costs of administration**

**In administering a trust, the trustee may incur only costs that are appropriate and reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee.**

COMMENT

The Committee conformed this section to the terms of the Massachusetts Prudent Investor Act, adding the qualification "appropriate" to the requirement for costs in administering a trust.

**Section 806. Trustee's skills**

**A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has such special skills or expertise, shall have a duty to use such special skills or expertise.**

COMMENT

The Committee conformed this section to the terms of the Massachusetts Prudent Investor Act by adding that a trustee claiming special skills shall have a duty to use those skills.

**Section 807. Delegation by trustee.**

**(a) A trustee may delegate duties and powers if it is prudent to do so. The trustee shall exercise reasonable care, skill and caution in:**

**(1) selecting an agent;**

**(2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and**

**(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.**

**(b) In performing a delegated function, an agent shall owe a duty to the trust to exercise reasonable care to comply with the terms of the delegation.**

**(c) A trustee who complies with subsection (a) shall not be liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.**

**(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the laws of the commonwealth, an agent shall submit to the jurisdiction of the courts of the commonwealth.**

COMMENT

The Committee conformed this section to the terms of the Massachusetts Prudent Investor Act, by changing the Code provision "that a prudent trustee of comparable skills could properly delegate under the circumstances" to "if it is prudent to do so."

**Section 808. Powers to direct**

**(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.**

**(b) If the terms of a trust confer upon a person, other than the settlor of a revocable trust, power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power, unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious**

**breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.**

**(c) A person who holds a power to direct is presumptively a fiduciary who is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct shall be liable for any loss that results from a breach of a fiduciary duty.**

COMMENT

This section protects a trustee in certain circumstances when following the direction of a non-trustee and imposes a fiduciary duty upon that non-trustee.

The Committee deleted the Uniform Act's subsection (c), providing that the terms of the trust might authorize the trustee or some other person to direct modification or termination of the trust.

**Section 809. Control and protection of trust property**

**A trustee shall take reasonable steps to take control of and protect the trust property.**

COMMENT

This provision is consistent with present Massachusetts law.

**Section 810. Recordkeeping and identification of trust property**

**(a) A trustee shall keep adequate records of the administration of the trust.**

**(b) A trustee shall keep trust property separate from the trustee's own property.**

**(c) A trustee may invest as a whole, the property of 2 or more separate trusts, if the trustee maintains records clearly indicating the respective interests.**

COMMENT

The Committee deleted the Uniform Code's subsection (c), which required a trustee to designate trust property on records maintained by a third party as trust property, as impractical.

**Section 811. Enforcement and defense of claims.**

**A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.**

COMMENT

This provision is consistent with present Massachusetts law.

**Section 812. Collecting trust property.**

**A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee.**

COMMENT

This provision is consistent with present Massachusetts law. The Committee believes that the "reasonable" standard allows a trustee not to pursue an uneconomic claim.

**Section 813. Duty to inform and report**

**(a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust. Unless unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for information related to the administration of the trust.**

**(b) Within 30 days after acceptance of the trust or the trust becomes irrevocable, whichever is later, the trustee shall inform, in writing, the qualified beneficiaries of the trustee's name and address. The information shall be delivered or sent by ordinary first class mail.**

**(c) A trustee shall send an account to the distributees and permissible distributees of trust income or principal and to other qualified beneficiaries who request it, at least annually and at the termination of the trust. The account of trust income and principal may be formal or informal, but shall include information relating to the trust property, liabilities, receipts and disbursements, including the amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.**

**(d) A beneficiary may waive the right to a trustee's account of trust income or principal or other information otherwise required to be furnished under this section. A beneficiary, with respect to future accounts and other information, may withdraw a waiver previously given. A waiver of a trustee's account or other information shall not relieve the trustee from accountability and potential liability for matters that the account or other information would have disclosed.**

COMMENT

The Committee substantially pared down the notice and information provisions of this section, and initially deleted the requirements that a trustee (1) notify qualified beneficiaries within 30 days of appointment and (2) furnish a copy of the trust instrument on request. However, because the Probate Code was subsequently enacted and contained provisions similar to those the Committee deleted from Section 813, the Committee

reconsidered its position and chose to add paragraph (b) (as modified) to the section. That paragraph requires notice to qualified beneficiaries within 30 days of appointment (or when the trust becomes irrevocable), but the notice need contain only the name and address of the trustee. Although the Committee did not restore the requirement that the trustee furnish a copy of the trust instrument upon request, the Committee recognizes that such a requirement is implicit in the language of paragraph (a) absent unusual circumstances or a prohibition in the trust instrument itself.

Subsection (d) permits a beneficiary to waive the right to an account, and a waiver previously given may be withdrawn. The Committee added a provision to clarify that a waiver does not relieve the trustee from accountability and potential liability for matters the account or other information would have disclosed.

**Section 814. Discretionary powers; tax savings**

**(a) Notwithstanding the broad discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole" or "uncontrolled", the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.**

**(b) Subject to subsection (d), and unless the terms of the trust expressly indicate that a rule in this subsection shall not apply, the following rules shall apply:**

**(1) a person other than a settlor, who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard; and**

**(2) a trustee shall not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.**

**(c) A power that is limited or prohibited by subsection (b) may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.**

**(d) Subsection (b) shall not apply to:**

**(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction was previously allowed; or**

**(2) any trust during any period that the trust may be revoked or amended by its settlor.**

COMMENT

This section states the Massachusetts rule that no matter how broad the discretion, it is never absolute and shall be exercised in a fiduciary manner in good faith and with regard to the purposes of the trust and the interest of the beneficiaries.

Subsection (b) reinforces Massachusetts case law to provide a savings clause, to prevent inadvertent violation of tax rules by creating an ascertainable standard for trustee distribution to the trustee personally, and a prohibition of trustee discretionary distributions to satisfy an obligation of support. The statute goes on to provide that the prohibited exercise could be determined by a majority of the remaining trustees, or by a special fiduciary appointed by the court.

Subsection (d) provides that the savings clauses do not apply to the settlor's spouse where a marital deduction was allowed for the trust or to any trust that may be revoked or amended by its settlor. The Committee deleted from subsection (d)(1) references to specific Internal Revenue Code provisions to conform to Massachusetts legislative practice. The Committee deleted from subsection (d) a third exception, for trusts to which annual exclusion gifts could be made pursuant to I.R.C. § 2503(c). The Uniform Code included that third exception out of concern that the savings clause could constitute a substantial restriction on the use of the trust property, which could disqualify the trust for the annual exclusion under § 2503(c). The Committee is not convinced that the savings clause would disqualify a gift for the annual exclusion, and thought it more important that the savings clause apply to a minority trust to avoid unintended estate inclusion.

**Section 815. General powers of trustee**

**(a) A trustee, without authorization by the court, may exercise:**

**(1) powers conferred by the terms of the trust; or**

**(2) except as limited by the terms of the trust:**

**(i) all powers over the trust property which an unmarried competent owner has over individually owned property;**

**(ii) any other powers appropriate to achieve the proper investment, management and distribution of the trust property; and**

**(iii) any other powers conferred by this chapter.**

**(b) The exercise of a power shall be subject to the fiduciary duties prescribed by this article.**

COMMENT

This section grants trustees the broadest possible powers consistent with their duties under law and under the trust instrument.

Section 816. Specific powers of trustee

Without limiting the authority conferred by section 815, a trustee may:

(1) collect trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) acquire or sell property, for cash or on credit, at public or private sale;

(3) exchange, partition or otherwise change the character of trust property;

(4) deposit trust money in an account in a regulated financial service institution;

(5) borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members or property owners, including merging, dissolving or otherwise changing the form of business organization or contributing additional capital;

(7) with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:

(i) vote, or give proxies to vote, with or without power of substitution or enter into or continue a voting trust agreement;

(ii) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;

(iii) pay calls, assessments, and other sums chargeable or accruing against the securities and sell or exercise stock subscription or conversion rights; and

(iv) deposit the securities with a depositary or other regulated financial service institution;

(8) with respect to an interest in real property, construct or make ordinary or extraordinary repairs to, alterations to or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements and make or vacate plats and adjust boundaries;

(9) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) grant an option involving a sale, lease or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) insure the property of the trust against damage or loss and insure the trustee, the trustee's agents and beneficiaries against liability arising from the administration of the trust;

(12) abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

(13) with respect to possible liability for violation of environmental law:

(i) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(ii) take action to prevent, abate or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(iii) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(iv) compromise claims against the trust which may be asserted for an alleged violation of environmental law; and

(v) pay the expense of any inspection, review, abatement or remedial action to comply with environmental law;

(14) pay or contest any claim, settle a claim by or against the trust and release, in whole or in part, a claim belonging to the trust;

(15) pay taxes, assessments, compensation of the trustee and of employees and agents of the trust and other expenses incurred in the administration of the trust;

(16) exercise elections with respect to federal, state and local taxes;

(17) select a mode of payment under any employee benefit or retirement plan, annuity or life insurance payable to the trustee, exercise rights thereunder, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and

reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

(19) pledge trust property to guarantee loans made by others to the beneficiary;

(20) appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security and remove any trustee so appointed;

(21) pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(i) paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

(ii) paying it to the beneficiary's custodian under chapter 201A or custodial trustee under part 5 of Article VII of chapter 190B and, for that purpose, creating a custodianship or custodial trust;

(iii) if the trustee does not know of a conservator, guardian, custodian or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(iv) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

(22) on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes and adjust for resulting differences in valuation;

(23) resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration or other procedure for alternative dispute resolution;

(24) prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) establish or continue title-holding entities, including so-called "nominee trusts", for the purposes of holding legal title to any portion or all of the trust property without the need to record or make public the terms of the trust; and

**(27) on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.**

COMMENT

This section enumerates specific powers commonly found in trust instruments. The Committee inserted one additional power, item (26), permitting a trustee to establish "nominee trusts" or other entities for the purpose of holding legal title to any portion or all of the trust property.

**Section 817. Distribution upon termination**

**(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution shall terminate if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent, but only if the proposal: (i) informed the beneficiary of the right to object and of the time allowed for objection; and (ii) provided the beneficiary with sufficient material facts to enable the beneficiary to evaluate the proposal.**

**(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses and taxes.**

COMMENT

This Section allows a trustee to send a proposal for distribution, and if a beneficiary does not object, gives the trustee protection against a later challenge by the beneficiary. The Committee was concerned that the beneficiary have enough information to evaluate the proposal, and so added the language at the end of Subsection (a) requiring provision of sufficient material facts to evaluate the proposal. Subsection (c), dealing with releases, was deleted as redundant in view of Section 1009 of the Code.

**ARTICLE 9**

**[RESERVED]**

COMMENT

The Uniform Law Commission recommends states reenact their version of the Uniform Prudent Investor Act in Article 9. The Committee does not recommend reenactment of the Massachusetts Prudent Investor Act in this Article, and instead has reserved the Article for potential future use.

## ARTICLE 10

## LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

**Section 1001. Remedies for breach of trust**

(a) A violation by a trustee of a duty the trustee owes to a beneficiary shall be a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

(1) compel the trustee to perform the trustee's duties;

(2) enjoin the trustee from committing a breach of trust;

(3) compel the trustee to redress a breach of trust by paying money, restoring property or other means;

(4) order a trustee to account;

(5) appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) suspend the trustee;

(7) remove the trustee;

(8) reduce or deny compensation to the trustee;

(9) subject to section 1012, void an act of the trustee, impose a lien or a constructive trust on trust property or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

COMMENT

The Committee believes this Section restates current Massachusetts law as these remedies are believed to be already held by Massachusetts probate judges.

**Section 1002. [Reserved]**

COMMENT

The Committee deleted Section 1002 of the Uniform Code regarding provisions for damages for breach of trust, leaving present law unchanged.

**Section 1003. [Reserved]**

COMMENT

The Committee deleted Section 1003 of the Uniform Code regarding provisions for damages in absence of breach of trust, leaving present law unchanged.

**Section 1004. [Reserved]**

COMMENT

The Committee deleted Section 1004 of the Uniform Code regarding provisions for damages award of attorney fees in actions relating to administration of trusts, leaving present law unchanged.

**Section 1005. Limitation of action against trustee**

**(a) Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust shall be barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary, unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Any claim against a trustee for breach of trust shall be barred in any event and notwithstanding lack of full disclosure, against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for examination by the beneficiary after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by the beneficiary personally or if, being a minor or disabled person, it is received by the beneficiary's representative as described in article 3.**

**(b) Where a claim is not barred by subsection (a), a beneficiary may not commence a proceeding against a trustee for breach of trust more than 3 years after the date the beneficiary or a representative of the beneficiary knew or reasonably should have known of the existence of a potential claim for breach of trust.**

**(c) If subsections (a) and (b) do not apply, a judicial proceeding against a trustee for breach of trust must be commenced within 5 years after the first to occur of:**

**(1) the removal, resignation or death of the trustee;**

**(2) the termination of the beneficiary's interest in the trust; or**

**(3) the termination of the trust.**

COMMENT

As revised by the Committee, the limitations period includes a provision that had been enacted in Article VII of the Probate Code—a beneficiary has six months to bring a claim as to any matter disclosed in an account. If there is no such disclosure, the period

is three years from the date the beneficiary knew or reasonably should have known of the potential claim. Otherwise a judicial proceeding against the trustee must be made within five years of the first to occur of (a) removal, resignation or death of the trustee, (b) termination of the beneficiary's interest in the trust, or (c) termination of the trust.

**Section 1006. Reliance on trust instrument**

**A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument shall not be liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.**

COMMENT

This Section restates current Massachusetts law.

**Section 1007. Event affecting administration or distribution.**

**If the happening of an event or change of status, including, but not limited to: birth, adoption, marriage, divorce, performance of educational requirements or death affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event or change of status shall not be liable for a loss resulting from the trustee's lack of knowledge.**

COMMENT

This Section is consistent with current Massachusetts law. The Committee made slight changes to the wording of the Uniform Code Section to make it clear that the list of events was not exclusive.

**Section 1008. Exculpation of trustee**

**(a) A term of a trust relieving a trustee of liability for breach of trust shall be unenforceable to the extent that it:**

**(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or**

**(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.**

**(b) An exculpatory term drafted or caused to be drafted by the trustee may be invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that its existence and contents were adequately communicated to the settlor.**

COMMENT

This provision is generally consistent with present Massachusetts law. The Committee substantially changed the wording of subsection (b) of the Uniform Code. As under present law, an exculpatory clause inserted by the draftsperson trustee is valid only

if the draftsperson informs the settlor of the clause and its meaning. *See Rutanen v. Ballard*, 424 Mass. 723 (1997).

**Section 1009. Beneficiary's consent, release or ratification.**

**A trustee shall not be liable to a beneficiary for breach of trust if the beneficiary, while having capacity, in writing, consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach, unless:**

**(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or**

**(2) at the time of the consent, release, or ratification, the beneficiary did not know of the material facts relating to the breach.**

COMMENT

The Committee required that any waiver be in writing. It deleted a requirement that the beneficiary know of the beneficiary's rights at the time of the waiver, leaving in the requirement that the beneficiary know of the material facts relating to the breach.

**Section 1010. Limitation on personal liability of trustee**

**(a) Except as otherwise provided in the contract, a trustee shall not be personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.**

**(b) A trustee shall be personally liable for torts committed in the course of administering a trust or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.**

**(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.**

COMMENT

This section is much like G.L. c. 203, § 14A (repealed upon enactment of the Probate Code), in reversing the common law presumption that the trustee is personally liable for actions taken in the trustee's official capacity. Subsection (b) adds helpful protection for trustees for environmental problems.

**Section 1011. Interest as general partner**

**(a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner, in a general or limited partnership, shall not be**

personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed under chapter 108A or chapter 109.

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner shall not be personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) The immunity provided by this section shall not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or 1 or more of the trustee's descendants, siblings or parents, or the spouse of any of them.

(d) If the trustee of a revocable trust holds an interest as a general partner, the settlor shall be personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

COMMENT

This section goes beyond present Massachusetts law and is helpful to trustees.

**Section 1012. Protection of person dealing with trustee**

(a) A person other than a beneficiary who in good faith assists a trustee or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers shall be protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee shall not be required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated shall be protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries shall prevail over the protection provided by this section.

COMMENT

Persons dealing with trustees in good faith, under reasonable standard of fair dealing, and without knowledge the trustee is exceeding the trustee's authority, are protected, and have no duty to inquire into the trustee's authority or to see to application of funds or assets delivered to the trustee.

Section 1013. Certification of trust

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) that the trust exists and the date the trust instrument was executed;

(2) the identity of the settlor;

(3) the identity and address of the currently acting trustee;

(4) the powers of the trustee;

(5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;

(6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;

(7) the trust's taxpayer identification number; and

(8) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust shall state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect shall not be liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

**(h) A person making a demand for the trust instrument, in addition to a certification of trust or excerpts, shall be liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.**

**(i) This section shall not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.**

COMMENT

This helpful provision should reduce demands for copies of the trust instrument. It will protect those in good faith relying on a certification. It provides that a person making a demand for the trust instrument in addition to a certification may be liable in damages if a court finds there was a lack of good faith in demanding the instrument.

## Effective Date Provisions

The effective date of the Massachusetts Uniform Trust Code is July 8, 2012. Further effective date provisions are set forth in St. 2012, c. 140:

**SECTION 62. Subsection (h) of section 408 of chapter 203E of the General Laws shall not apply to a trust created under an instrument executed before the effective date of this act.**

**SECTION 63. Subsection (a) of section 502 of chapter 203E of the General Laws shall not apply to spendthrift provisions in a trust created under an instrument executed before the effective date of this act.**

**SECTION 64. Subsection (a) of section 602 of chapter 203E of the General Laws shall not apply to trust instruments executed before the effective date of this act.**

**SECTION 65. Subsection (a) of section 703 of chapter 203E of the General Laws shall not apply to trust instruments executed before the effective date of this act.**

**SECTION 66. (a) Except as otherwise provided in this act:**

**(1) this act shall apply to all trusts created before, on or after the effective date of this act;**

**(2) this act shall apply to all judicial proceedings concerning trusts commenced on or after the effective date;**

**(3) an action taken before the effective date of this act shall not be affected by this act.**

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Hon. George Phelan (recall)[a1] Lisa M. Cukier[a2]



# TRUSTS, INHERITANCES, GIFTS AND "OPPORTUNITIES" IN DIVORCE

## INTRODUCTION

"I love you forever." After endearment eternally promised, what could go wrong? The possibilities abound: divorce, subsequent marriages, or death with no or uninformed prenuptial or postnuptial agreements; asset transfers by aging individuals or individuals suffering from diminished or diminishing capacity; and death of, or inheritance and/or gift from, a third party in the context of marriage followed by divorce. All these circumstances represent openings for divorce counsel and peril for unwitting estate planners. The concept of the marital estate in a divorce is expansive and may supersede estate plan documents and derail the estate plans of third parties who entrust to smart lawyers the succession of their assets to loved ones without impediment or drama.

## WHY THE "DIVORCE ESTATE" AND "OPPORTUNITIES FOR FUTURE ACQUISITION" MAY MAKE CURRENT ESTATE PLANS VULNERABLE

There are mandatory considerations for judges in dividing the marital estate upon divorce: Conduct of the parties during the marriage; age; health; station; occupation; amount and sources of income; vocational skills and employability; estate; liabilities and needs; amount and duration of any alimony awarded; and opportunity for future acquisition of capital assets and income. [1] There is no mathematical formula to determine what weight judges should accord to any of the factors in § 34, nor is mathematical precision required in valuating those assets. [2] The judge's findings must reflect that all relevant factors in § 34 were considered and the judge's conclusions are apparent in the findings and rulings. [3] Further, the findings must show that the judge did not consider any irrelevant factors. [4] A judgment is reversed only when the judge's findings were clearly erroneous, as trial judges have broad discretion to weigh and balance the § 34 factors. [5] Judicial discretion in how assets are to be divided is distinct from what assets are subject to division. In making that latter determination, courts are not bound by traditional concepts of title or property. [6]

The divisible marital estate in a divorce consists of "all property to which a party holds title, however acquired." [7] A judge may even consider the circumstances of the parties prior to marriage and their contributions during a period of cohabitation. [8] This may include assets from a premarital economic time period. [9] The divisible marital estate may also include pension, retirement, and like assets acquired before marriage. [10] Absent fraud or some other nefarious event, the divisible marital estate does not include assets acquired after divorce. [11] Massachusetts legal authority imposes no "line in the sand" allocating which particular marital assets will be divided: "we continue to adhere to an expansive approach to inclusion of assets in the marital estate, that principle is not without limits." [12]

The parties' respective contributions to the marital enterprise, financial or otherwise, have been described as the touchstone of an equitable division of the marital estate. [13] The purpose of the division of marital property is to recognize and equitably recompense ***62** the parties' respective contributions to the marital partnership. [14] A court is required to consider the comparative contributions of the parties to the fabric of the marriage. In marriages by which the spouses have made unequal

contributions to the marital enterprise, or by which one spouse has been deficient and the other has been a super-contributor, the court might be inclined to award a disproportionate allocation of marital assets between the two spouses. [15]

## OTHER LESS COMMON PARTIAL INTERESTS

Joint accounts held with elder parents as a mere convenience to them and the non-elder joint holder may present a divorce divisibility issue. [16] While both/all joint account holders are still living, a financial institution may permit withdrawals, assignment, or transfer in whole or in part by any of the account holders. [17] Often these accounts were established as a "convenience" without future survivorship and without present donative intent with respect to the divorcing joint holder. [18] The question arises, then, as to what extent the funds in the account are marital assets. Powers of appointment are commonly included in trust and wills where the holder may decide to whom assets are subsequently devised, thus creating an issue of whether the assets over which the power exists should be included in the marital estate.

A power of appointment is the authority described in a trust or a last will (a "testamentary power") that allows a person holding the power to determine who will receive certain property over which the power is held. [19] When a divorcing party has a beneficial interest in an asset over which someone else holds a power of appointment, that beneficial interest will most likely be considered a mere "expectancy," too remote and speculative for inclusion in the marital estate because an exercise of the power may give ("appoint") the interest to someone else. [20] When a divorcing spouse was the settlor of a trust in which he reserved for himself the power to take back all the trust principal and income, in other words and in effect a general power of appointment, those trust assets belong in the divisible marital estate, up to the maximum to which the divorcing settlor could have reached. [21] The maximum distribution, or amount that the divorcing settlor has power to take back, is considered part of the marital estate potentially subject to equitable division by the divorce judge.

## INHERITANCES

From the appellate decisions, some general analyses have emerged. How does the inheritance compare to the overall marital estate; how far into the marriage, or close to the end, was it received; whether and how it was woven into the fabric of the marriage; [22] and was it real estate, money, or assets that may appreciate or decline, such as stock? If the inheritance was cash, was the marriage frugally lived because the parties wanted the inheritance to fund their retirement lifestyle? If the interest is real estate, was it vested and presently possessory or must the divorcing party wait to enjoy it as in a remainder interest? Are there other inheritors of the same asset, now or perhaps in the future (an "open class"), such as siblings, which would affect inclusion in the divorce estate and complicate valuation of the asset?

Even if the inheritance was received before the marriage, the spouse may receive in a division the appreciation in value of that inherited asset during the marital coverture period. [23] The trial court may consider its source, each spouse's degree of oversight of the inherited asset, and whether the asset was woven into the marital fabric, kept separate by the inheriting spouse for articulable reasons, such as future retirement, or represented a future economic failsafe that caused the divorcing spouses to live beyond the means their income could have maintained during the marriage. [24] Even if not part of the divisible marital estate, a future inheritance may warrant disparate division of the assets because one party has a greater opportunity to acquire future income and assets post-divorce. [25] A party who seeks to retain a self-overvalued asset is asking for trouble. A party's inflated opinion of value may be relied upon by the court in arriving at an asset division that, while numerically equal, unfairly skews the bottom line of the overall marital division. In trying a case, divorce counsel should be aware that in the absence of professional or expert opinion as to valuation, a court may credit the testimony of one of the parties as to the value of inheritance, and a spouse's negligent mistake of fact as to value may still be used by the court to the detriment of the mistaken party absent expert testimony. [26]

While marriages are strong, the parties tend to share and treat inheritances as a gain to both spouses and the family unit. As a practical matter, given the reality of divorce rates, inheritances should be protected by prenuptial or postnuptial planning. Without such protection, inheritance, once woven into the fabric of the marriage, is subject to division in divorce, usually to the dismay of the spouse who received the inheritance.

Post-divorce income distributions, mandatory or discretionary, to beneficiaries from trust interests, inheritances and gifts may continue to be included in income for purposes of calculating child support orders, according to the Massachusetts Child Support Guidelines, which describe 29 types of income specifically including trust "distributions and income" [27] and "income from interest in an estate, either directly or through a trust." [28] Although divorcing parties may have unconditionally relinquished any and all rights to the other's assets through an agreement, income-producing assets, ***63** such as trusts and partnerships, cannot be excluded from one's income calculation in subsequent child support contests. These judgments have been reversed by appellate courts, which have held that they run against public policy because they bargain away a child's right to support, and any such countable income is not impermissible "double dipping." [29]

## "TRACING" INHERITANCES AND PAST GIFTS AT TIME OF DIVORCE

The mandatory § 34 factor, "opportunity" to acquire future capital assets and income, has become a consideration for courts whenever potential future trust interests and expectable inheritances are present in a divorce, but are too remote or speculative to include in the marital estate. [30] This factor may alter the allocation of the divisible marital assets and cause an unequal, but still equitable, division. [31] In other words, equitable divisions may be mathematically unequal based on the "opportunity" factor. [32] There appears to be no bright-line "opportunity" rule, and outcomes are fact-specific for each divorce.

While the comparative economic and noneconomic contributions traceable to one married party, such as those relating to child care or the maintenance of the marital home, are not a mandatory § 34 factor, appellate case law has acknowledged their potential to affect the asset division outcome. [33] The origin of a spouse's "contribution" of a particular inherited or gifted asset does not necessarily result in the asset becoming part of the originating spouse's divorce award. [34]

In instances where a marriage has lasted more than short term, significant premarriage inheritances often could be traced to one spouse who managed and nurtured their growth while the other spouse self-indulged to the detriment of their economic marital partnership. These facts justified an overwhelming disproportionate division of the marital estate to the spouse who inherited from his or her family. [35] This solution may be more problematic when the inherited assets are the bulk of the marital estate and the marriage is long term. [36] Payment from other joint assets toward significant tax obligations arising from inheritances may also compel a finding that the inheritance was treated by the parties during marriage as a marital asset from which they both intended to continue to benefit despite the trace source. [37]

Counsel should be wary when a party to ongoing or potential divorce exercises a disclaimer to reduce the marital estate. [38] Although usually estate tax- or gift tax-driven, disclaimers may be exercised by a divorcing spouse to avoid receiving an asset and thus remove the asset from the divisible marital estate or consideration as an expectancy. A disclaimer may be exercised even if there is an express or implied spendthrift clause in an instrument from which the disclaimed asset is passing. [39] This raises the question of whether the exercise of a disclaimer after either the filing or service of the divorce complaint violates the automatic restraint rule. [40] It is unclear whether such disclaimers must be disclosed in the parties' divorce financial statements. [41] Divorce counsel may want to pose formal discovery on this specific issue.

## TRUSTS 101 FOR DIVORCE LAWYERS

The world of trust and trust terminology can be arcane if not unintelligible for those with only fleeting knowledge. These terms spill over into the real property world because many estate plans involve the contingent succession of real property interests. Divorce counsel must familiarize themselves with the following terms and concepts: Self-settled trusts by a divorcing party versus by a third party; trusts that are revocable, partly revocable, or irrevocable; remainder interests; vested versus non-vested; interests that are possessory or not; conditions precedent, such as outliving someone else; and potential interests, such as a will legacy, a testamentary trust legacy, or one through a power of appointment. When these issues are present in a divorce, certain vernaculars have become commonplace: Mere "expectancies" are too "remote or speculative," yet others may be "fairly certain." Other examples are: The identity of the trust "settlor"; the extent of "trustee discretion" as to income or principal "distributions" distinguished from "rights of withdrawal"; "ascertainable standards" as trustee "guides" to distributions; and beneficiaries as co-trustees and so-called "independent" trustees. Whether appearing premarriage, during marriage, and even

after divorce, all this estate-world terminology has played a role in the courts' analyses of the division of marital assets; the outcomes may have surprised the donors of that largesse and chagrined the estate planners who drafted the documents.

## WHETHER TRUST OR FUTURE INHERITANCE EXPECTANCIES ARE "OPPORTUNITIES"

When a divorcing party has the mere possibility of receiving an asset in the future, that attenuation is called an expectancy or an "opportunity" and may not be part of the divorce estate if it is "too remote and speculative," but instead may represent a § 34 "opportunity," a mandatory factor to be considered by the divorce judge when deciding how to allocate the assets that are subject to division. [42] In extreme circumstances, such "opportunities" may still be called a divisible asset. [43]

If a testator or third-party trust settlor is made aware that an inheritance or beneficial interest is imperiled by pending divorce, there is a motivation to amend the last will or trust. This motivation ***64** can last at least until the divorce is final and, barring any other future calamities in the divorce judgment, the testator and settlor, if still competent to do so, may re-modify the documents yet again to reinstate the original outcomes. That strategy may be effective to preclude divorce asset division of an asset if the testator/settlor is still competent and willing to incur the expense of such a procedure.

Despite its near ubiquity in divorce cases, there appears to be no case precedent definitively discussing the "opportunity" factor and how it affects a § 34 analysis and division of marital assets. This is probably because the weight to be accorded to each of the § 34 factors is within the judge's discretion, and that discretion will not be disturbed as long as the trial judge's findings show that all relevant § 34 factors were considered and the reasons for the judgment are apparent and flow rationally from the findings. [44] If the judge's findings reflect that all § 34 factors were considered, and the reasons for the judgment flow rationally from the findings, the judgment will not be disturbed. [45]

*Ketterle v. Ketterle* [46] contains a significant discussion of the "opportunity" criterion and sheds some light on how the opportunity factor influenced the ultimate divorce asset division. This case had as a party the winner of the 2001 Nobel Prize in Physics. The disparate futures of the divorcing parties led the court to give significant weight to the future opportunity factor and the corresponding disproportionate award of the divisible assets to the spouse who lacked such an opportunity.

Trust interests, which may not ripen until some future event date, will also probably be considered under the opportunity factor and not become part of the divisible marital estate. In *D.L. v. G.L.*, the husband's family established seven trusts some 24 years before a marriage that lasted 10 years. [47] The husband's trust interests were too remote or speculative, but the husband's present interest in trust income, although subject to trustee discretion, was a stream of income that could be used to determine alimony and child support. The husband's family established numerous complex trusts, all at various times and prior to the parties' marriage. The wife did not make any significant financial contributions to the marriage, but she was primarily, if not exclusively, responsible for child-rearing, managing the household, overseeing substantial renovations to the marital home, and contributing to the preservation and maintenance of certain of the husband's assets. The trust principal had never been a part of the fabric of the marriage other than as a producer of income. Because payments of principal had never been made to the husband or anyone else from any of the trusts, and further because the husband's father had a specific power of appointment exercisable by his last will over the remaining principal of the trust, all seven trust principal interests were excluded from the marital estate. In addition, the trust was generational in nature because the beneficiaries included not only the husband but his issue and the spouses of such issue. This supported the finding that the trust was set up to benefit the long-term, not near-term, needs of the beneficiaries. The trust income, albeit subject to trustee discretion, was treated differently. Although alimony and property division serve different purposes, they are interrelated remedies that cannot be viewed apart. [48] The Alimony Reform Act incorporated type, duration and amount to the § 34 analysis. Because the husband had received 100% of trust income for 10 years during the marriage, distributed to him annually and automatically pursuant to standing instructions from the trustees, albeit subject to the discretion of the trustee, the court determined that income from the trusts should be included in calculating alimony and child support. As for child support, unlike in *Pfannenstiehl*, [49] past distribution history mattered. One of the trusts (the so-called generation-skipping trust) included a provision giving a beneficiary the right to withdraw up to 5% of the principal balance of the trust each year. Other than this brief mention, the court did not further discuss this right to withdraw, which figured prominently in *Levitan v. Rosen*. [50] Importantly, the court in *Cavanagh v. Cavanagh* cites the 2021 Child Support Guidelines in defining gross income as from whatever source, including to the extent that they represent a regular source of income. [51]

Contingent remainder trust interests have also been determined to be merely an opportunity but may nonetheless prominently factor in the disposition of divisible marital assets, causing a disparate division for the spouse without the interest. [52] In *McMahon v. McMahon*, the husband had advanced his career and education, spending significant periods of time away from the family on military duty. His career advancement gave him a greater financial opportunity. The court also considered the fact that the husband had dissipated marital assets, another set of circumstances justifying a disparate award of divisible assets in favor of the spouse without the interest. [53]

## TRUST INTERESTS

The treatment of trust interests in a divorce can be conceptually confounding. The overarching analysis is to ascertain the trust settlor's intent and to effectuate it. Intent may be construed from the entire trust instrument and the underlying circumstances. We know generally that all property to which a spouse holds title, however acquired, is at risk of being divisible. [54] That determination is not constrained by traditional concepts of real estate title or property and their labels, such as the ones tied to various types of trusts. [55]

Careful scrutiny must be made of the nature of the beneficial trust interest of a divorcing party: it must have the characteristics of being "present," "enforceable," "vested," or not subject to contingencies, and capable of valuation, in order to be included in the divisible estate. In *Lauricella v. Lauricella*, the husband's beneficial interests in certain real estate held in a trust created by the husband's father were part of the divisible marital estate because they were present, enforceable, and susceptible of valuation. [56] The husband's father created a trust to hold title to a two-family home in which *65 the divorcing parties resided. The husband's father was the original trustee, and the husband's mother, the husband, and his sister were the beneficiaries. The interests of the beneficiaries were restricted by a spendthrift clause and a provision that permitted amendment upon a unanimous vote of the trustee (or trustees) and beneficiaries. The trust was also subject to termination by the trustee or trustees if the property were sold, in which case the beneficiaries were to receive the proceeds in equal shares. The court held that the husband had a present, possessory, enforceable and "equitable" right to use the trust property for his benefit, which he had exercised during the marriage by occupying one of the dwelling units as the marital residence. While the husband had a vested right to the future receipt of his share of the legal title to the trust property, it was "subject to divestment" if he did not survive until the trust terminated. At the time, he was only 26 years old, and the court, engaging in a bit of speculation, reasoned that it was likely he would survive to receive his share of the title. The court indicated that "the spendthrift clause is not a bar" and focused on the husband's interest being unlike a mere expectancy.

In *Williams v. Massa*, given the availability of other jointly produced assets, and recognizing the husband's far greater contributions to the marital partnership, the court saw no reason to divide the husband's inherited or gifted property and awarded certain inherited trust assets to the husband, and excluded certain of the husband's contingent remainder trust interests from the marital estate. [57] The case involved five separate family trusts in which the husband had varying interests (both vested and contingent remainders) and with differing purposes, including preservation of principal. The court did not include the husband's contingent remainder interest as part of the divisible marital estate due to a contingency that rendered that interest unvested, not clearly fixed or enforceable and thus constituting a mere expectancy, comparable to a future inheritance.

In *Comins v. Comins*, after a 48-year marriage between spouses then in their mid-70s, it was appropriate to include in the marital estate the wife's interest in a trust that had been settled and funded by her father, and in which the wife had a present, enforceable and equitable right to use for her benefit in view of the length of the marriage and considering the parties' mutual reliance during the marriage on the trust fund to enhance the couple's lifestyle. [58] The trust provided that all property received would be divided into two equal funds, one for each daughter, each fund to be held as a separate trust. The wife had a power of appointment to choose recipients of the trust corpus upon her death. Given the survivorship contingency and the respective ages of the husband and his father, the court concluded that the husband's acquisition of his trust interest was not fairly certain.

In *S.L. v. R.L.*, after a 32-year marriage, the wife was a beneficiary under five trusts, each with a twist, and all settled by third-party family members of the wife. [59] The wife's remainder interest in one of the five trusts was deemed not a divisible marital asset because it was vulnerable to future complete divestment if a power of appointment in her mother's last will were to be exercised. The wife's interests in the other four trusts were determined to be vested and did survive the § 34 marital estate division. The Appeals Court held that the challenging but not troublesome trial court decision to do an "if and when received" valuation of the wife's interests in the other four trusts was appropriate specifically because valuation at the time of divorce was

uncertain. The reasons for the uncertainty were several, and depended on the provisions of each trust, all of which contained the contingency of the wife surviving her mother who was a lifetime income beneficiary; two of the trusts required that enough principal remain to generate certain income levels; one of the trusts carried an ascertainable standard tied to the lifestyle of the wife's mother but with a "spendthrift" provision. Another trust was also subject to a spendthrift clause and power of appointment in the wife's mother to assign her present or future income to the wife, her four siblings, and their issue, if any; another trust had a spendthrift clause for all beneficiaries. Other than mentioning, almost in passing, the presence of spendthrift clauses throughout the trusts, the Appeals Court made no mention of their significance, if any, to the § 34 analysis.

In *Child v. Child*, the husband was beneficiary of two trusts: one gave the trustees sole discretion to distribute income and principal to him or for his benefit; the second required the trustees to distribute the income to the husband but gave them sole discretion to distribute principal. [60] With the exception of the right to receive income from one trust, the husband did not appear to have a present enforceable equitable right to use either of the trust properties for his benefit. [61] That said, it is not a foregone conclusion that a party's beneficial interest in a trust, the distributions of which are subject to trustee discretion, renders that interest too remote or speculative for divorce division. [62] Judicial discretion is necessary so the courts may handle a myriad of factual situations. [63]

If a trust is revocable and "self-settled" by a divorcing party, its assets will generally be considered part of the divisible marital estate rather than being considered owned by the trust as a separate entity. Even in this circumstance, the attributes of a particular asset within that self-settled type of trust or the circumstances of how it got there may render it exempt, such as in the inheritance or gifts categories. [64]

For interests in trusts not created by either divorcing party, counsel must scrutinize the identity of the trustee, the distribution terms, and trust language distinguishing trustee discretion to make distributions from the divorcing beneficiary's right to command distributions. [65] If a trust is revocable, but created by a third party as opposed *66 to having been "self-settled" by the grantor, especially one with a familial relationship to one of the divorcing parties, the provisions of the trust, the nature of the assets therein, the extent of beneficial interests thereto, and dispositive provisions must all be analyzed in the divorce proceeding. For a revocable trust that is created by the opposing divorcing party, all trust assets will likely be treated as being in the divisible marital estate subject to creditors, except if the assets therein were inherited or gifted. In such a case, issues would arise as to how long ago the assets were received, the nature of such assets, and the length of marriage, as well as other relevant variables that would have to be explored to determine whether these trust interests were "woven into the fabric of the marriage." [66]

An irrevocable trust's assets are generally beyond the claw back reach of the settlor if the settlor gave up ownership of the assets held by the trust. [67] If the settlor of an irrevocable trust is getting divorced, the assets therein should be invulnerable to asset division unless the assets were transferred to the trust in contemplation of divorce. [68]

An irrevocable, testamentary, or *inter vivos* trust may still be revocable as to the settlor in ways separate from the irretrievable assets transferred thereto, such as retention of right to income only or retention of a power of appointment. Even so, if the trust settlor is getting divorced but retained rights either to income only or power of appointment to other persons, any of these might make at least the income, and perhaps even the assets contemplated within the power of appointment, vulnerable in the settlor's divorce for support calculations, if not also vulnerable to equitable asset division. The divorcing trust settlor's retention of the right to change trustees may raise red flags if a different trustee is named shortly before or in the midst of divorce who takes actions such as decanting assets to a new trust whose new terms block the transfer of assets to the divorcing spouse.

A testamentary trust will be effective and funded only at the death of the testator of the subject will. [69] In a testamentary-type trust, the eventual assets or income therefrom might be considered as "opportunity to acquire future assets and income" of a divorcing beneficiary of the testamentary trust. [70] However, divorce counsel for the divorcing testamentary trust beneficiary may argue that in cases where the testator still has the capacity to modify the testamentary trust provisions of that last will, this interest is not an actual opportunity because the testator can wait until the divorce is final and then re-amend the testamentary trust. Even if lacking testamentary capacity, a court-appointed conservator may amend or revoke those dispositions, and thus the inclusion of assets is at best speculative and contingent, as will be discussed further below.

If there is trustee discretion in a trust settled by a third party, counsel must analyze: whether distributions could be made to either divorcing party; what were the nature (income, principal or both) and timing of past distributions (regular, periodic, random or unpredictable); whether there exists an ascertainable standard to guide or limit the trustee's discretion; whether there are sole or multiple non-beneficiary trustees and whether the trust requires unanimity of trustee decision to distribute; whether the trustees have historically and generously exercised discretion upon request; whether the divorcing parties depended significantly on that generosity during the marriage and relied on it for future security; whether the spouses live a higher standard of living as a result of trust distributions; whether any of the beneficiaries are disabled and whether the nature of the trust is intended to function as a supplemental needs trust; whether those same distributions terminated around the proximate date when the beneficiary's divorce action was filed; whether the value of trust assets in which the divorcing party may have a non-speculative interest is presently calculable with some certainty; and whether the class of current and future beneficiaries is still open to expansion by future joiners or has already closed. These issues become even less susceptible to characterization when the interest of the divorcing beneficiary is only a future contingent interest predicated on the happening of a particular event.

Sometimes beneficial interests are "present" and "vested." Other interests, while vested, are still subject to some future contingency, such as survivorship where the interest cannot be divested but may not ripen to unfettered use and enjoyment. Such use and enjoyment must instead await some contingency, such as reaching a particular future date or the death of someone holding a concurrent life estate interest in real property. Vesting during the marriage is not a requirement for inclusion of an interest in the divisible estate. [71] Only when the life estate holder dies will the vested remainder interest become unconditional. And a power of appointment held by another person may subject a granted beneficial interest to potential divestiture.

Remainder interests saddled with survivorship contingencies may, depending on the comparative ages or health circumstances of the beneficiaries, be too speculative and thus may not constitute a present interest includable in the marital estate; such interests can nonetheless still be considered as an opportunity to acquire assets in the future. [72] Terms like "life estate," "remainder interest," "retained power of appointment," "present interest" and "possessory interest" abound in direct deed conveyances as well as in the context of a trust owning the real estate. Massachusetts real property law is clear that a remainder interest is vested [73] because it cannot be taken away unless a power of appointment to do so is specifically reserved or granted in the creating document; it is "subject to divestment," in which case the remainder interest is not only not presently "possessory" due to the life estate, but its potential to vest may be diverted. Trust provisions may contain possessory exotica (for example, rather than a life estate terminating on the date of the death of the life *67 estate holder, a tenancy is given only for a specific number of years or time period extinguishing on a future date certain), in which case the interest is vested but not yet possessory.

In cases where a divorcing party has a vested remainder interest not in peril of divestment, the current age or health of the life estate holder whom the divorcing party must outlive may render the interest fairly certain rather than remote or speculative. Irrespective of age or health factors, if the interest does not belong to the divisible marital estate, it will be considered under the "opportunity" factor.

Although not a divorce case, *Dell'Olio* is instructive because it involved a life estate and a remainder interest devised in a last will that constituted "present" but "not yet possessory" interests and addressed a "vesting" issue. [74] This holding has implications for asset division in a divorce when other individuals besides the divorcing party hold remainder interests in real property. In a Probate Court petition for partition, the commonwealth filed a MassHealth creditor claim. The decedent, Emily, was only 8 years old and among seven grandchildren to whom a grandfather's last will, dated in 1956, devised remainder interests in real property, subject to life estates to various family members. Emily died over 50 years later, in 2008, while some original life tenants as well as remainder holders were still living. All life estate holders had died by the year 2013, and two years later, three of the six surviving grandchildren, all of whom were living at the property at the time, filed a petition to partition. The disputed issue concerned the date of vesting of Emily's remainder interest obtained via the last will: (1) whether it occurred when the testator dies; or (2) upon the remainder contingent survival of all life estate holders. If vesting occurred when the testator died, then Emily's remainder would be subject to creditor claims both before and after her death.

The court ruled that Emily's remainder vested when the creator of that interest, the last will testator, died. The court ruled that the interest was not extinguished when Emily died without having outlived all life estate holders. [75] Where a testator devises a remainder interest to a direct descendent whom he knew to be living at the time the will was executed, courts are to apply a strong presumption that the testator intended that interest to vest upon the testator's death. That presumption may be overcome only by showing that the provisions of the will manifested a different intent, specifically, that the vesting be postponed until the death of all life tenants. [76] The court reasoned that an interest may be "vested in possession" not only when there is a right to

present enjoyment, but also when it does not carry a right to immediate possession if it confers a fixed right of taking possession in the future. [77] If remainder interests created under a will are not contingent on future events, they are said to vest "in interest" upon the death of the testator. [78] This constitutes a present interest, but not yet possessory. Once the beneficiary has gained the right to occupy and enjoy the property, that interest is said to be "in possession." [79]

The court also addressed the issue of valuation. In this case, the class of remainder holders increased over time by the terms of the remainder language, creating an open class where there were two "after joiners" at the time the grandfather testator died. Although remainder interests devised via last wills vest upon the testator's death, and are not subject to divestment by the remainder holder's death before all life tenants, the value of the vested, but not yet possessory, remainder interest is subject to a decrease in value--in effect a partial divestment--by the subsequent birth of new family members in the relevant class of beneficiaries. [80] Thus, the vesting percentage interest is open to downward fluctuations in value if there are new joiners, or an increase in value if the remainder interest holders died before vesting and the remainders were then to take per capita.

Fortunately, the case of *Skye v. Hession* discusses many of these real property interest "buzzwords" in a readily understandable decision. [81] This case involved a real property deed where the grantor reserved not only a life estate for herself, with remainder interest to others, but also reserved a special power of appointment in the deed instrument. In contrast with the general power of appointment, the special power of appointment does not permit the holder to appoint the property to herself, her creditors, her estate or estate creditors. [82] The retention of such power rendered the interests of the remainder persons merely a "defeasible interest": although the remainder interest presently existed, possession and unfettered enjoyment would only happen after the life estate interest was gone. [83] Future enjoyment was even further contingent upon the failure to exercise a particular power: the power of appointment. Counsel should be careful to note that the possession or retention of a special power of appointment itself, due to the exclusion of the power to appoint to oneself, does not represent a legal interest in the property. [84]

## DATE TO VALUATE DIVISIBLE ASSETS

Complicated or uncertain valuation of an asset does not necessarily preclude trust or inheritable assets from any consideration in divorce or from inclusion in the divisible marital estate, even though they may be relegated to the "opportunity" factor. Courts prefer division at the time of divorce rather than waiting for some date or event in the future ("if and when received"). [85] Asset divisions in the divorce judgment may not see effect until some later time, leading to unintended results. [86] If there is no expert valuation testimony, then the court may rely on the testimony of one of the litigants in the divorce, even if erroneous. In *Dilanian v. Dilanian*, it was undisputed that the husband's actual inheritance was lower than that found by the trial judge, but the error was caused by the husband's own testimony and the judge reasonably could attribute the error to the ***68** husband's negligence, especially when the exact amount of the inheritance was not particularly important to the division of assets. [87]

A court is not required to accept the opinion of the experts and is entitled to credit all, part or none of their valuation testimony. [88] Although these issues are often resolved by testimony from business valuation experts, courts may permit self-evaluation of present business value based on a reliable degree of business acumen and experience in the absence of expert opinion otherwise. [89] Unless clearly erroneous, the court's determination of value will stand. [90] "A division of marital assets anticipates a final and equitable property owned by the parties at the time of the divorce ...." [91] Counsel must remember that divorce asset divisions are not subject to future modification unless there was fraud. [92]

Several variables should be considered with respect to real estate valuation issues arising from the existence of single-family, multifamily or vacation homes, or commercial property such as restaurants. Other marital trust or inheritable assets prove even more problematic and subject to expert opinion, such as medical practices with partners, limited liability companies with other members, discounts for minority shareholders in corporate entities, and other one-of-a-kind assets.

There are several possibilities when arguing what date of valuation should be used to divide the marital estate, such as the most recent financial statements submitted with the court. But in multi-day trials that sometimes take place on nonconsecutive days occurring over a period of months, this may be challenging. The date of trial (beginning or end) may be used unless circumstances dictate otherwise, like market forces intervening within that time, especially if that is of particularly long duration. [93] The date of separation may also be used, but one should be mindful of how much time has elapsed between separation and trial date.

When there is a long period of time between separation and divorce, questions arise as to how to treat asset value increases or decreases during that period of time. [94] In a divorce case involving a two-year marriage supplemented by a six-year premarital economic enterprise where the parties shared and acted as part of a married, economically interdependent effort, the Supreme Judicial Court (SJC) provided a date of trial valuation based on the parties' contemporaneous financial statements. [95] The date for temporary orders may also be argued. Again, in any litigation from date of filing to date of disposition, counsel should be prepared to make arguments concerning market-type fluctuations, such as in equity stock assets.

## THE "NOMINEE" TRUST

The customary usefulness of a nominee trust is to protect the identities of beneficial interest holders, typically of real property. [96] The record title trust instrument is recorded at the county Registry of Deeds but need not contain the names of the beneficial interest owners who are instead listed in a separate non-recorded document called a "schedule of beneficiaries," a privacy afforded in real estate transactions. The type of asset and the nature of the interest are critical questions that determine whether a beneficial interest in a nominee trust held by a divorcing party as described in the schedule of beneficiaries will be deemed part of the divisible estate or instead considered a "future opportunity."

The "nominee" trust itself does not own any beneficial interest in any assets, but it does hold legal title to its assets. It is a mere holding entity. [97] *Roberts v. Roberts* explains the purposes and features of such a nominee trust and emphasizes that the trustees have no power to independently act regarding the trust property but may act only at the direction of the beneficiaries. [98] The trustees have only perfunctory duties, possess only nominal incidents of ownership, and are agents for the mere convenience of the beneficiaries. [99] The trustee may also be a beneficiary himself, and beneficiaries may terminate the trust at any time and thus receive legal title to the trust property as tenants-in-common in proportion to their beneficial interests. [100]

*Goodwill Enterprises, Inc.* revisited the attributes of a nominee trust. In this bankruptcy case, the court reasoned that "there is logic in treating the beneficiaries of a nominee trust as the true owners of the property for purposes of liability as well as benefit." [101] The trustees are merely agents of the beneficiaries in whom "ultimate control and authority resided at all times," and the beneficiaries' interest in the nominee trust is an undivided interest in real property notwithstanding that the beneficiary may not have a controlling majority vote in what happens to that property. [102] Thus, the co-holders of beneficial interests are no different than co-owners of property held as tenants-in-common, and liability attaches as well as true ownership. [103]

## DECANTING AS DIVORCE-PROOFING

Whereas a trustee of a self-settled revocable trust by its terms and by its nature may be permitted to transfer trust assets freely, the irrevocable trust may present some barriers to unconstrained transfers of assets either out of the trust completely or to different beneficiaries other than the one who is undergoing a divorce. The concept of ***69** decanting allows one to amend an otherwise unamendable trust. By decanting, the trustee removes assets from a trust supposedly irrevocable (that is, where modifications are not permitted) and transfers them to another trust whose provisions are designed to prevent, or at least obstruct, those transferred assets from being lost in the divorce of a beneficiary, even if the beneficiary is the same under both trust instruments. [104] This is an extraordinary power to create a brand-new trust into which to transfer the trust corpus, in its entirety, so as to meet a present need or strategic interest that was not contemplated at the time the trust was drafted.

Although Massachusetts has no specific statute, pre- or post-Massachusetts Uniform Trust Code (MUTC), permitting such a maneuver, our state has famously approved such even in the midst of divorce litigation and on the basis of an affidavit purporting to capture the settlor's intent of nearly three decades earlier. [105] This was a case where one trust was decanted into an entirely new trust, after divorce was filed, to deprive a spouse of an interest in the trust. It was a deliberate tactical play to preserve the trust corpus for the intended beneficiary to the exclusion of his wife who otherwise had an interest in it.

Occurring in a non-divorce context, broad language, from which one could infer trustee authority and settlor intent to do decanting, was relied upon to support that decanting [106] because it was determined to be in the best interest of the beneficiaries. Drafting counsel should be cautioned not to rely on such interpretive largesse by appellate courts in the future, especially given the *Morse v. Kraft* court's remarks, which are clearly a signal that post-*Kraft*-drafted trust instruments are expected to contain

specific decanting authority if such is sought. [107] *Morse v. Kraft* gives us two fundamentals about decanting: (1) decanting may be allowed and (2) no specific decanting language is required. [108] But the intent to decant must be reasonably inferable in the trust instrument via broad language or provable by other evidence of intent. [109] Counsel should be cautioned not to rely on parole or extrinsic evidence to be admissible on this issue at any trial. The elephant in this litigation room is whether Massachusetts public policy should tolerate decanting in a divorce asset division, child support, or alimony context, and whether decanting after filing and service of a complaint for divorce violates the automatic restraining order under Rule 411.

*Morse v. Kraft* hinged on the fortuity of a 2012 affidavit rendered by a septuagenarian purporting to explain his intent of 30 years earlier that there was, albeit unstated, authority in his 1982 trust for the trustee to decant to new trusts without the consent or approval of any beneficiary or court. Luckily, Mr. Kraft was still alive to attest to that belated manifestation of intent. The 1982 trust contained four separate sub-trusts for the benefit of four Kraft sons, then minors. The upshot of *Kraft* is that a trustee with decanting power has the authority to amend what is, on its face and by its terms, an unamendable trust.

Although a Connecticut case, *Ferri* yields potential public policy issues for divorces under Massachusetts law; indeed, the facts seemed egregious enough to demand an equitable, if not statutory, remedy that could thwart a decanting that occurred mid-divorce and unabashedly for the purpose of spiriting away marital assets from the clutches of the divorce estate. [110] Instead, the SJC and the divorcing husband relied on the memory of an octogenarian who wrote a present-day affidavit detailing his thoughts of nearly 30 years prior. The belated affidavit claimed a past intent to prevent a spouse divorcing a beneficiary under the settlor's trust from having access to trust assets in the divorce. The Massachusetts SJC was asked by the Connecticut Supreme Court to answer certified questions arising from declaratory judgment and summary judgment complaints concerning the authority of a trustee to distribute (that is, to decant) substantially all of the assets from one irrevocable trust into a new and second irrevocable trust. [111]

The questions arose out of a divorce proceeding in Connecticut between the defendant and her husband, who was the beneficiary of the Massachusetts irrevocable trust. In essence, a Massachusetts irrevocable trust with a spendthrift clause was used to decant into a second irrevocable trust also with a spendthrift clause. [112] The first trust was created in June 1983 by the divorcing husband's father for the sole benefit of his son who at that time was 18 years old. The trust was created in Massachusetts and governed by Massachusetts law. There were two methods established in the 1983 trust by which trust assets were distributable to the beneficiary (son). First, the trustee was authorized to pay to or "segregate" trust assets for the beneficiary; second, and only after he had reached age 35, the beneficiary husband could request withdrawals of fixed percentages of trust assets increasing from 25% of principal at age 35 to 100% after age 47. [113] The divorcing parties were married in 1995 when the husband was 30 years old. The divorce was filed 15 years later in 2010 when the husband was about age 45. Within four or five months after the filing of the divorce, the same trustees of the first trust established a new trust and did so specifically to protect the trust corpus for the husband in his ongoing divorce. The trustees were the husband's brother and another individual. They transferred substantially all the assets of the 1983 trust to themselves as trustees of the 2011 trust. In both trusts, the husband was the sole beneficiary. The 2011 trust included a spendthrift clause giving the trustee complete authority over when and whether to make payments to the beneficiary, if at all, and the beneficiary was deprived of the "power to demand payment" of trust assets. [114]

The trustees acknowledged a specific decanting purpose: to prevent the husband from losing trust assets in the divorce. The trustees ***70** claimed, somewhat unbelievably, that the decanting was done without the husband's knowledge or request, [115] an assertion difficult to accept under the facts and circumstances. It appears that at the time of the decanting, the terms of the 1983 trust gave the husband a "right to request a withdrawal" of up to 75% of the principal. [116] Unfortunately, the exact language of this withdrawal provision was not included in the SJC's certified answers. The SJC, however, referred to the husband's interest as a "vested interest" maturing into 100% of the assets when he reached age 47. [117] The settlor, fortuitously still alive, filed an affidavit in July 2012, some 29 years later, and during the divorce proceedings. Extrinsic evidence was admitted based on trust ambiguity to explain the drafting history, intention of the settlor, and whether decanting was authorized. [118] The SJC underscored the principle that when the instrument displays broad trustee authority, then specific representation of authority to decant need not be expressly written therein. [119] The 2012 affidavit explained the settlor's 1983 intent, evinced when the beneficiary husband was then just 18 years old. The SJC found particularly noteworthy trust language stating that the trustees could "segregate" funds for later payment to the beneficiary. [120]

The court found that the decanting was not inconsistent with the spendthrift provision because the spendthrift clause evidenced the settlor's intent to protect the trust income and principal from invasion by the beneficiary's creditors. [121] Thus, the spendthrift clause was vanquished under these facts by broad trustee powers akin to decanting in this divorce context. The court rejected the wife's argument that the husband's right to request a withdrawal was inconsistent with the authority to decant, holding that the two were not mutually exclusive. [122] They rejected the argument that the settlor intended to prevent decanting after the beneficiary gained withdrawal rights at age 35, no doubt swayed by the belated affidavit of intent. [123] In his concurring opinion, a shot across the bow to those anticipating a rush to decant in Massachusetts divorces by sympathetic third-party trustees of irrevocable trusts, the late Chief Justice Ralph Gants emphasized that the SJC had specifically not decided whether it will permit trustees in Massachusetts to create a new spendthrift trust and decant to it all the assets from an existing non-spendthrift trust when the sole purpose of the transfer is to remove the trust assets from the marital estate even if trust language specifically so authorizes. [124] Chief Justice Gants pointed out that the MUTC prescribes that a trust may be created only to the extent its purposes are lawful and not contrary to public policy. [125]

In light of Chief Justice Gants' concurring opinion, query whether decanting and creation of a new spendthrift trust solely for the purpose of depriving a divorcing spouse-creditor of assets is contrary to Massachusetts public policy and violative of § 404. The SJC declined to weigh in on the wife's argument that under Massachusetts law, a party to a divorce is not a mere "creditor" under the spendthrift provision. [126] It should be noted that although the MUTC at § 404 is clear that a trust cannot be created for a purpose contrary to public policy, there is no counterpart provision that a trust cannot be modified for such a purpose. Would such modification resulting in a radically different outcome constitute not just modification of an existing trust, but the creation of an entirely new one that seemingly violates not only the MUTC at § 404, but also the automatic restraining order on assets during divorce?

## DECANTING, SPENDTHRIFT CLAUSES, THE MUTC AND PUBLIC POLICY

MUTC "default and mandatory" rules prescribe that the terms of a trust (that is, the settlor's intent) shall prevail over any other provision of the MUTC except: § 5 of the spendthrift provision and the rights of certain creditors to reach a trust, as further provided in Article 5; and the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice. [127] This latter section may provide grounds for the public policy argument against a last-minute decanting in the context of a divorce that in effect permits a spouse to not only preclude and shelter assets from division, but to evade alimony and other support obligations otherwise justifiable under the facts.

Much of the controversy in the appellate cases has come from the "spendthrift" clause contained in testamentary or *inter vivos* trusts. [128] The MUTC gives deference to the enforceability of spendthrift provisions. [129] Such a clause is commonly inserted when the settlor fears future misadventure (such as divorce or personal injury liability) of a beneficiary therein, such as an adult child of the settlor. The purpose of spendthrift clauses is to preempt alienation, pledging, assignment, attachment, execution on, and garnishment of assets held in trust from the reaches of antagonists, notably the divorcing spouse of the trust beneficiary. [130] This purpose also extends to restraining principal or income distributions to, or demands by, a beneficiary who may become ensnared in a contentious divorce or other litigation.

If there is a spendthrift clause in the trust, lawyers must ask whether it supersedes all other distribution provisions, even rights of a beneficiary to demand withdrawals. There is no Massachusetts case or statute under which divorcing spouses enjoy preferred creditor status. This lack of status is problematic when a divorcing spouse tries to claim a share of assets from the spouse who has a right as a beneficiary to assets held in a trust settled by a third party. The beneficiary spouse will claim that the settlor, most often a parent or other ancestor, did not intend to leave trust assets vulnerable to a divorce for the benefit of a divorcing son-in-law or daughter-in-law as in *Ferri*. A spendthrift clause will be invoked to support such a defense.

*71 Analysis of case law over the past 20 years reveals that the value of spendthrift clauses is disintegrating in the context of equitable division of assets in divorce. The decisions seem to be lining up along the thesis that it is simply inequitable to deprive a spouse, who has contributed to the bond of matrimony, of assets held in trust based only on a spendthrift clause that has its roots in the protection of assets against creditors. The status of a spouse is not akin to that of a creditor. Our matrimonial statutes and case law require fairness in support over a lifetime, whether married or divorced.

If the spendthrift intent of the settlor is not prescribed within the trust document, but instead in a side letter, it seems an obvious imperative that the affidavit be contemporaneous with the execution of the trust document rather than run the risk of having to compose such an affidavit nearly three decades later as happened in *Kraft* [131] and *Ferri*. [132]

*Pfannenstiehl* [133] had a nuclear effect on the family law bar, divorce practice, and trust/estate planning bars. The outcome in this case put aside what was the traditionally reliable "woven into the fabric of the marriage" analysis. In this case, the court grappled with whether the present value of the husband's beneficial interest in a 12-year-old discretionary spendthrift trust settled by his father a few years after the parties married should be included in the divisible marital estate where the marriage was 10 years in length. The court held that such present value may not be included because it was "so speculative as to constitute nothing more than an expectancy," and thus that it is "not assignable to the marital estate." [134] The class of beneficiaries was thus still open to future joiners.

The trustees in the case were a non-beneficiary family attorney and the husband's brother who was also a trust beneficiary. The trust provided that any distributions to beneficiaries were entirely discretionary in the trustees and may be made only with the approval of both trustees, who were additionally bound by an ascertainable standard applying to the entire beneficiary class. The 2004 trust also contained a typical spendthrift provision, which stated that "neither the principal or income of any trust created hereunder shall be subject to alienation, pledge, assignment or other anticipation by the person for whom the same is intended, nor to attachment, execution, garnishment or other seizure under any legal, equitable or other process." [135] Before the divorce was filed, the husband and his siblings had received many, and sometimes regularly timed, trust distributions, and those distributions to the divorcing parties supported their marital lifestyle (thus typifying the "woven into the fabric of the marriage" argument), in the husband's case by a total of $800,000. Upon the September 2010 divorce complaint filing, the trustees shut off the husband, but not the other beneficiaries, suggesting that the trustees were aware of and attempting to protect trust property from being subject to the lawful divorce process. The SJC rejected a fractional division based on the then-number of total beneficiaries. Although concluding that the interest was a "mere expectancy" subject to trustee discretion, and notwithstanding the historical track record of regularly timed distributions woven into the parties' lifestyle, the SJC held that the husband's "expectancy" interest nonetheless may be considered under the § 34 factor of "opportunity." [136] Besides holding that the trust interest was not fixed, current and enforceable, the court noted that the husband could not "compel" distributions. [137] The expectancy status was further supported by the potential fluctuation in value over time due to unequal distributions or additional beneficiaries as well as trustee obligation to be aware of long-term needs of the entire class of beneficiaries. [138] Thus, even the presence of the ascertainable standard provision (whose purported purpose is to guide or limit the trustee's discretion to a calculable amount of periodic support) was not sufficient to render the husband's interest non-speculative.

## TRUSTEE DISCRETION: "DISTRIBUTIONS," "RIGHTS" AND "DEMANDS"

Counsel may encounter trust provisions that are written in terms of a beneficiary's right to demand a withdrawal in contrast to a right to receive or to request trust distributions. Does a beneficiary's right to demand an annual 5% withdrawal constitute an ascertainable standard guide as to that beneficiary? Is a "demand" right an imperative that supersedes a spendthrift clause and trustee discretion? Counsel must assess whether these are significant, how the terms relate to the facts, and whether they are distinctions without a difference that are still ultimately trumped by a spendthrift provision. In a profession that demands language precision, lawyering that does not heed these distinctions runs the risk of malpractice.

Counsel must scrutinize trust provisions to determine what distributions are truly discretionary by the trustee or mandatory if "demanded," or unilaterally taken, by a beneficiary either individually or as a co-trustee, spendthrift clause be damned. Does such unilateral withdrawal constitute *de facto* trust modification? Counsel should also assess whether it is trust income or trust principal, or both, that can be either distributed or outright demanded.

There is innate tension in a trust instrument that contains either a spendthrift clause as well as a "five and five" ($5,000 annually or 5% of trust corpus) right of withdrawal clause (in itself an ascertainable standard) or a separate "ascertainable standard" to guide trustee discretion, all three of which are typically found in estate planning documents. Settlor intent and priority and the question of which provision supersedes may be reasonably discernible from the trust instrument or, if not, extrinsic evidence may be required.

The question of which provision prevails was answered, for now, in the case of *Levitan v. Rosen*, which featured the spendthrift clause, trustee discretion, unilateral withdrawals seemingly unauthorized by trust language, and the beneficiary's annual 5% right to demand. [139] The apparent conflict among these provisions was put to rest and only under the specific facts. This was a divorce case consolidated with an equity action between the parties and included the third-party independent trustee. The wife's father was the settlor *72 of this 1984 trust. The parties were married in 1997, and thus the trust was already 13 years old. The complaint for divorce was filed 16 years later in 2013. The wife's father died in 2007. The wife was one of three beneficiaries. The court acknowledged that pursuant to the terms of the trust, Florida law controlled its interpretation. [140] The court also noted that Florida had a public policy favoring spendthrift provisions in trusts protecting a beneficiary's trust income. [141]

The trust involved was a Florida trust requiring Florida law to be applied to both the administration and, more importantly, the interpretation of the trust, including the spendthrift clause. [142] However, Massachusetts divorce law applied the § 34 factors to the division of marital assets. [143] The beneficiary class was already closed to future joiners, thus permitting more certainty to valuation and lack of reduction in that valuation. [144] This discretionary family trust contained not only a spendthrift provision but also a "right" by the wife to annually "withdraw" 5% of her share of the trust principal. [145] The trust required the wife's share to be continued to be held in trust for her lifetime with remainder distributed to her issue after her death after all remainder persons reached age 25. The wife's trust interest was managed by two trustees: the wife and an "independent" trustee who was given the "sole discretion" to "distribute" "as much of the income and principal" to the wife as he "deems advisable" (which the court declined to recognize as an "ascertainable standard"). [146] The only prerequisite to exact this 5% "right" was that the wife notify the independent trustee; once notified, the trust instrument required that the independent trustee "shall" make such "distribution" to the wife." [147]

The wife exercised such right of withdrawal post-divorce filing in three successive years, 2014, 2015 and 2016, receiving a total of some $270,971, of which, by court order, half was given to the husband. The trust, however, contained a separate spendthrift provision prohibiting "distribution" of the wife's share to creditors and other third parties, including a spouse. [148] The trust authorized the independent trustee to "withhold any payment or distribution of income or principal (even though such payment or distribution is otherwise required hereunder) if the independent trustee in his sole discretion deems that such payment or distribution would not be subject to full enjoyment by the wife." [149] The wife's trust interest was certain and quantifiable at time of divorce at $1.67 million. The two main issues in the case were whether the wife's trust share was a marital divisible asset and, if so, whether the spendthrift provision excluded it as well as the wife's 5% withdrawal right. The primary intent of the settlor was to benefit his adult daughter, the wife in the divorce action, and not future generations. Inconsistent with those intentions was the fact that the wife was a co-trustee along with a described independent trustee who was not a beneficiary of the trust. [150] The trust language also gave the wife a special power of appointment to direct distributions. [151] As beneficiary, the divorcing wife had made annual requests for distributions (but not "five percent" demands) in the three years after the divorce litigation began, and the independent trustee, pursuant to the trial court's temporary orders, had complied. [152] The Appeals Court construed the wife's 5% demand right as a "distribution," and distributions were at the sole discretion of the independent trustee. [153] There was also no discussion in the appellate decision of the fact that the wife was a co-trustee, nor any mention of the undisputed findings of fact that the wife had previously acted unilaterally to make distributions to herself that were not later contested by the independent trustee. Instead, the Appeals Court reasoned that the withdrawal demand was a form of distribution, and all distributions were controlled by the spendthrift clause. [154]

*Levitan* gives us other instructive points. With respect to settlor intent, non-Massachusetts law applies to the "scope" of the spendthrift clause. [155] Where trust provisions are ambiguous or contradictory, the trust instrument should be considered as a whole to discern the settlor's intent. [156] The entire trust was considered by the Appeals Court to be part of the divisible marital estate, but had to be given ("equitably divided") solely to the wife because the spendthrift clause prohibited it from going to the husband in his status as divorce creditor. [157] The court reasoned that the trustee's discretion was only "guided" (akin to an ascertainable standard) by the 5% withdrawal demand right, and although such a metric gives "predictability" to the distribution calculation, it was still subject and inferior to the spendthrift clause because it was a "distribution." [158] Thus, the court ruled that the wife's interest, though guided by and fairly certain of calculation by the 5% provision, was a mere expectancy, and the spendthrift clause prevailed to defeat any interest in the trust by the husband as divorce creditor. [159]

*Levitan v. Rosen* pointed to the ambiguity in how the spendthrift provision should apply when the court referred to the "facial conflict" between the wife's right of withdrawal and the independent trustee's discretion under the spendthrift provision to withhold "any payment or distribution of income or principal even though such payment or distribution is otherwise required hereunder." [160] Interpreting the absence of concrete ascertainable standard language to guide the trustee's exercise of discretion (as he "deems advisable"), the court explained that the absence did not strengthen the argument for inclusion in the divisible marital estate: "the mere fact that a trustee's discretion is 'uncontrolled,' (i.e., not governed by an ascertainable standard) does not necessarily preclude a trust's ***73** inclusion in the marital estate." [161] The Appeals Court also noted that "though the independent trustee's discretion is not guided by an ascertainable standard, there is some degree of predictability built into the trust by virtue of the wife's annual right to withdraw five percent of the trust principal ..." [162] This rationale appears to be circular: the vesting and predictability make the wife's trust interest includible in the marital estate, yet the entire interest is blocked by the spendthrift clause, and thus the division of the trust interest runs entirely into the wife's column. This rationale appears to create a subcategory of assets divisible in the marital estate but directed to one party only due to the spendthrift provision.

In *D.L. v. G.L.*, decided only 15 years before *Levitan v. Rosen*, one of the trusts (the so-called generation-skipping trust) included a provision giving a beneficiary the right to withdraw up to 5% of the principal balance of the trust each year. [163] Other than this brief mention, the court did not further discuss this 5% withdrawal right as a distribution, its status as an ascertainable standard guide, its strength against trustee discretion, whether there was a facial conflict, or what, if any, difference it made in the division of the marital estate or "opportunity for the future acquisition" of assets.

## THE "ASCERTAINABLE STANDARD" AS A TRUSTEE "GUIDE" FOR DISCRETIONARY DISTRIBUTIONS

Trustee discretion to make distributions to a divorcing party is often tied to, or at least superficially guided by, the so-called "ascertainable standard." Such outcomes have varied, however, and the "ascertainable standard" has taken a back seat to other more prominent factors, such as trust provisions that permit the numbers of beneficiaries to increase as time passes (an "open class"). [164] The prospect of later class joiners complicates the court's ability to valuate that interest. That valuation uncertainty is magnified when an "open class" provision is coupled with malleable "ascertainable standard" language, thus relegating the non-divisible expectancy to a future non-guaranteed "opportunity."

Though called "guides" by appellate courts, standards for distributions of income and/or principal are often not quantifiable, or even intelligible, and are expressed so generically or cryptically as to be of little use in putting a number to them. The so-called "ascertainable standard" suffers from a lack of any degree of certainty or mathematical precision, and the typical language is not readily translatable in a trust/divorce context to an amount or fraction helpful to a trial judge who by statute is tasked to do the divorce math. The ascertainable standard is a progeny of estate tax law. [165] Although its corollary intended purpose may be to guide trustee discretion, such provisions are not particularly precise, nor do they lead to readily calculable dollar values.

Trusts may imbue in a trustee full or only partial discretion depending on innumerable variables that often involve the nuances of family dynamics. Even apparently boundless complete discretion to supply the "needs of health, education, maintenance and support" is suspect in the implementation, and unsurprisingly may lead to disputes about exercising discretion excessively or meagerly. In *Marsman v. Nasca*, the ascertainable "guidance" distribution standard for the trustee was to pay the beneficiary thereunder distributions "as they deem advisable for the comfort, support and maintenance" of the beneficiary and to maintain the beneficiary in a standard of living "normal for him before he became a beneficiary of the trust." [166] Another trustee distribution verbal guidepost was discretion to "pay to the wife so much or all of the income and principal of the trust as in its discretion it deems advisable to provide for the comfort, welfare, support, travel and happiness of the wife." [167] Such a standard does not always interfere with a finding that the underlying interest is present, vested and calculable for inclusion in the divisible marital estate. In *Pfannenstiehl*, the trustees were directed to

> pay to, apply for the benefit of, the class composed of any one or more of the donor's then living issue such amounts of income and principal as the trustee, in its sole discretion, may deem advisable from time to time, whether in equal or unequal shares, to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class. [168]

## TRUSTS WHERE THIRD-PARTY SETTLORS ARE INCAPACITATED OR UNDER CONSERVATORSHIP WHEN BENEFICIARY'S DIVORCE UNFOLDS

Conservatorship law provides tools enabling a court-appointed fiduciary to exercise, on behalf of an incapacitated trust settlor, the power to tactically deprive or divest trust interests from a beneficiary who is a party to divorce to protect the assets from division to benefit a soon-to-be former spouse. To assess this issue, counsel needs to be aware of the distinction between mental incapacity to manage financial affairs and incapacity to manage personal affairs because each implicates a different type of lack of cognition.

A guardian may be appointed by the Probate and Family Court to make personal decisions for an incapacitated person due to incapacity that exists when a person has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety or self-care, even with appropriate technological assistance. This does not include advanced age as a basis for such incapacity. [169]

In contrast, the court appoints a conservator when an individual needs protection and requires a decision-maker to make financial decisions. Such decisions may concern how to manage property and business affairs effectively due to a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological ***74** assistance, or instances where the individual is detained or otherwise unable to return to the United States and the person has property that will be wasted or dissipated unless management is provided, or where money is needed for the support, care and welfare of the person or those entitled to the person's support, and protective action is necessary or desirable to obtain or provide the money. [170] A probate court determination that a basis for appointment of a conservator or other protective order exists is not necessarily a determination of incapacity of the protected person. [171] Incapacity must be specifically found and adjudicated through formal proceedings. Importantly, the appointed conservator shall have custody of all wills, codicils, and other estate planning documents executed by the protected person. [172] Thus, a duty implicitly exists to evaluate the protected person's estate plan and to update it or revise it to effect the intentions of the protected person to the best that those intentions can be ascertained.

A petition for appointment of a conservator may be filed in the probate court by the protected person or any person "interested" in the protected person's welfare, or for "good cause" (for example, the divorcing spouse of a protected person who is a trust beneficiary). [173] The MUPC does not define "good cause." After appointment as conservator, title to the protected person's property vests in the conservator, and subsequent transfers directly by the protected person are considered ineffective. [174] Implicitly, the conservator has estate planning powers if the protected person or a beneficiary thereof is undergoing a divorce. [175] Divorce counsel should consider requesting a guardian ad litem to represent the protected person or to report to the court on potential estate plans.

The conservator has certain authorities that present opportunities for counsel representing a divorcing beneficiary of a protected person. [176] These include the power to make gifts; transfer, convey and disclaim property and interests; exercise or not exercise powers of appointment; create trusts; change life insurance beneficiaries or surrender policies for cash; and exercise rights in the estate of a deceased spouse. Significantly, the conservator has the authority to make, amend or revoke the protected person's last will; [177] create a revocable or irrevocable trust or amend or revoke a revocable trust; [178] execute a disclaimer to prevent receiving an asset; [179] convey, release or disclaim contingent and expectant interests in property, including marital property rights and any rights of survivorship incident to joint tenancy or tenancy by the entireties; [180] and exercise or release a power of appointment. [181] Presumably, the conservator may even decant to amend an otherwise unamendable trust. The test for all these actions is: what would the protected person do if he or she were not suffering the statutorily defined inability? [182] Note that the probate court, through litigation, cannot "reform" the last will of an already deceased person but may only determine that a clause therein is "ineffective." [183]

Through the actions of a court-appointed conservator, with court approval, the still-living but now "mentally incapacitated" protected person may still engage in estate planning to change a last will or trust either before the beneficiary's divorce or even in the midst of the ongoing divorce of the beneficiary thereunder, and then reinstate those same dispositive documents after

the divorce is final. This could be analogous to a decant, but with court approval. Although the result of such planning may be regarded as unseemly, there is no law to prohibit it and it would seem a leap to suggest that public policy should outweigh the dispositive intent of persons who are not party to a beneficiary's divorce. Long-term nursing home placement and its considerable cost may compel Medicaid planning by the conservator; such planning may work to the detriment or benefit of the divorcing spouse. The Massachusetts Medicaid/MassHealth regulations [184] are complex and will not see in-depth examination here. But divorce counsel should be aware that certain transfers of assets countable against Medicaid pay eligibility may nonetheless fit an exception if ordered by the court within the context of divorce. By contrast, if it is the protected person who may soon become involved in a contested divorce, such an estate plan petition on the protected person's behalf, and subsequent modification of dispositive provisions and documents, may constitute an asset transfer, assignment, removal, or disposition of marital property that is prohibited by Supplemental Rule 411. [185]

## FRAUDULENT CONVEYANCE ARGUMENT

Fraudulent conveyance may be an alternate litigation strategy if the trustee decanting a potential divorce asset is not a party to the divorce. [186] This is fraught with ethical issues and its viability untested. A similar statutory action is to "reach and apply" fraudulently conveyed property. [187] A constructive trust may arise when property is conveyed in fraud of third-party creditors (such as a divorcing spouse) rather than in fraud of the transferor or transferee. [188] A constructive trust is a flexible tool of equity designed to prevent unjust enrichment resulting from fraud or a violation of a fiduciary duty or confidential relationship; the plaintiff in a fraudulent transfer action must establish the debtor's actual or implied fraudulent intent. [189]

A recent federal case may have breathed new life into the potential public policy argument that a divorcing spouse, victimized by transfers of divorce assets effected by third parties or trustees, *75 qualifies as a creditor with standing to make claims under the fraudulent transfer ambit. [190] In *Foisie v. Worcester Polytechnic Institute*, after 50 years of marriage, a Connecticut divorce was resolved by stipulated agreement in 2011 that included division of marital assets. The husband admitted post-divorce that he failed to disclose his interest in a $4.5 million trust and another $10 million of promissory notes. About five years after the divorce, the husband transferred much of his trust interest and $3 million worth of promissory notes to the academic institution. The husband died in 2018. Upon discovering the chicanery, the wife, then a Florida resident, sued the educational institution, a Massachusetts corporation, in federal court. The First Circuit sent the case back to the district court for determination of what state's version of the Uniform Fraudulent Transfer Act applied (Connecticut or Massachusetts). The court noted that Massachusetts has recognized spouses as creditors only when the alleged fraudulent transfers occurred while the divorce proceedings were either ongoing or imminent. [191] The court thus distinguished fraudulent transfers occurring before or during a divorce from those occurring after divorce. [192] In a backhanded and cryptic nod, the court noted: "Although the right to payment asserted by a spouse facing divorce is urgent and concrete (as the marital estate is about to be divided), this does not mean that every claim submitted by an ex-spouse is necessarily speculative." [193] The importance of this decision for divorce law practitioners is a tacit recognition that spouses may qualify as creditors with cognizable claims involving trust transfers, such as the one above, which may even justify a post-divorce re-division of the marital estate under either Connecticut or Massachusetts law.

## PRENUPTIAL AND POSTNUPTIAL AGREEMENTS: ADVANCED DIRECTIVES TO DISSOLUTION OF MARRIAGE

Massachusetts recognizes premarital contracts and permits parties at any time before marriage to make a written contract providing that, after marriage, such property shall remain or become the property of one spouse or the other according to the terms of the contract and may include limitations, such limitations taking effect at the time of the marriage. [194] Postnuptial agreements have also been recognized as not violating public policy and may be enforced in the same way as premarital agreements and subject to the same analysis. [195] The Probate and Family Court has jurisdiction to enforce these agreements. [196] The case law recipe for testing the validity of prenuptial agreements is well settled. [197] Most important to an asset analysis, a fair and reasonable agreement need not approximate a property division award under § 34, and such agreements, if valid, may result in asset divisions far different than what § 34 might require. [198] Such prenuptial and postnuptial agreements offer statutory opportunities to preempt the marital division and cause considerable confusion regarding questions of opportunity, inheritance, gifts, contingencies, the "ascertainable standard," and spendthrift clauses, all imbroglios appearing time and again

in the appellate arena. Estate planners should consult with family law practitioners in advance of document drafting to inquire whether such marital agreements should form a basic part of the estate plan.

To the extent that the law recognizes that spouses hold far greater status than creditors such that spendthrift clauses are of questionable value to protect trusts from division in divorce, there is even greater need for prenuptial planning to shield trusts and postnuptial planning to accommodate failure to plan before marriage for distributions made after marriage. It is only through this type of planning that gifts, inheritance, and trust distributions can be proactively immunized from division in divorce. Marital planning is as important as estate planning. Indeed, prenuptial agreements are increasingly drafted by a team of both matrimonial lawyers and trust and estate draftspersons.

## FINGER TO THE APPELLATE WIND

Two significant cases have been decided since 2018 that implicate the symbiosis of divorce practice and estate planning. The cases illustrate the uncertainty of estate planning in ultimately accomplishing the settlor's or testator's intent when divorce of a beneficiary beckons.

In *Calhoun v. Rawlins*, the court looked past a nominal trust settlor who followed statutory procedure in creating a trust instrument to find that a different individual was the *de facto* settlor. [199] This Superior Court personal injury lawsuit successfully pierced a trust irrevocable by its terms, and notwithstanding its standard spendthrift clause designed to protect the former husband who was the defendant in the lawsuit. The former husband had guardians due to a traumatic brain injury. Pursuant to his 2007 divorce-separation agreement, his former wife, as settlor, created a trust to hold assets divided in their 2007 divorce, for the benefit of the divorcing husband during his lifetime, with the parties' children as remainder beneficiaries. The trust instrument met all statutory formalities for a valid enforceable trust and was executed by the former wife. By its terms, the trust was irrevocable and included a spendthrift clause against future creditors of the husband. The trust also gave trustees, an initial one being the former husband's sister, complete discretion to distribute, or not, principal to the husband during his lifetime. Pursuant to the separation agreement and the divorce, a mix of marital assets was transferred into the trust ownership, the far greater portion (97%) having been what the court characterized as traceable to the wife's pre-divorce assets. The plaintiffs in the lawsuit sought to pierce the irrevocable trust notwithstanding the spendthrift clause.

The court ruled that although the former wife was the nominal settlor, the trust was "self-settled" by the husband as *de facto* settlor, and creditor access to trust assets was not limited to just the ***76** assets in the trust traceable to the husband's pre-divorce assets because all assets that eventually made their way to the trust formed the contractual consideration for the separation agreement. [200] This asset-tracing theory appears to have sidestepped decades of domestic relations case law supporting the concept of the combined divisible marital estate, the joint "marital enterprise" that supposedly contains all marital assets, as well as the notion of probate court approval, and the necessity of the finality of judgments. Despite the spendthrift clause, despite the so-called irrevocable nature of the trust by the nominal settlor ex-wife, and despite the fact that the parties' children were remainder beneficiaries, the court held that the husband's lawsuit creditors may access the maximum amount that the former husband as *de facto* trust settlor may access. [201] The court cited MUTC section 505(a)(2). [202] This ruling upended long-held propositions in law relating to trust execution, the spendthrift clause, the combined divisible marital estate, joint marital enterprise, the negotiated and court-blessed separation agreement, and the notion of depending on trust irrevocability.

There may be some strategies for trust drafters to immunize or minimize the potential vulnerability of irrevocable trust assets from post-divorce creditors who are allowed to play matador with the venerable spendthrift clause, as cited in the MUTC, when it comes to the future divorces of trust beneficiaries. Rather than leave distribution to the complete discretion of a sole independent trustee, counsel may consider limiting a beneficiary's right to demand and a trustee's discretion to distribute to a specific and limited percentage of trust corpus annually or some other time frame; state specifically whether this provision overrides or remains inferior to any spendthrift clause and trustee discretion; distinguish a beneficiary's right to demand a distribution if the intent is to let that demand right override the spendthrift clause; and, as part of prenuptial or postnuptial drafting, include a provision that allows either party to direct decanting of some or all assets into a different trust with a spendthrift clause specifically proscribing asset transfers to a divorcing spouse.

The most recent case in the realm of irrevocable trusts with spendthrift clauses is *De Prins v. Michaeles*. [203] The SJC addressed multiple issues but also raised further and still-unresolved questions for estate planners and divorce practitioners. Though not

decided on the basis of the MUTC, the SJC did cite the code as well as case law, statutes and, above all, equity. The facts of the case are tragic and singularly egregious, and they ultimately demanded an equitable solution.

The case discusses several trust concepts: self-settled trusts, irrevocability, spendthrift clauses, donative intent, and a non-settlor trustee's discretion to distribute some or all assets to the settlor during the settlor's life.

Mr. Belanger and Mrs. Belanger were Massachusetts residents until the year 2000. They then moved to Arizona to retire. Their neighbors, Mr. and Mrs. De Prins, fought and prevailed against the Belangers in a 2007 Arizona state court lawsuit over shared water rights. Distraught, Mrs. Belanger killed herself in October 2008. In November 2008, Mr. Belanger created an irrevocable trust that by its terms could not be altered, amended, revoked or terminated. He declared it to be a Massachusetts trust, despite not having lived there since the year 2000. Mr. Belanger made himself sole beneficiary during his lifetime with his daughter as his sole beneficiary post-death. Mr. Belanger transferred substantially all of his assets to his self-settled trust. The trustee did not make any pre-death distributions to Mr. Belanger, a fact not unusual on its face considering the brief duration of the events as they unfolded. On March 2, 2009, Mr. Belanger killed both the De Prins, and on March 3, 2009, he killed himself. Under this chronology, from trust creation to double homicide elapsed only four months, and this compressed time frame figures prominently in the SJC's rationale as evidence of what they called "a single scheme."

Mr. Belanger's trustee, his attorney, filed to probate Mr. Belanger's estate in Arizona state court on June 10, 2010. The De Prins' son sued Mr. Belanger's personal representative in a wrongful death action that was removed to the Arizona Federal District Court. In November 2014, the De Prins' son filed a separate "reach and apply" lawsuit against Mr. Belanger's trust in the Arizona Federal Court. The wrongful death claim was settled in July 2015. The parties stipulated in the Arizona state probate court case that recovery by the De Prins would be exclusively against trust assets via the reach and apply lawsuit.

The parties next agreed to transfer the reach and apply lawsuit to Massachusetts Federal District Court, which ruled that the three required elements of a reach and apply claim under Massachusetts state law had been established: (1) the creditor has secured a judgment; (2) the creditor has sought unsuccessfully to execute on the judgment; and (3) there was property that could not be taken on execution. On appeal, the First Circuit Court of Appeals certified a question to the Massachusetts SJC: would the assets of a self-settled irrevocable trust, with a spendthrift clause whose terms allowed unlimited lifetime distributions to the settlor, be protected after the settlor's death from a reach and apply lawsuit by the settlor's pre-death creditors? [204] In deciding "no," the SJC reasoned that Belanger's course of conduct amounted to a "single plan" involving an attempt to insulate assets from the aftermath of homicide. [205] The SJC ruled that Belanger's trust lacked the "donative intent" required for application of the MUTC provisions to give power to the spendthrift clause. [206] Thus, common law, not the MUTC, applied to the facts. The SJC, in any event and in the alternative, also offered its analysis under the inapplicable MUTC. There were several subsidiary holdings in the case, all important to the estate planning and divorce bar. The SJC suggested that even if the MUTC did apply, it would reach the same result. [207]

The SJC referred to MUTC § 505 (a)(2): "with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit ...." Thus, the SJC interpreted this provision as defeating or disregarding not only the spendthrift clause § 105 (5) "default/ *77 mandatory" rule, but also § 506(b). [208] "Mandatory distribution shall not include a distribution subject to the exercise of the trustee's discretion even if: (1) the discretion is expressed in the form of a standard (that is, a so-called ascertainable standard); or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction." [209]

Thus, the question can fairly be raised whether spendthrift clauses in the MUTC can be reconciled with the decision in *De Prins:* that is, notwithstanding the spendthrift clause, the creditor can reach self-settled trust assets when the trust is not truly irrevocable despite its label because the trustee could have distributed any and all trust assets to the settlor while the settlor was still alive. The SJC also observed that neither the text of the MUTC nor its legislative history answers the question about post-death recovery against a self-settled irrevocable trust. [210] Interestingly, the SJC cited to a couple of vintage trust creditor cases for the principles that creditors may reach the maximum amount that the trustee can pay to the settlor per the terms of the trust [211] and that assets in a self-settled trust cannot be hidden from creditors. [212] The SJC honed in on what it described as the reasonable inference that Belanger's sequential actions were part of a "single plan" to deprive the De Prins of recovery in the water rights lawsuit, and thus that the creation of the trust after deciding to (but before) murdering the De Prins was "contrary

to public policy." Equity appears to have been the essence of the SJC rationale: in the last page of its decision, the court wrote that "(t)he equities here simply do not allow ...."[213]

It was unclear whether there was an ascertainable standard for the trustee to measure distributions to Mr. Belanger while he was still alive and, if so, whether it would have made a difference in the face of the "single plan" finding. Numerous other questions arise. What if the homicides did not happen for years instead of four months later? What if the beneficiary class could have been expanded while Mr. Belanger was still alive? What if there were language instructing the trustee to consider preserving assets for Mr. Belanger's daughter before making distributions to Mr. Belanger? Would these provisions have weakened the rationale that the trust lacked "donative intent?" Would evidence that the trustee was waiting for Mr. Belanger's post-trust lifestyle expenses to develop before making distributions have added to "donative intent"? Should such distributions be made *pro forma* from time to time to distance the trust from a finding of no donative intent and to bring the trust under the ambit of the MUTC's spendthrift clause?

## CONCLUSION

The appellate courts have treated so-called irrevocable trusts in divorce in ways that should concern the trusts and estates bar. Estate planners need to know how divorce law treats trust interests, gifts, inheritances and expectancies (called "opportunities for future acquisition of assets" by the courts), and how to value them so that their drafted instruments can survive appellate scrutiny. Conversely, divorce counsel and those advising on prenuptial and postnuptial agreements need to know the anatomy of trusts, their peculiar vernacular, and the fundamentals of the MUTC.

Traditionally, trust and will drafting were focused on the client sitting across the desk. How many estate planners ever envisioned, let alone drafted defensively for, the inclusion of trust principal and income in divorce asset divisions, alimony, and child support calculations of estate planning beneficiaries whom the drafter never met?

This is happening with a frequency of which estate planners should be aware because the divorce bar has already picked up the mantle. There is uncertainty for future will and trust drafters and divorce counsel about the vulnerability of last wills and trusts, even so-called irrevocable ones, notwithstanding the venerable MUTC spendthrift clause and the presence of ascertainable standards. Equitable division of trust-like interests in divorce, and to what extent they are shielded from or vulnerable to inclusion in the divisible marital estate, will depend on countless variables.

There are endless potential antagonists, in and outside divorce, whose misfortunes will trigger analysis of assets and the documents that control disposition. The battle will be joined along family lines. Death and inheritance therefrom will pit heirs against surviving joint owners and life estate, remainder or contingent interest holders. At termination of first marriage, the spouses' tussle will often ensnare third parties, such as parents who thought they had planned decades ago for harmonious asset succession. Second, or even subsequent, marriage implosions will foment the ire of first-marriage adult children and stepchildren. Adding aging or nearly incapable elders whose assets are at risk in someone else's divorce, trustees, personal representatives, and others with discretion to distribute assets to this combustible mix almost guarantees discomfort, protracted litigation, and malpractice exposure to estate planners for failure to draft and to divorce counsel for failing to spot issues.

Estate and trust drafting counsel must know what assets and income therefrom may become vulnerable to current and future divorce of the beneficiaries and advise their clients accordingly. They should at least make their estate plan clients aware of the pitfalls and offer the opportunity to plan defensively so counsel and client do not get caught *in flagrante delicto* by the "unforeseeable" future divorce of a beneficiary. Similarly, divorce counsel must not act like deer in the headlights when the case demands exploration of the intestines of turgid trust terminology like "presently vested but not possessory and still contingent" interests, which may nevertheless figure prominently in divorce asset division and support orders. At a minimum, counsel should request a "*Vaughan*" affidavit.[214]

Recent case law erodes the notion that a trust is irrevocable notwithstanding settlor intent and actual text. Even assets in what were labeled and drafted as irrevocable trusts with a spendthrift clause *78 may be vulnerable to future creditors, including the divorcing spouse of a former client or the client's intended future beneficiaries. The assets of someone else's irrevocable trust, such as a parent's, may be included in the divorce of a trust beneficiary. All of this occurs before divorce counsel even has the chance to argue about valuation of marital assets.

If the facts are bad enough, the "irrevocable" trust will leak, the "spendthrift" clause may lose its luster, and equity may be invoked to supersede written trust language and settlor intent. So far, this seems to be confined to the personal injury/tort arena, not divorce. Language precluding the ability to "amend, modify or revoke" is not enough to make assets in a trust, albeit irrevocable by its terms, invulnerable to creditors before or even after the settlor's death. Even the inclusion of the spendthrift clause is not enough to shield trust assets from creditors before or after the settlor's death when the facts perhaps call instead for an equitable remedy.

Many questions are thus raised. Does the irrevocable trust retain legal vitality only when the trust language specifically prohibits any lifetime distributions at all to the divorcing party who is the trust settlor? What about permissible distributions of income but not principal? Does the power of the court to "take such action and exercise such jurisdiction as may be necessary in the interests of justice" supersede the spendthrift provision and all things irrevocable when dealing with a trust that does exhibit true donative intent? What if the trust prohibits any principal distributions to the self-settled trust divorce party during lifetime but requires total distribution after the settlor dies to the settlor's probate estate instead of to named beneficiaries? If contentious divorce litigation is protracted, does this make the trust assets vulnerable to slow-walked "reach and apply" claims not thereafter made within the one-year date of death creditor claims statute? [215] Most importantly, what is the impact on trust administration when a trust contest and trust assets languish for more than a decade as in the *De Prins* case?

To arm all Massachusetts domestic relations practitioners and estate planners with sufficient knowledge to advise their clients, the bar needs to pay attention to future cases that make their way up to the SJC or the Appeals Court, so they will be able to predict, anticipate, and advise clients about reliable tools to either access trust assets or shield trusts from invasion in divorce.

## Footnotes

a1 *Judge George Phelan has served on the Massachusetts Probate and Family Court since 2010. He is a retired Army JAG colonel who served in Iraq with the 82d Airborne Division. The views expressed herein are solely the author's and are not attributable to the Massachusetts judiciary.*

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1 MASS. GEN. LAWS ch. 208, § 34.

2 Fechtor v. Fechtor, 26 Mass. App. Ct. 859 (1989).

3 Bowring v. Reid, 399 Mass. 265 (1987).

4 Rice v. Rice, 372 Mass. 398 (1977).

5 Mass. R. Civ. P. 52(a); Kittredge v. Kittredge, 441 Mass. 28 (2004); Adams v. Adams, 459 Mass. 361 (2011).

6 *Rice*, 372 Mass. 398; Bernier v. Bernier, 449 Mass. 774 (2007); Baccanti v. Morton, 434 Mass. 787 (2001).

7 Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105 (2016); Williams v. Massa, 431 Mass. 619 (2000).

8 Liebson v. Liebson, 412 Mass. 431 (1992).

9 Connor v. Benedict, 481 Mass. 567 (2019).

10 Moriarty v. Stone, 41 Mass. App. Ct. 151 (1996).

11 Baccanti v. Morton, 434 Mass. 787 (2001).

12 D.L. v. G.L., 61 Mass. App. Ct. 488 (2004); Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985).

13 *Moriarty*, 41 Mass. App. Ct. 151.

14 Heacock v. Heacock, 402 Mass. 21 (1988).

15 Bacon v. Bacon, 26 Mass. App. Ct. 117 (1988).

16 Miles v. Caples, 362 Mass. 107, 114 (1972); Ball v. Forbes, 314 Mass. 200, 203-04 (1943).

17 *See generally* Mass. Gen. Laws ch. 167D.

18 Bakwin v. Mardirosian, 467 Mass. 631 (2014).

19 I.R.C. § 2041.

20 D.L. v. G.L., 61 Mass. App. Ct. 488 (2004).

21 Ruml v. Ruml, 50 Mass. App. Ct. 500 (2000).

22 D.L. v. G.L., 61 Mass. App. Ct. 488, 489 (2004) (Holding trusts held as husband's "personal portfolio," and those used to purchase a restaurant prior to marriage from which income was derived during marriage, had "never been a part of the fabric of [the] marriage."); Caruso v. Caruso, 71 Mass. App. Ct. 1105 (2008) (Finding a trust funded after the judge had found the marriage to have been broken down still "woven into the fabric of the marriage" due to the trust's interest being a multi-unit apartment building that the husband had managed and received income from throughout the entire marriage).

23 Ravasizadeh v. Niakosari, 94 Mass. App. Ct. 123 (2018).

24 Comins v. Comins, 33 Mass. App. Ct. 28 (1992).

25 Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985).

26 Dilanian v. Dilanian, 94 Mass. App. Ct. 505 (2018).

27 Child Support Guidelines, amended Aug. 2, 2021, and effective Oct. 4, 2021, at section I.A. 17.

28 Child Support Guidelines, amended Aug. 2, 2021, and effective Oct. 4, 2021, at section I.A. 24.

29 Fehrm-Cappuccino v. Cappuccino, 90 Mass. App. Ct. 525 (2016).

30 Williams v. Massa, 431 Mass. 619 (2000).

31 Ketterle v. Ketterle, 61 Mass. App. Ct. 758 (2004).

32 *Id.*

33 Moriarty v. Stone, 41 Mass. App. Ct. 151 (1996).

34 Tanner v. Tanner, 14 Mass. App Ct. 922 (1982).

35 Bacon v. Bacon, 26 Mass. App. Ct. 117 (1988); *see also Williams*, 31 Mass. 619*Williams*, 31 Mass. 619.

36 *Bacon*, 26 Mass. App. Ct. 117.

37 Denninger v. Denninger, 34 Mass. App. Ct. 429 (1993).

38 The logistics of perfecting such disclaimers are prescribed under the Massachusetts Uniform Probate Code, Mass. Gen. Laws ch. 190B, § 2 - 801, as well as the Internal Revenue Code § 2518.

39 MASS. UNIF. TR. CODE § 2 - 801 (4)(i).

40 Probate and Family Court Supplemental Rule 411 on its face does not seem to require a divorce litigant to disclose a disclaimer made.

41 *See* Probate and Family Court Supplemental Rule 410.

42 Williams v. Massa, 431 Mass. 619 (2000).

43 Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985).

44 Ross v. Ross, 385 Mass. 30 (1982); *Williams*, 31 Mass. 619*Williams*, 31 Mass. 619.

45 *Williams*, 431 Mass. 619.

46 61 Mass. App. Ct. 758 (2004).

47 61 Mass. App. Ct. 488 (2004).

48 *See* Heins v. Ledis, 422 Mass. 477 (1996).

49 475 Mass. 105 (2016).

50 95 Mass. App. Ct. 248 (2019).

51 490 Mass. 398 (2022).

52 Williams v. Massa, 431 Mass. 619 (2000).

53 McMahon v. McMahon, 31 Mass. App. Ct. 504 (1991).

54 Rice v. Rice, 372 Mass. 398 (1977).

55 S.L. v. R.L., 55 Mass. App. Ct. 880 (2002).

56 409 Mass. 211 (1991).

57 431 Mass. 619.

58 33 Mass. App. Ct. 28 (1992).

59 55 Mass. App. Ct. 880 (2002).

60 58 Mass. App. Ct. 76 (2003).

61 Child v. Child, 58 Mass. App. Ct. 76 (2003).

62 Bianco v. Bianco, 371 Mass. 420 (1976); Lauricella v. Lauricella, 409 Mass. 211 (1991).

63 Putnam v. Putnam, 366 Mass. 261 (1974); Mahoney v. Mahoney, 425 Mass. 441 (1997) (enforceable contractual right in divisible pension); Hanify v. Hanify, 403 Mass. 184 (1988) (enforceable right to lawsuit proceeds); Baccanti v. Morton, 434 Mass. 787 (2001) (enforceable right to delayed stock options).

64 D.L. v G.L., 61 Mass. App. Ct. 488 (2004).

65 Levitan v. Rosen, 95 Mass. App. Ct. 248 (2019).

66 *D.L.*, 61 Mass. App. Ct. 488; *Lauricella*, 409 Mass. 211; Comins v. Comins, 33 Mass. App. Ct. 28 (1992).

67 Ferri v. Powell-Ferri, 476 Mass. 651, 658 (2017).

68 MASS. GEN. LAWS ch. 109A, the Massachusetts enactment of the Uniform Fraudulent Transfer Act.

69 *Testamentary Trust*, Bouvier Law Dictionary (6th ed. 1856) (defining testamentary trust as, "a trust created in a decedent's last will and testament, which designates assets to be conveyed to a trustee for the benefit of some named or designated individual, individuals, or entity.").

70 Williams v. Massa, 431 Mass. 619 (2000).

71 Baccanti v. Morton, 434 Mass. 787 (2001) (involved stock options whose vesting would happen upon the passage of time, and a particular kind of "contingency" that was "fairly certain" to happen).

72 Williams v. Massa, 431 Mass. 619 (2000); D.L. v G.L., 61 Mass. App. Ct. 488 (2004); S.L. v. R.L., 55 Mass. App. Ct. 880 (2002).

73 Dell'Olio v. Assistant Sec. of the Off. of Medicaid, 96 Mass. App. Ct. 691 (2019).

74 *Id.*

75 *Id.* at 698.

76 *Id.* at 695.

77 *Id.* at 696.

78 *Id.*

79 Dell'Olio v. Assistant Sec. of the Off. of Medicaid, 96 Mass. App. Ct. 691, 697 (2019).

80 Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105 (2016).

81 Skye v. Hession, 91 Mass. App Ct. 423 (2017).

82 I.R.C. § 2041.

83 *Skye*, 91 Mass. App Ct. at 425.

84 Estate of Rosen, 86 Mass. App. Ct. 793 (2014).

85 Dewan v. Dewan, 399 Mass. 754 (1987).

86 *Id.*; S.L. v. R.L., 55 Mass. App. Ct. 880 (2002).

87 Dilanian v. Dilanian, 94 Mass. App. Ct. 505 (2018).

88 Vedensky v. Vedensky, 86 Mass. App. Ct. 768 (2014).

89 *Dilanian*, 94 Mass. App. Ct. at 512.

90 Downing v. Downing, 12 Mass. App. Ct. 968, 969 (1981). *See also* Sarrouf v. New England Patriots Football Club, Inc., 397 Mass. 542, 550 (1986); Fechtor v. Fechtor, 26 Mass. App. Ct. 859 (1989).

91 Heins v. Ledis, 422 Mass. 477, 483-84 (1996).

92 Sahin v. Sahin, 435 Mass. 396 (2001).

93 Moriarty v. Stone, 41 Mass. App. Ct. 151 (1996).

94 Savides v. Savides, 400 Mass. 250 (1987), presented unusual facts: 10 years passed during which one party made exclusive and significant contributions to the marital estate. *See also* *Moriarty*, 41 Mass. App. Ct. 151 (date of trial for valuation); Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985) (case-by-case analysis is required and trust interest and expectancy under a last will were both obtained after date of divorce and thus not part of § 34 estate but a remainder interest in a trust despite a survivorship requirement and a spendthrift clause was includible).

95 Connor v. Benedict, 481 Mass. 567 (2019).

96 Goodwill Enter., Inc. v. Kavanagh, 95 Mass. App. Ct. 856 (2019).

97 Roberts v. Roberts, 419 Mass. 685 (1995).

98 *Id.* at 687.

99 *Id.* at 688.

100 *Goodwill Enter.*, 481 Mass at 861.

101 *Id.* at 860.

102 Goodwill Enter., Inc. v. Kavanagh, 95 Mass. App. Ct. 856, 862 (2019).

103 *Id.* at 861.

104 Morse v. Kraft, 466 Mass. 92, 95 (2013).

105 Ferri v. Ferri-Powell, 476 Mass. 651 (2017); Mass. S.D. 732, 2021 Gen. Ct. Mass., 192nd Sess. (2021). (Proposing the Massachusetts Uniform Trust Decanting Act to allow a trustee to distribute property from one trust to another.)

106 Morse v. Kraft, 466 Mass. 92 (2013).

107 *Id.* at 101.

108 *Id.* at 100.

109 Ferri v. Ferri-Powell, 476 Mass. 651, 658 (2017).

110 *Ferri*, 476 Mass. 651.

111 *Id.* at 652.

112 *Id.* at 651.

113 *Id.* at 652.

114 *Id.* at 653.

115 Ferri v. Ferri-Powell, 476 Mass. 651, 653 (2017).

116 *Id.*

117 *Id.*

118 *Id.* at 654.

119 *Id.* at 655.

120 *Id.* at 657.

121 Ferri v. Ferri-Powell, 476 Mass. 651, 659 (2017).

122 *Id.* at 660-61.

123 *Id.* at 661.

124 *Id.* at 664.

125 MASS. GEN. LAWS ch. 203E, § 404.

126 Ferri v. Ferri-Powell, 476 Mass. 651, 664-65 (2017).

127 MASS. GEN. LAWS ch. 203E, § 105.

128 Pemberton v. Pemberton, 9 Mass. App. Ct. 9 (1980).

129 *Mass. Gen. Laws* ch. 203E, § 502(c).

130 *Ferri*, 476 Mass. at 659, quoting Bank of New England v. Strandlund, 402 Mass. 707, 709 (1988).

131 466 Mass. 92, 97 (2013).

132 476 Mass. 651, 653 (2017).

133 475 Mass. 105 (2016).

134 *Id.* at 106, quoting Adams v. Adams, 459 Mass. 361, 374 (2011).

135 *Id.* at 108, quoting the 2004 discretionary spendthrift trust.

136 *Id.* at 116.

137 *Id.* at 115.

138 *Id.* at 114; MASS. GEN. LAWS ch. 203E, § 414(e) (2012) (Allowing modification or termination of an uneconomic trust regardless of any spendthrift or similar protective provision).

139 95 Mass. App. Ct. 248 (2019).

140 *Id.* at 249.

141 *Id.* at 251.

142 *Id.*

143 *Id.* at 253.

144 *Id.* at 254.

145 Levitan v. Rosen, 95 Mass. App. Ct. 248, 251 (2019).

146 *Id.* at 254.

147 *Id.* at 250.

148 *Id.*

149 *Id.*

150 *Id.* at 249.

151 Levitan v. Rosen, 95 Mass. App. Ct. 248, 250 (2019).

152 *Id.* at 256, n.5.

153 *Id.* at 252.

154 *Id.*

155 *Id.* at 253.

156 *Id.* at 251.

157 Levitan v. Rosen, 95 Mass. App. Ct. 248, 255 (2019).

158 *Id.* at 254-55.

159 *Id.* at 255.

160 *Id.* at 251.

161 *Id.* at 254.

162 *Id.*

163 D.L. v. G.L., 61 Mass. App. Ct. 488 (2004).

164 *See* Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105, 114 (2016).

165 An estate tax marital deduction is not allowed for terminable property interests unless they are "qualified" terminable interest property (or "QTIP") held to a standard regulating distributions to health, education, support or maintenance. I.R.C. § 2041(a)(2), (b)(1)(A) at United States Code Title 26.

166 Marsman v. Nasca, 30 Mass. App. Ct. 789 (1991).

167 Comins v. Comins, 33 Mass. App. Ct. 28 (1992).

168 *Pfannenstiehl*, 475 Mass. at 108.

169 MASS. GEN. LAWS ch. 190B, § 5-101(9).

170 MASS. GEN. LAWS ch. 190B, § 5-401(c).

171 MASS. GEN. LAWS ch. 190B, § 5-407(f).

172 MASS. GEN. LAWS ch. 190B, § 5-407(g).

173 MASS. GEN. LAWS ch. 190B, § 5-105(3).

174 MASS. GEN. LAWS ch. 190B, §§ 5-419(a) & (b).

175 *See* MASS. GEN. LAWS ch. 190B, §§ 5-415 & 416.

176 *See* MASS. GEN. LAWS ch. 190B, §§ 5-407(d), 423, 424, 407(e)(1-8).)

177 MASS. GEN. LAWS ch. 190B, § 5-407(d)(7)).

178 MASS. GEN. LAWS ch. 190B, § 5-407(d)(4).

179 MASS. GEN. LAWS ch. 190B, § 5-407(d)(6).

180 MASS. GEN. LAWS ch. 190B, § 5-407(d)(2).

181 MASS. GEN. LAWS ch. 190B, § 5-407(d)(3).

182 MASS. GEN. LAWS ch. 190B, § 5-407(e).

183 Barounis v. Barounis, 87 Mass. App. Ct. 667 (2015).

184 *See generally* 130 CMR 520.001 et. seq., MASS. GEN. LAWS ch. 118E, 42 U.S.C. § 1396.

185 Supplemental Rules of the Probate and Family Court 411.

186 MASS. GEN. LAWS ch. 109A is the Massachusetts enactment of the Uniform Fraudulent Transfer Act.

187 MASS. GEN. LAWS ch. 214, § 3 (8).

188 MASS. GEN. LAWS ch. 109A, § 5-6.

189 MASS. GEN. LAWS ch. 109A, § 5-6; Cavadi v. DeYeso, 458 Mass. 615 (2011).

190 Foisie v. Worcester Polytechnic Institute, 967 F.3d 27 (1st Cir. 2020).

191 *Id.*, at 36-37, citing Du Mont v. Godbey, 382 Mass. 234 (1981); *see also* Welford v. Nobrega, 30 Mass. App. Ct. 92 (1991); Yacobian v. Yacobian, 24 Mass. App. Ct. 946 (1987).

192 *Foisie*, 967 F.3d at 38.

193 *Id.* at 40.

194 MASS. GEN. LAWS ch. 209.

195 Ansin v. Craven-Ansin, 457 Mass. 283 (2010).

196 MASS. GEN. LAWS ch. 231A, § 1.

197 *See* Knox v. Remick, 371 Mass. 433 (1976); DeMatteo v. DeMatteo, 436 Mass. 18, 26 (2002), citing Osborne v. Osborne, 384 Mass. 591 (1981) and further quoting the fair disclosure rules explained in Rosenberg v. Lipnick, 377 Mass. 666, 672 (1979).

198 Eyster v. Pechenik, 71 Mass. App. Ct. 773 (2008).

199 93 Mass. App. Ct. 458 (2018).

200 *Id.* at 464.

201 *Id.* at 468.

202 *Id.* at 462.

203 486 Mass. 41 (2020).

204 *De Prins*, 486 Mass. 41 (2020).

205 *Id.* at 49.

206 *Id.* at 46-47.

207 *Id.* at 45-46.

208 MASS. GEN. LAWS ch. 203E, § 105 says that the terms of the trust (that is, the settlor's intent) shall prevail over any provision of this chapter except(b)(5). Section 506(b) states that "[w]hether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal ... if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date."

209 *Id.* at § 506(a).

210 De Prins v. Michaeles, 486 Mass. 41, 44 (2020).

211 Ware v. Gulda, 331 Mass. 68 (1954).

212 Forbes v. Snow, 245 Mass. 85 (1923).

213 *De Prins*, 486 Mass. at 18.

214 Memorandum from the SJC re. Samuel Vaughan v. Elizabeth Vaughan (Nov. 25, 1991).

215 MASS. GEN. LAWS ch. 190B, § 3-803.

104 MALR 61

101 Mass.App.Ct. 1107
Unpublished Disposition



Appeals Court of Massachusetts.

EASTCO REALTY, LLC

v.

1350 MAIN, LLC, & another. [1]

21-P-554

Entered: May 27, 2022.

By the Court (Green, C.J., Wolohojian & Henry, JJ. [2])

## MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** This case was brought by Eastco Realty, LLC (Eastco), a minority interest holder in an office building known as "One Financial Plaza" (OFP) in Springfield, against 1350 Main, LLC (1350 Main), the majority interest holder in OFP, and Samuel D. Plotkin Co., Inc. (Plotkin), the property manager, concerning the assessment of common area charges. After a jury-waived trial, judgments for 1350 Main and Plotkin entered dismissing all of Eastco's claims, and a separate judgment entered in 1350 Main's favor on its counterclaim for damages and attorney's fees. [3] On appeal, Eastco argues: (1) its claims for equitable relief were erroneously dismissed because the trial judge did not properly apply the provisions of the Massachusetts Uniform Trust Code and misinterpreted the provisions of the controlling trust instrument; and (2) 1350 Main was not entitled to judgment on its counterclaim because the property management contract was void due to 1350 Main's self-dealing or, alternatively, the contract required that electricity charges be allocated by percentage ownership, not percentage occupancy. We affirm the judgments on the substantive claims, but vacate the award of attorney's fees and costs and remand for further proceedings.

Background. We recite here only a subset of the evidence, reserving other facts for our later discussion.

OFP is held by the Financial Plaza Trust (trust). The trust was established by a declaration of trust dated November 1, 1982. The trust's original trustees were Olympia & York Liberty Square Company (Olympia), and FNBC Realty Corporation (FNBC). Olympia and FNBC were also the original beneficiaries, in proportion to the shares each held in the equitable interest in the trust property. The trust instrument provided for the future appointment of successor trustees, who were likewise permitted to be both trustees and beneficiaries.

As contemplated by the trust, Olympia and FNBC also entered into an ownership agreement, the purpose of which was "to establish the terms and conditions upon which [OFP] is to be owned, managed, operated and used." Under the ownership agreement, the equitable interest in OFP was divided into eighteen shares, representing the basement and each of the other seventeen stories of the building.

In May 2007, 1350 Main acquired a majority 69.74 percent equitable interest in the trust property, and also became a successor trustee of the trust. At that time, 1350 Main appointed itself property manager of OFP, but contracted the management services to Plotkin. Plotkin's principal holds a 12.5 percent ownership stake in 1350 Main.

***2** Eastco acquired its minority 30.26 percent interest in the trust property on July 16, 2007. At that time, Eastco also became a successor trustee of the trust.

On August 1, 2011, 1350 Main, acting for the trust, appointed Plotkin as property manager.

Discussion. 1. Eastco's claims. Eastco contends that 1350 Main breached its duty of loyalty by appointing Plotkin as property manager given that Plotkin's principal held a 12.5 percent stake in 1350 Main. Eastco sees this arrangement as one in which 1350 Main impermissibly stood on both sides of

the transaction. On this basis, Eastco argues that the property management agreement between the trust and Plotkin should have been voided or reformed by the trial judge.[4]

It is true, as Eastco points out, that the Massachusetts Uniform Trust Code (MUTC), which is applicable to "all trusts created before, on or after the effective date of this act," St. 2012, c. 140, § 66 (a) (1), provides that

> "[a] ... transaction involving the investment or management of trust property shall be presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by a trustee with ... a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment."

G. L. c. 203E, § 802 (c) (4). It is equally true that the judge found that the 12.5 percent stake held by Plotkin's principal in 1350 Main was an "interest that might affect [1350 Main's] best judgment." However, even where such an interest is present, the transaction is not voidable by an affected beneficiary if "the transaction was authorized by the terms of the trust."[5] G. L. c. 203E, § 802 (b) (1).

*3 That is the case here. The trust instrument provides that a trustee shall have power to "[t]ake any action with respect to the trust property as may from time to time be specifically directed by the beneficiaries which shall include any authorization pursuant to the Ownership Agreement." The ownership agreement in turn provides that "the Trustees shall employ a ... [property] Manager who shall have been nominated by the then Beneficiaries owning Shares representing a majority of the Equitable Interest, so long as such nominee or representatives thereof are experienced in the management of first-class office buildings in the Hartford-Springfield area." Reading the trust instrument and the ownership agreement together, as they were meant to be, see, e.g., Gilmore v. Century Bank & Trust Co., 20 Mass. App. Ct. 49, 56 (1985), 1350 Main (as majority holder of the equitable interest) was entitled to choose a property manager on the condition that the manager have the requisite experience. The evidence permitted the judge to find that Plotkin had experience managing first-class office buildings in the Hartford-Springfield area. Accordingly, the appointment of Plotkin as property manager was authorized by the terms of the trust, and the transaction was not voidable by Eastco. See G. L. c. 203E, § 802 (b) (1). We note further that Eastco failed to show that the retention of Plotkin as property manager was unreasonable. Indeed, as the judge found, Plotkin made improvements in the way OFP was managed, maintained, and positioned in the community, resulting in new revenue streams for both beneficiaries, increased occupancy rates and income, and decreased operating costs. In addition, Plotkin referred prospective tenants to Eastco (although it was not obligated to do so). Finally, we note that Eastco acquired its interest in the trust after Plotkin began managing the building; thus the arrangement about which Eastco now complains was one it voluntarily stepped into. Eastco's claims for a declaratory judgment and other equitable relief were therefore properly dismissed.

2. 1350 Main's counterclaim. In its counterclaim, 1350 Main alleged that Eastco failed to pay monies due and owing to the trust for Eastco's share of the management fees and the portion of janitorial and electrical expenses allocated to Eastco's exclusive areas.[6] The ownership agreement provides that the beneficiaries shall pay certain expenses of operating the office building, designated "Common Expenses," in proportion to their equitable ownership of the shares of the trust property. Other operating expenses, attributable to areas of the office building exclusively occupied by a beneficiary or the beneficiary's tenant, and not attributable to the common areas of the building, are designated "Exclusive Expenses," and "shall be paid by the Beneficiary owning the Exclusive Area to which such Exclusive Expenses are properly allocable and attributable." Certain costs are defined in the ownership agreement as either "Common Expenses" or "Exclusive Expenses," but the agreement provides that "[d]etermination of whether an expense of operation is a Common Expense or an Exclusive Expense shall be made by the [property] Manager."

If a beneficiary fails to pay the property manager "(i) such Beneficiary's share of the estimated Common Expenses for such month, (ii) the estimated Exclusive Expenses for such month allocable to such Beneficiary that are paid or payable by the [property] Manager, and (iii) an amount reasonably estimated by the Manager as necessary to maintain an acceptable working capital fund[,] ... the Delinquent Beneficiary shall be liable for any loss, cost, or damage resulting from such failure." Any other beneficiary may advance all or part of the sum owed by the delinquent beneficiary, "and the Delinquent Beneficiary shall be obligated to pay to the Advancing Beneficiary interest on account of advances so made at a rate [i.e., five percent above the base rate of Bank of America]," along with "all expenses

incurred by the Advancing Beneficiary on account of such failure, including, without limitation, attorneys' fees incurred in the collection of such sums."

The trial judge found that Eastco had failed to make all required payments, and that 1350 Main had advanced $227,406.80 of its own funds to make payment of those unpaid amounts. On appeal, Eastco argues that the judge's ruling is incorrect for three reasons. First, Eastco argues that the property management agreement was void. Second, Eastco argues that Plotkin did not have the authority to allocate electricity costs on the basis of occupied space rather than in proportion to beneficial interest. Third, Eastco argues that the judge's finding that 1350 Main advanced funds in the amount awarded was clearly erroneous.

Eastco's first argument fails for the reasons we explained above. Second, Eastco argues that Plotkin breached the property management agreement and the ownership agreement by electing to treat electrical expenses as an exclusive expense, allocable to each beneficiary based on occupied square footage, rather than as a common expense, to be split according to the beneficiaries' beneficial interests in the building. The judge correctly concluded that the ownership agreement does not specifically classify electrical expenses as either a common expense or an exclusive expense, and that the property manager has the authority to determine "whether an expense of operation is a Common Expense or an Exclusive Expense." Accordingly, there was no breach by Plotkin, and Eastco is obligated under the ownership agreement to pay the sums advanced by 1350 Main to cover electrical expenses.

*4 As to Eastco's third argument, there was evidence to support the judge's finding that 1350 Main had advanced a total of $227,406.80 between 2011 and 2018 to cover costs and expenses owed but not paid by Eastco. This finding is not clearly erroneous. See Building Inspector of Lancaster v. Sanderson, 372 Mass. 157, 160 (1977) (finding of fact clearly erroneous only when reviewing court left with firm conviction mistake has been made). Accordingly, under the terms of the ownership agreement, 1350 Main is entitled to payment of the principal amount of $227,406.80, plus interest as provided in the agreement, and its attorney's fees expended in collecting this sum.

Finally, we turn to the award of attorney's fees, which Eastco challenges on the ground that the fees associated with prosecuting 1350 Main's counterclaim (which are recoverable under the ownership agreement) cannot be separated from the fees associated with defending against Eastco's claims. [7] 1350 Main initially requested an award of $112,615.40 in attorney's fees plus costs. The Superior Court judge found that counsel's initial fee affidavit lacked the "breakdown of the specific fees and costs incurred, necessary for the court to analyze reasonableness," and asked counsel to submit a revised affidavit. The revised affidavit requested $120,366.15 in fees and averred that "[b]ecause the Plaintiff's claims were focused on relief stating that it did not owe the amounts sought by 1350 Main, there is no practical way to distinguish any of this work as solely related to the counterclaim." The judge accepted this argument, and concluded that 1350 Main's costs of defense were properly considered costs of collection, and awarded $100,000 in attorney's fees, as well as costs of $3,979.44, the full amount requested.

We disagree with this approach. Under the ownership agreement, 1350 Main was entitled to recover fees and costs only as a successful advancing beneficiary; it was not entitled to recover fees and costs for defending against claims that it breached its responsibilities as trustee. In other words, in defending against Eastco's claims, 1350 Main was acting as a trustee responding to a beneficiary's claims; in prosecuting its counterclaim, 1350 Main was acting as a beneficiary collecting a sum owed to it by another beneficiary. Thus, although we do not quarrel with the judge's view that $100,000 was a reasonable amount of attorney's fees for a vigorously litigated commercial case that was tried over six days, that was not the question because 1350 Main was not entitled to recover for its defense of its activities as trustee. Accordingly, the questions of fees and costs must be remanded for the judge to ensure that 1350 Main is not awarded fees and costs for its defense as trustee. On remand, the judge may seek additional submissions from 1350 Main, or -- given that counsel has represented that time was not segregated in the way required -- the judge may decide to allocate a percentage of fees based on the judge's firsthand observation of how the litigation as a whole and the issues at trial played out, including how much time was spent on trying the counterclaim versus the claims.

Conclusion. The judgment in favor of 1350 Main and Plotkin dismissing counts 9 and 10 of the complaint, and the judgment for 1350 Main and Plotkin after trial without a jury dismissing the remaining claims on the merits are affirmed. So much of the judgment on the counterclaim in favor of 1350 Main as awarded attorney's fees and costs is vacated, and the questions of fees and costs are remanded for further proceedings

consistent with this decision. As so amended, the judgment on the counterclaim is affirmed.

*5 1350 Main's request for an award of appellate attorney's fees and costs is allowed insofar as those fees and costs were incurred in defending the appeal from the judgment on its counterclaim. If, as happened below, 1350 Main's counsel did not contemporaneously keep track of time in the manner required, then the entire amount billed for the appeal should be submitted, in accordance with the procedure set out in Fabre v. Walton, 441 Mass. 9, 10-11 (2004), and the panel will allocate fees based on the presentation of the issues on appeal, as well as the other factors outlined in Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979). 1350 Main should file its application for fees and costs on appeal, with appropriate supporting materials, within fourteen days of this decision. Eastco shall file any opposition or response within fourteen days thereafter.

So ordered.

affirmed in part; vacated in part and remanded

**All Citations**

101 Mass.App.Ct. 1107, 188 N.E.3d 994 (Table), 2022 WL 1697269

## Footnotes

1 Samuel D. Plotkin Co., Inc., also known as NAI Plotkin (Plotkin).

2 The panelists are listed in order of seniority.

3 Although Eastco's verified complaint asserted additional claims which were also dismissed below, in this appeal Eastco focuses exclusively on the dismissal of its claim for declaratory judgment and equitable relief and the judgment for 1350 Main on its counterclaim. None of Eastco's other claims is before us. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019); Mendoza v. Licensing Bd. of Fall River, 444 Mass. 188, 194 n.10 (2005) ("[The appellant] did not brief this aspect of his appeal, and it is therefore waived").

4 The trial judge found no evidence that 1350 Main acted in bad faith or in willful disregard of the purposes of the trust, and therefore concluded that 1350 Main was entitled to the protection of the trust's exculpatory clause. The exculpatory clause shields a trustee from personal liability for "any loss arising out of any act or omission in good faith." This language clearly extends to monetary damages, but it is silent with respect to equitable remedies that might be provided by statute. See Berish v. Bornstein, 437 Mass. 252, 271-272 (2002) (discussing application of trust's exculpatory clause in connection with damages arising out of trustee's willful breach of fiduciary duty); Matter of the Colecchia Family Irrevocable Trust, 100 Mass. App. Ct. 504, 519-520 (2021) (discussing exculpatory clauses in trust instruments in context of shielding trustee from personal liability for damages). In any event, we need not decide whether the exculpatory clause protected 1350 Main from the equitable relief Eastco seeks in this suit because we conclude that 1350 Main's appointment of Plotkin as property manager was permitted under the terms of the trust and the ownership agreement.

5 Eastco argues that the transaction is void ab initio, without any showing of financial harm to the beneficiary or bad faith by the trustee. There is some doubt on this point. "A trustee does not necessarily incur liability merely because he has an individual interest in the transaction." 2A A.W. Scott & W.F. Fratcher, Trusts § 170.24, at 432 (4th ed. 1987). See Boston Safe Deposit & Trust Co. v. Lewis, 317 Mass. 137, 140 (1944) (trustee may act in "dual capacity" where "authorized by the trust instrument"); Bullivant v. First Nat'l Bank of Boston, 246 Mass. 324, 333-334 (1923) (bank acting as trustee of voting trust holding majority of

corporation's shares did not breach fiduciary duty to corporation's shareholders in voting for reorganization plan where bank was also creditor of corporation, bank acted in good faith, and reorganization plan was fair to all shareholders). However, we need not decide the issue because, in any event, the appointment of Plotkin as property manager was authorized by the terms of the trust.

6 Janitorial expenses are no longer in issue.

7 Eastco also argues that fees should not have been awarded for all the same reasons it argues 1350 Main was not entitled to judgment on the counterclaim. Those arguments fail for the reasons we have explained.

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492 Mass. 687
Supreme Judicial Court of Massachusetts,
Middlesex.

In the MATTER OF the ESTATE
OF Theresa A. JABLONSKI.

SJC-13397
|
Argued May 1, 2023
|
Decided August 24, 2023

**Synopsis**

**Background:** Will proponent filed petition to probate will that bequeathed entirety of testator's estate to testamentary trust for care of testator's pet dog and any pet that survived testator, and for appointment as personal representative of testator's estate, in accordance with testator's will. Testator's other heirs filed objections to will and to appointment of proponent as personal representative. The Probate and Family Court Department, Middlesex Division, Elaine M. Moriarty, J., granted partial summary judgment to proponent and denied reconsideration, and then, following trial, entered judgment for proponent. Heirs appealed. Appeal was transferred to Supreme Judicial Court on its own motion.

**Holdings:** The Supreme Judicial Court, Cypher, J., held that:

residual clause of testamentary trust that terminated prior to testator's death, conferring upon trustee authority to designate charity to receive trust funds "that shall be in their possession, custody or control" never took effect, and

fact issues precluded partial summary judgment for will proponent on claim that remainder would accelerate to as-yet unnamed charity in event pet that testator had predeceased her, under doctrine of acceleration of remainder.

Vacated and remanded.

**Procedural Posture(s):** On Appeal; Judgment; Motion for Summary Judgment.

**1052 Devise and Legacy, Residuary interests, Remainder interests, Extrinsic evidence affecting construction, Intestacy. Dog. Trust, Construction, Remainder interests, Termination. Will, Construction, Extrinsic evidence. Charity.

PETITION filed in the Middlesex Division of the Probate and Family Court Department on June 19, 2019.

A motion for partial summary judgment was heard by Elaine M. Moriarty, J.; a motion for reconsideration was heard by her; and the remaining issues were also heard by her.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

**Attorneys and Law Firms**

David M. Levy, Jamaica Plain, for the objectors.

Penelope A. Kathiwala, for the proponent.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

**Opinion**

CYPHER, J.

*687 **1053 The decedent, Theresa A. Jablonski, executed a will that left her entire estate to a testamentary trust, pursuant to G. L. c. 203E, § 408, for the benefit of her fifteen year old cocker spaniel, Licorice, and any other pet she might have at the time of her death. According to the terms of the trust, after the death of all beneficiaries, the trustees were obligated to designate a charity to receive the remainder of any and all funds in the trustees' control. At the time of the decedent's death, however, neither Licorice nor any other pet survived the decedent. This case presents the issue whether the remainder of the decedent's estate *688 to charity is valid despite Licorice having predeceased the decedent or, alternatively, whether Licorice's failure to survive the decedent renders the pet trust void, such that the decedent's property is to pass through intestacy to the decedent's heirs. Where we conclude that the provisions for Licorice in the testamentary trust lapsed, and where there exists a genuine issue of material fact whether there was a clear intention that the charitable remainder not be conditioned on Licorice's survival of the decedent, the judge erred in awarding partial summary judgment. Accordingly, we vacate the decree and order, and we remand the matter for further proceedings.

Background. We recite the facts in the light most favorable to the nonmoving party. See Huang v. Ma, 491 Mass. 235, 239, 201 N.E.3d 713 (2023) (evidence viewed in light most

favorable to nonmoving party on review of decision on motion for summary judgment). On August 13, 2013, the decedent, Theresa A. Jablonski, executed a will that left her entire estate in trust to her cocker spaniel, Licorice. At the time the will was executed, the decedent's niece, Ann M. Jablonski, [1] retained a durable power of attorney, and she managed the decedent's affairs. The will had been prepared by Ann's attorney at Ann's request. According to the attorney, the decedent's "main concern" in executing the will was to ensure care for Licorice.

Article V of the will created the "Licorice Testamentary Trust" (trust), pursuant to the requirements of G. L. c. 203E, § 408. The trust's beneficiaries were limited to the decedent's dog, Licorice, as well as any other pets the decedent may have in her possession at the time of her death. According to the terms of the trust, it was to be funded on the decedent's death. The trustees, not designated by the trust instrument, were to use the funds of the trust to provide for the "health, care, maintenance, and appearance" of the trust beneficiaries. After the death of all beneficiaries, i.e., Licorice and any other pet who survived the decedent, the trustees then retained the "power and authority to designate a charity to receive the remainder of any and all such funds that shall be in [the trustees'] possession, custody or control."

Article V of the will, which contained the provisions that established the instant trust, was the only bequest in the will. Article IV of the will, however, contained the will's residuary ***689** clause. According to Article IV, all remaining property, including "all lapsed legacies and devises or other gifts made by this [w]ill which fail for any reason" would be given in trust to the trustees of the trust that was established in Article V of the will.

Approximately six years after the execution of the will, on May 24, 2019, the ****1054** decedent died at the age of eighty-three. She died without a surviving spouse, child, parent, or sibling. Her next of kin were her four nieces and nephews: Joseph J. Jablonski, Jr., Paul A. Jablonski, Sally E. Jablonski, and Ann M. Jablonski. Licorice, the decedent's only named beneficiary, had been euthanized approximately two years earlier, on March 15, 2017, and thus predeceased her. No other pets survived her.

On June 19, 2019, Ann filed a petition in the Probate and Family Court to probate the decedent's will and to be appointed as personal representative, in accordance with the will. The decedent's other three surviving heirs (objectors), Joseph, Paul, and Sally, objected to the purported will and to Ann's appointment as personal representative of the estate. The objectors argued that the only bequest in the will, i.e., the trust set up for the care of Licorice, lapsed because no pet had survived the decedent. [2] Ann moved to strike the objections, arguing that the decedent intended to leave her entire estate to the trust for the benefit of Licorice and then to charity on Licorice's death, even if Licorice predeceased her. The motion was denied. After the case was reassigned to the court's fiduciary litigation session, the parties agreed to resolve on summary judgment the issue whether the bequest to the trust had lapsed.

Following the objectors' motion for summary judgment, the judge granted partial summary judgment in favor of Ann on the validity of the charitable remainder provision. The judge held that, as a matter of law, the trust provision for Licorice failed because Licorice predeceased Theresa. See G. L. c. 203E, § 408 (a) ("A trust for the care of animals alive during the settlor's lifetime shall be valid. Unless the trust instrument provides for an earlier termination, the trust shall terminate upon the death of the animal or, if the trust was created to provide for the care of more than [one] animal alive during the settlor's lifetime, upon the death of [the] last surviving animal"). Despite the failure of the trust, the judge awarded partial summary judgment in favor of Ann because ***690** the charitable remainder provision was to be given effect under the doctrine of acceleration of remainders. See Thompson v. Thornton, 197 Mass. 273, 275, 83 N.E. 880 (1908) ("The death of the life tenant before the testator simply accelerates the time when the devise over becomes operative").

The objectors sought timely reconsideration of the judge's award of partial summary judgment in favor of Ann. The motion for reconsideration was denied. In denying the motion for reconsideration, the judge determined that the decedent "intend[ed] for the charitable remainder to take effect regardless of whether her pet survived her." The judge determined that the lack of an intent to condition the charitable remainder on Licorice's survival of the decedent was "clear" from the fact that the Article V trust was the sole bequest in the will. The judge also emphasized that the lack of an alternative gift under the will, in the event Licorice predeceased the decedent, was an indication that the decedent's intent was for her estate to pass through the Article V trust regardless of whether Licorice predeceased her. Moreover, the judge determined that, although the Article IV residuary clause of the decedent's will did not "save" the Article V provision by

where there is no material issue of fact in dispute" [citation omitted]); Flesner v. Technical Communications Corp., 410 Mass. 805, 809, 575 N.E.2d 1107 (1991) (when state of mind questions, such as intent, are at issue, summary judgment often is inappropriate); Mass. R. Civ. P. 56 (c). Cf. Hershman-Tcherepnin, 452 Mass. at 86-87, 891 N.E.2d 194 (court properly could resolve ambiguity on summary judgment record because no party raised genuine dispute of material facts surrounding will's execution to warrant resolution at trial).

If, following remand, there is no clear intention that the charitable gift was to be accelerated in the event Licorice predeceased the decedent, then the lapsed trust will fall into the will's residue, as we explained supra. See Flannery, 432 Mass. at 669, 738 N.E.2d 739. Article IV of the will contains the residuary clause. It states, in pertinent part, "I hereby give ... all lapsed legacies and devises or other gifts made by this [w]ill which fail for any reason, tangible or intangible, including any property over which I have a power of appointment, in trust to the [t]rustees of the LICORICE TESTAMENTARY TRUST established herein" (emphasis added). Under the express terms of the decedent's will, any lapsed gifts fall into the residuary of the will.

The residuary of the will, however, leaves all lapsed gifts to a lapsed and invalid trust, as discussed supra. Therefore, in the event there exists no clear intent that the charitable remainder was to be accelerated on Licorice's failure to survive the decedent, the entire trust lapses into the residue, and the residue also lapses because the residue leaves everything to the invalid Licorice Testamentary Trust. As a result, the gift then will pass as intestate property. See Bray v. Bray, 359 Mass. 439, 441, 269 N.E.2d 452 (1971) ("Where a gift lapses which is itself part of the residue, it must pass as intestate property"); *695 Crocker v. Crocker, 230 Mass. 478, 482, 120 N.E. 110 (1918) ("Where a legacy lapses which is a part of the residue it cannot fall again into the residue. It must pass as intestate property").

Accordingly, we vacate the decree and order on the petition for formal adjudication dated January 13, 2022, and remand the matter for further proceedings consistent with this opinion. [7]

So ordered.

**All Citations**

492 Mass. 687, 214 N.E.3d 1051

## Footnotes

1 Because some parties share a surname, we will refer to them by their first names.

2 The objectors also alleged that the decedent lacked testamentary capacity and that the will was procured by undue influence from Ann.

3 The objectors withdrew their claim that Theresa lacked testamentary capacity.

4 Theresa died approximately two years after Licorice.

5 The actual language of the Licorice Testamentary Trust also supports the principle that it was to be funded and become effective only on the decedent's death. Specifically, the trust instrument stated: "It is anticipated that this [t]rust will be funded upon the death of the [t]estator."

6 "The written instrument is the final and unalterable expression of the purpose of the testator. The power of the court is limited to interpretation and construction. It cannot make a new will." Polsey v. Newton, 199 Mass. 450, 454, 85 N.E. 574 (1908).

7 Where we have determined that the judge erred in granting partial summary judgment and, as a result, are vacating the decree and order on the petition for formal adjudication of the will, we need not address

the objectors' argument that the trial judge made a clearly erroneous finding at trial that Ann had not misappropriated the decedent's assets. See Tenczar v. Indian Pond Country Club, Inc., 491 Mass. 89, 107 n.17, 199 N.E.3d 420 (2022) (unnecessary to reach merits of appellant's arguments that $3.4 million jury award was excessive where judgment was vacated, verdict was set aside, and matter was remanded for new trial).

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100 Mass.App.Ct. 504
Appeals Court of Massachusetts,
Essex.

In the MATTER OF the COLECCHIA FAMILY IRREVOCABLE TRUST.

No. 20-P-224
|
Argued February 9, 2021.
|
Decided November 29, 2021.

**Synopsis**

**Background:** Beneficiary of irrevocable family trust, to which settlors had transferred a house in which they had continued to reside as life tenants, filed general trust petition against trustees, with a complaint in equity attached, seeking to recover compensation for services beneficiary performed without knowing that house had been transferred to trust, and alleging that trustees breached their duty of care in distributing proceeds of sale of house after death of settlors. The Probate and Family Court Department, Essex Division, Jennifer M.R. Ulwick, J., granted partial judgment on the pleadings to trustees on claims for damages for breach of duty of loyalty, improper distribution of assets, quantum meruit, undue influence, and breach of duty to inform and account, granted judgment on pleadings to trustees on remaining claims for breach of duty of care and breach of duty to inform and account, granted judgment on pleadings to trustees on all counts based on failure to comply with service-of-notice requirements in probate court's supplemental rules, and awarded attorney fees and costs to trustees. Beneficiary appealed.

**Holdings:** The Appeals Court, Wolohojian, J., held that:

as a matter of first impression, absent a contrary court order, notice of citation, for action commenced by general trust petition, could be made by publication alone;

trustees did not receive a benefit from maintenance and repair services provided by beneficiary before beneficiary knew that the house had been transferred to the trust;

trust instrument provided limited protection to trustees from personal liability for not following prudent investor rule;

as a matter of first impression, date that a beneficiary's qualification is determined, for purposes of statutory right to be informed by trustee, in writing, of trustee's name and address, is date on which an event occurs to trigger beneficiary's entitlement under trust;

as a matter of first impression, affidavit requirement, in Massachusetts Uniform Probate Code, for objections to the probate of an estate was not applicable to beneficiary's undue influence claim against trustees; and

beneficiary stated a claim for undue influence.

Affirmed in part, vacated in part, and remanded.

**Procedural Posture(s):** On Appeal; Motion for Attorney's Fees; Motion for Judgment on the Pleadings; Motion for Partial Judgment on the Pleadings.

****992** Trust, Interest of beneficiary, Trustee's discretion, Exemption of trustee from liability, Attorney's fees, Assets of trust. Uniform Trust Code. Practice, Civil, Amendment of complaint, Service, Attorney's fees. Probate Court, Notice. Fiduciary. Damages, Quantum meruit. Undue Influence.

PETITION filed in the Essex Division of the Probate and Family Court Department on May 23, 2018.

Motions for judgment on the pleadings were heard by Jennifer M.R. Ulwick, J., and a motion to amend the judgment and a request for attorney's fees also were heard by her.

**Attorneys and Law Firms**

Brian K. Wells, for Michael Colecchia.

Gino N. Ricciardelli, Saugus, for Denise Colecchia & another.

Present: Wolohojian, Desmond, & Grant, JJ.

**Opinion**

WOLOHOJIAN, J.

***506** These consolidated appeals from the dismissal of a general trust petition (and the subsequent award of attorney's fees and costs) raise three novel procedural and substantive issues. First is whether the language of the order of notice preprinted on the Probate and Family Court's "trust citation" form (MPC 584) permits notice by publication alone. We

conclude, in essence, that the form's use of the term "and/or" can reasonably be read to mean that notice of the citation may be made by publication alone, which the petitioner here made. We also conclude that neither G. L. c. 190B, § 1-401, nor Rule 6 of the Supplemental Rules of the Probate Court (2012) (supplemental rule 6) requires a different reading of the form order of notice. Second is what is the point in time at which a person becomes a "qualified beneficiary" for purposes of a trustee's duty to inform under G. L. c. 203E, § 813. We conclude that, in order to determine whether a person is a "qualified beneficiary" for purposes of a trustee's duty to inform under § 813, the phrase "the date the beneficiary's qualification is determined" found in G. L. c. 203E, § 103, means the date, under the terms of the trust instrument, on which an event occurs to trigger a beneficiary's entitlement under the trust. Third is whether the requirements of the Massachusetts Uniform Probate Code, including the affidavit requirement contained in G. L. c. 190B, § 1-401 (c), apply in a general trust petition action such as this one. We conclude that they do not.

The three matters of first impression we have just identified arise in the context of the overarching question whether the *507 petitioner's substantive claims were properly dismissed. Those claims were disposed of in two tranches. First, the judge allowed the trustees' motion for partial judgment on the pleadings and entered judgment on count I (breach of the duty of loyalty), count IV (improper distribution of assets), count V (quantum meruit), and count VI (undue influence), and entered partial judgment on count III (breach of the duty to inform and account). Second, the judge allowed the trustees' motion for judgment **993 on the pleadings on the remaining counts, which were count II (breach of the duty of care) and the remainder of count III, as well as the trustees' motion to dismiss all counts for failure to comply with Rule 3 of the Supplemental Rules of the Probate Court (2012) (supplemental rule 3) and supplemental rule 6. We conclude that no claims should have been dismissed for failure to comply with the service requirements of supplemental rules 3 and 6. We also conclude that the claims for breach of the duty of loyalty, quantum meruit, breach of the duty to inform, and improper distribution of assets were each properly dismissed for failure, in essence, to state a viable claim. We conclude, however, that the petition adequately stated claims for breach of the duty to account (in part), breach of the duty of care (in part), and undue influence, and that those claims should not have been dismissed. Finally, in light of these conclusions, we vacate the award of attorney's fees and costs in favor of the trustees (whom we also sometimes call the respondents) without prejudice to renewal on remand. [1]

A procedural preamble. Michael Colecchia (Michael) [2] began the underlying action by filing a general trust petition to which he attached a document that was, in form and substance, a complaint *508 in equity that sought to "recover[ ] compensation for services performed under mistaken pretenses" or, in the alternative, to invalidate the Colecchia Family Irrevocable Trust (trust) "because it was created under undue influence." This hybrid pleading, a sort of litigation minotaur, is at the center of a procedural labyrinth through which we make our way.

Under G. L. c. 203E, § 201, which is part of the Massachusetts Uniform Trust Code, although "[a] trust shall not be subject to continuing judicial supervision unless ordered by the court," "[t]he court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law." G. L. c. 203E, § 201 (a) & (b). An interested person may initiate such an action by filing a general trust petition using Probate and Family Court form MPC 201. A general trust petition may "relate to any matter involving [a] trust's administration, including a request for instructions and an action to declare rights." [3] G. L. c. 203E, § 201 (c). Thus, **994 although a general trust petition may be used to invoke the court's jurisdiction over any matter of trust administration, it cannot be used as an omnibus vehicle for every type of relief a beneficiary may seek against a trust's trustees. For example, it is not a proper mechanism by which to bring claims for monetary damages, such as (by way of example only) breach of fiduciary duty, undue enrichment, or breach of loyalty. Yet that is what Michael attempted to do here by attaching a complaint in equity to his general trust petition, and then later filing a motion to amend that attachment with a "First Amended Complaint" (FAC) also seeking monetary relief. [4]

We do not endorse this approach, and the judge would not have erred had she dismissed without prejudice Michael's claims that did not relate to the trust's administration. We thus caution future litigants against proceeding as Michael did here. Nonetheless, we *509 exercise our discretion to overlook the pleading defect in the interest of judicial economy and, like the judge, take into account the allegations and claims contained in the complaint attached to the general trust petition and in the FAC. [5]

Background. We summarize the facts alleged in the complaint and the FAC in the light most favorable to Michael, reserving others to our later discussion of particular issues. Michael is one of six siblings whose parents were Mario and Lillian Colecchia. Mario and Lillian bought a house in Revere in 1955 (property), where they raised their six children (Mario Jr., Michael, Mark, Denise, Donna, and Diane).[6] On February 3, 2005, Mario and Lillian created an irrevocable trust into which they transferred the property by quitclaim deed.[7] Under the terms of the trust,

> "[t]he donors reserve the right to the use and occupancy of the real estate during their lifetimes, with the donors to pay for all maintenance and repairs, water and sewer charges, insurance charges, and taxes relating to said premises, if they shall so elect. At any time, the donors' right of use of the premises shall not include the right to collect rent therefrom. In addition, for further clarification, during the lifetimes of the donors, they shall have the right to possession or enjoyment of any real estate, which constitutes the principal residence. Nothing herein shall be construed to limit the ability of the Trustees to alienate, sell or convey the real estate or any interest therein, or to lease, mortgage or demise any or all the premises, so long as the provisions stated above are met."

According to the terms of the trust, Mario and Lillian's children would receive nothing during Mario and Lillian's lifetimes. However, after Mario and Lillian both died, Michael and his brothers were each **995 to receive ten percent of the trust res. The remaining seventy percent was to be divided equally among the three daughters. Donna and Denise were named trustees.

Michael did not know that his parents had transferred the *510 property into the trust. Nor did he know that his parents intended to distribute the trust assets unequally among their children. Believing that all six children would inherit equally, and that his parents (rather than the trust) owned the property, from February 3, 2005 (the date on which Mario and Lillian created the trust and transferred the property to it) to February 2016 (when Lillian died),[8] Michael maintained the property by landscaping the yard, removing snow from the sidewalks and driveway, renovating a bathroom, and performing general maintenance. Michael performed this work without compensation because he believed his parents continued to own the house and that all six children would inherit equally. Had he known otherwise, he would not have performed the work without compensation. After both parents died, Michael learned of the existence of the trust and of its terms.

Over Michael's objection, Donna and Denise, as trustees, sold the property to a third party for $366,000 on January 1, 2017.[9] The sale proceeds were held in the Interest on Lawyers' Trust (IOLTA) account of the attorney who represented the trust in the transaction. Michael does not quarrel with the fact that the proceeds were initially deposited into the attorney's IOLTA account. However, he does quarrel with the fact that they were held by the attorney for approximately nine months, which he avers was both without right and unreasonably delayed distribution to the beneficiaries. Michael also contends that Donna and Denise failed to take reasonable steps to get the funds released from the IOLTA account, and in addition, that once the funds were released, Donna and Denise failed to place them in an appropriate interest-bearing account and delayed distribution to the beneficiaries.

Michael filed a general trust petition on May 23, 2018, attaching a complaint and a copy of the trust. Count I of the complaint asserted that Denise and Donna breached their duty of loyalty by (1) not informing him that the trust existed, (2) not informing him that Mario and Lillian no longer owned all interest in the property, (3) not dealing with Michael on fair contractual terms, and (4) accepting, and benefiting from, Michael's work on the property without disclosing the existence of the trust or the fact that they would receive a greater share upon their parents' death. In *511 count II, Michael alleged that the trustees breached their duty of care by failing to put the proceeds from the sale of the property into an interest-bearing account and in failing to disburse the funds in a reasonable time. Count III alleged that the trustees had breached their duty to inform the beneficiaries of the trust and account for assets held by the trust. Count IV alleged that Denise and Donna took personal items from the property after Lillian died, and failed to make an inventory of those items or to disburse them properly. Count V asserted a claim of quantum meruit for the value of the work Michael performed on the property without compensation. Finally, count VI asserted that Donna exerted undue influence on Mario and Lillian, resulting in the unequal division of the property among their children.

**996 Denise and Donna filed affidavits of objection. They also filed a motion for partial judgment on the pleadings with respect to counts I, III, IV, V, and VI of the complaint.[10] On the date of the hearing on the motion, Michael filed

the FAC, which restated the same six causes of action but amplified some of the factual allegations and theories of the original complaint. Although certainly not obligated to do so when ruling on the motion to dismiss, the judge took the allegations of the FAC into account. The judge issued a detailed written explanation of her decision to dismiss count I, count III (partially), and counts IV, V, and VI. Specifically, as to count I (breach of duty of loyalty), the judge ruled that under the terms of the trust and under common law, it was Mario and Lillian who were responsible as life tenants for the maintenance and repairs to the property during their lifetimes, and that the trustees received no personal gain or benefit from the work performed because the trust did not hold use and occupancy rights to the property. As to count III (duty to inform and account), the judge agreed that the trustees had a duty to inform the beneficiaries of the trust as of Lillian's death on February 27, 2016. The claim was allowed to proceed to the extent it rested on the trustees' failure to inform after Lillian's death; it was otherwise dismissed. Count IV was dismissed because the complaint did not allege that the personal property allegedly taken by Donna and Denise was property of the trust. Count V (quantum meruit) was dismissed because the judge concluded that it was Mario and Lillian, as holders of the life estate, who benefited from Michael's ***512** work, not the trust or the trustees. Count VI (undue influence) was dismissed for failure to file an affidavit stating the specific facts and bases for the claim, and because the allegations of the FAC failed to state facts with any specificity.

Donna and Denise then filed a motion for judgment on the pleadings on the remainder of the complaint (count II and the remainder of count III), and a motion to dismiss all of the claims for failure to comply with supplemental rules 3 and 6. Michael has failed to include in the record appendix a copy of the full memoranda in support of those motions. Accordingly, we do not know precisely the bases for the motions, except that, among other things, Donna and Denise argued that service had not been made in accordance with supplemental rules 3 and 6. After hearing, the judge allowed the motions on alternate grounds. First, she dismissed all counts for failure to prosecute, specifically failure to comply with supplemental rules 3 and 6. Second, she dismissed count II [11] for the reasons stated in the memorandum in support of the motion, which (as we have stated) we do not have the benefit of in the appellate record.

A decree of dismissal entered on March 14, 2019. On March 20, 2019, Michael filed a notice of appeal. Subsequently, Donna and Denise filed two motions to amend the judgment. The first of these was filed on April 12, 2019, and resulted in an amended judgment; [12] a judgment of dismissal entered on May 3, 2019. The second postjudgment motion was filed on May 10, ****997** 2019, and sought a further amendment of the judgment to award attorney's fees and costs. Although that motion had not yet been acted on, the appeal proceeded. Once we discovered that the appeal was premature, we took the steps described in note 1, supra, and a further amended judgment entered on July 26, 2021, awarding attorney's fees and costs to the respondents in the amount of $45,000. Before us now are Michael's appeals from the dismissal of his claims and from the award of attorney's fees and costs in favor of the trustees.

Discussion. 1. Service of citation. As noted above, this action was begun by the filing of a general trust petition on May 23, 2018. Six days later, the register of probate issued a citation giving notice of the petition and informing interested parties of a ***513** date by which they must file a written appearance and objection. The citation was issued on a preprinted form (form MPC 584 [12/28/16]) of the probate court, and an "order of notice" was preprinted on its verso. Those printed instructions provided for notice as follows:


Michael gave notice of the citation for the petition only by way of publication. Donna and Denise argue that more was required. First, relying on supplemental rule 6, [13] they contend that all ***514** interested ****998** parties (i.e., the trustees and beneficiaries) had to be served in hand or by certified mail if their whereabouts were known and, if their whereabouts were unknown, by delivery or mail to their last known address and additionally by publication. [14] Second, pointing to supplemental rule 3, [15] they argue that the first amended complaint required service of a new citation, which never occurred.

We begin by observing that the instructions regarding service as they are printed on the Probate and Family Court's "order of notice" on the back side of the citation are not clear. Specifically -- absent further clarification which did not here

occur -- the use of the phrase "and/or" creates ambiguity because a person could reasonably understand either (a) that any one of the three specified methods of service was acceptable in the alternative, or (b) that the first two methods were acceptable in the alternative, but that notice of publication was additionally required. Because notice by way of publication alone was a reasonable construction of the order of notice, neither Michael nor his counsel can be faulted for following that route.

Supplemental rule 6 is not to the contrary. Although supplemental rule 6 (C) requires that interested persons who are located within the Commonwealth be served either in hand or by mail, see note 13, supra, the rule permits alternate forms of service "where otherwise required by statute or ordered by the court." Here, as we have already explained, the order of notice issued by the court was written in such a way as to suggest that notice could be made by publication alone.

Moreover, the preprinted form's reference to G. L. c. 190B, § 1-401, [16] would have served only to confirm Michael's reading of the order of notice. Section 1-401 provides that, unless otherwise ordered by the court, notice of a citation is to be made either by certified, registered, or first class mail, or by delivery to the *515 interested person, or by publication. [17] Thus, absent contrary **999 court order (which the judge is, of course, empowered to make in any given case), the statute permits the various methods of service in the alternative, which is entirely consistent with one of the two reasonable readings of the preprinted order of notice.

For these reasons, the judge should not have dismissed the general trust petition for Michael's failure to follow the service requirements of supplemental rule 6. The problem here was not with service, but with the lack of clarity in the order of notice. If the probate court continues to use the existing preprinted order of notice form, it is incumbent on the judge in each case to indicate whether notice by publication is additive or alternative to service by delivery or mail. This can be easily accomplished by striking out one part or the other of the phrase "and/or."

This leaves for our consideration supplemental rule 3, which requires that "notice of any pleading asserting new or additional claims for relief not asserted in the original petition shall be given by service of a new citation." It is undisputed that no new citation was sought, issued, or served for the FAC. That said, although the FAC amplified the allegations and theories of the original petition, *516 it did not assert new or additional claims for relief. It also did not add new parties or causes of action. Moreover, the judge never allowed the motion to file the FAC (although she did take its allegations into account). We need not decide whether a new citation was required under supplemental rule 3 in these unusual circumstances because, even assuming that one were, Donna and Denise would still not benefit because the surviving counts (count VI, count II [partial], and count III [partial]) (see Conclusion, infra), were asserted in the original complaint, to which supplemental rule 3 has no application.

We now turn to the substantive arguments concerning the various causes of action. In doing so, we keep in mind that the standards for both a motion to dismiss under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), and a motion for judgment on the pleadings under Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974), are the same. See Welch v. Sudbury Youth Soccer Ass'n, 453 Mass. 352, 353-354, 901 N.E.2d 1222 (2009). In both cases, we consider the well-pleaded factual allegations of the FAC to determine whether they "raise [the petitioner's] right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (citation omitted). Iannacchino v. Ford Motor Co., 451 Mass. 623, 636, 888 N.E.2d 879 (2008). See Marchese v. Boston Redev. Auth., 483 Mass. 149, 156, 130 N.E.3d 1222 (2019). Our review is de novo.

2. Breach of the duty of loyalty. In essence, Michael claims that the trustees breached their duty of loyalty to him by accepting the benefit of the work he did to maintain or improve the property without telling him that the property had been placed into the trust or that they (as beneficiaries) would receive a greater share of the trust res upon their parents' death. In this way, Michael contends that the trustees did not transact fairly with him. See Cleary v. Cleary, 427 Mass. 286, 291, 692 N.E.2d 955 (1998), quoting Witherington v. Nickerson, 256 Mass. 351, 356, 152 N.E. 707 (1926) ("The general rule is that one acting in a fiduciary capacity for another has the burden of proving that a transaction **1000 with himself was advantageous for the person for whom he was acting"); Restatement (Second) of Trusts § 170(2), at 364 (1959) ("The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts").

However, as the judge concluded, under the terms of the trust, it was the donors (who retained a life estate in the property) -- not the trustees -- who bore the cost of maintaining

and repairing ***517** the property during their lifetimes. Specifically, the trust provided that "[t]he donors reserve the right to the use and occupancy of the real estate during their lifetimes, with the donors to pay for all maintenance and repairs, water and sewer charges, insurance charges, and taxes relating to said premises, if they shall so elect." Thus, the allegations of the FAC do not support Michael's theory that the trustees received a benefit from the maintenance and repairs he made to the property during his parents' lifetimes. See Spring v. Hollander, 261 Mass. 373, 376, 158 N.E. 791 (1927).

3. Quantum meruit. Michael essentially recasts his duty of loyalty claim as one for quantum meruit as well. He alleges that the trustees unfairly benefited from the value of the maintenance and repairs he made to the property during Mario's and Lillian's lifetimes, knowing that he would not have performed the work without compensation if he had known that it would benefit the trust. We note that the FAC does not allege that work was done at the trustees' request. Nonetheless, Michael seeks to recover from the trustees the value of his work under a theory of unjust enrichment. "To achieve recovery upon the theory of quantum meruit, the claimant must prove (1) that [he] conferred a measurable benefit upon the defendants; (2) that the claimant reasonably expected compensation from the defendants; and (3) that the defendants accepted the benefit with the knowledge, actual or chargeable, of the claimant's reasonable expectation." Finard & Co., LLC v. Sitt Asset Mgt., 79 Mass. App. Ct. 226, 229, 945 N.E.2d 404 (2011).

The quantum meruit claim fails for the same reasons we have already explained: under the terms of the trust, repairs and maintenance of the property fell to Mario and Lillian, who retained a life estate in the property. Although it is conceivable that the value of Michael's services may have preserved or increased the value of the property, it does not follow that the trustees were unjustly enriched by the value of Michael's services, because it was the donors -- not the trustees -- who were obligated to bear the costs of repairs and maintenance at the time Michael provided those services.

4. Breach of the duty of care. Michael argues that the trustees breached the duty of care in their handling of the proceeds from the sale of the property in two respects.[18] First, he alleges that the ***518** trustees allowed the trust's attorney to retain the ****1001** proceeds from the sale in the attorney's IOLTA account long after he should have released them. Second, he claims that the trustees failed to invest the sale proceeds properly once they were released by the attorney, see the Prudent Investor Act, G. L. c. 203C, § 3, and did not disburse the funds promptly. We examine each of these in turn.

The trustees agree with Michael that the attorney held on to the sale proceeds for longer than he was entitled. They take the position that the lawyer was entitled to hold only $5,000 in escrow until the recording of a discharge on an old undischarged lien that had been discovered by the title examiner. The remainder of the sale proceeds, in the trustees' view, should have been released from the attorney's IOLTA account promptly after the January 1, 2017 sale. Instead, the attorney did not release the sale proceeds until September 20, 2017, after Donna contacted him and expressed her anger over his continuing to retain the funds. According to the trustees, it was the attorney's responsibility to obtain the discharge. He failed to do so, and ultimately Donna took on the responsibility of obtaining the discharge from the Federal Deposit Insurance Corporation, which she obtained by November 3, 2017, approximately eleven months after the sale of the property.

The trustees claim that they acted diligently in seeking to get the funds released from the attorney's IOLTA account. But based on the trustees' acknowledgement that the lawyer retained the funds too long, combined with the fact that it does not appear what efforts the trustees made before September 2017 to get the funds released, it is a question of fact whether the trustees acted with sufficient diligence in the circumstances. See Exchange Trust Co. v. Doudera, 270 Mass. 227, 229, 170 N.E. 73 (1930) ("a trustee in the management of his trust is bound to use good faith and to ***519** exercise the diligence, sound discretion, and wise judgment of a prudent man in dealing with his own affairs"). This theory of the claim for breach of the trustees' duty of care accordingly should not have been dismissed.

Finally, Michael claims that the trustees breached their duty of care when they failed to invest the sale proceeds in a suitable interest-bearing account and thus did not comply with the prudent investor rule. "[A] trustee who invests and manages trust assets shall owe a duty to the beneficiaries of a trust to comply with the prudent investor rule" contained in G. L. c. 203C, § 3, unless the trustee's acts are shielded by an exculpatory provision within the trust instrument. G. L. c. 203C, § 2. An "exculpatory clause" is a "term of a trust relieving a trustee of liability for breach of trust." G. L. c. 203E, § 1008 (a). Such clauses are unenforceable "to the

extent [they] ... relieve[ ] the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries" or if "inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor." Id. See Passero v. Fitzsimmons, 92 Mass. App. Ct. 76, 81, 81 N.E.3d 814 (2017).

Here, the trustees argue that section 4.3(d) of the trust functions as an exculpatory clause shielding them from liability for failing to comply with the prudent investor rule. But section 4.3(d) does not contain explicit language limiting the trustees' liability.[19] See **1002 Sylvia v. Johnson, 44 Mass. App. Ct. 483, 484 n.2, 691 N.E.2d 608 (1998) ("Ordinarily, an exculpatory clause releases a party from his wrongful acts"). Instead, that section is part of a list of general powers conferred on the trustees:

"4.3. General powers of trustee.

"In addition to all common law and statutory authority, my trustee, except as otherwise provided, shall have power without approval of any court and in any manner it considers advisable:

"...

"(d) to invest income and principal without being subject to legal limitations on investments by fiduciaries[.]"

*520 This is not like the trust language in Steele v. Kelley, 46 Mass. App. Ct. 712, 710 N.E.2d 973 (1999), upon which the trustees rely, which explicitly provided that "[t]he trustee shall not be liable ... for any act or omission in the exercise of this trust, so long as he acts in good faith ... [and he] shall not be liable for anything except his own personal and willful misfeasance or fraud." Id. at 719, 710 N.E.2d 973.

All that said, it is difficult to imagine the point of construing the trust to, on the one hand, give the trustees power to invest without regard to the prudent investor rule while, on the other hand, opening them up to personal liability if they act in good faith when not following the prudent investor rule. For this reason, we construe section 4.3(b) of the trust to shield the trustees from personal liability for not following the prudent investor rule, but only to the extent permitted by G. L. c. 203E, § 1008; namely, to the extent that the trustees acted in good faith, or without reckless indifference to the purpose of the trust or the interests of the beneficiaries. Because the FAC does not allege either bad faith or reckless indifference with respect to the approximately three months during which the funds were invested by the trustees before distribution to the beneficiaries, this theory of Michael's claim for breach of the duty of care was properly dismissed.

5. Breach of duty to inform and account under G. L. c. 203E, § 813, and breach of common-law duty to account. Read liberally, count III of the FAC (breach of duty to inform and account) appears to rest both on G. L. c. 203E, § 813, and on the common law.

i. Duty to inform. Michael argues that the trustees have violated G. L. c. 203E, § 813 (b), by failing since the inception of the trust to inform him of its existence. Section 813 (b) requires that "[w]ithin 30 days after acceptance of the trust or the trust becomes irrevocable, whichever is later, the trustees shall inform, in writing, the qualified beneficiaries of the trustee's name and address."

General Laws c. 203E, § 813, was adopted as part of the Massachusetts Uniform Trust Code (MUTC), which became effective July 8, 2012 -- seven years after the creation of the trust at issue here. Although the MUTC applies, with limited exceptions, to trusts created before its enactment, see St. 2012, c. 140, § 66,[20] it **1003 does not affect an action taken before its effective date. See *521 Mackey v. Santander Bank, N.A., 98 Mass. App. Ct. 431, 434 n.9, 437, 156 N.E.3d 785 (2020). Moreover, even after its effective date, the trustees' duty to inform under § 813 extends only to "qualified beneficiaries." A "qualified beneficiary" is defined for purposes of the MUTC as:

"a beneficiary who, on the date the beneficiary's qualification is determined:

"(i) is a distributee or permissible distributee of trust income or principal; or

"(ii) would be a distributee or permissible distributee of trust

> income or principal if the trust terminated on that date."
>
> "to the distributees and permissible distributees of trust income or principal and to other qualified beneficiaries who **1004 request it, at least annually and at the termination of the trust."

G. L. c. 203E, § 103. See DeGiacomo v. Quincy, 476 Mass. 38, 49 n.10, 63 N.E.3d 365 (2016). We understand the phrase "the date the beneficiary's qualification is determined" to mean the date, under the terms of the trust instrument, on which an event occurs to trigger a beneficiary's entitlement under the trust. Here, that date was Lillian's death, because Michael could not become a beneficiary until both his parents had died. Upon Lillian's death, Michael became a distributee under the trust and, thus, met the definition of "qualified beneficiary." Until then, he was not a "qualified beneficiary" because the triggering event for his qualification as a beneficiary (Lillian's death) had not yet occurred. Accordingly, the MUTC provides no basis for Michael to quarrel with the trustees' failure to inform him of the existence of the trust prior to Lillian's death on February 27, 2016. It does, however, provide sufficient basis for their duty to inform him thereafter.

Relying on Baldwin v. Western R.R. Corp., 4 Gray 333, 336, 70 Mass. 333 (1855), the trustees argue that -- even if they had a duty to inform Michael of the trust's existence after Lillian's death -- count III *522 should have been dismissed on the alternate ground that Michael failed to allege special damages flowing from the failure to inform him of the trust's existence. See Mass. R. Civ. P. 9 (g), 365 Mass. 751 (1974).

Suffice it to say that Baldwin, an old tort case involving a collision between a carriage and a locomotive, provides insufficient steam for the trustees' argument. We think that the theory of damages was adequately pleaded in the FAC, namely, that had Michael been informed of the existence of the trust, he would not have provided repairs, maintenance, and improvements to the property without compensation. That said, since those damages are alleged to have been incurred during Mario's and Lillian's lifetimes and thus before the duty to inform under the MUTC arose, there is no causal connection between Michael's alleged damages and the trustees' alleged violation of the MUTC's duty to inform. Accordingly, to the extent count III rests on the MUTC's duty to inform, it was properly dismissed in its entirety.

ii. Duty to account. There is both a duty to account imposed by the MUTC, G. L. c. 203E, § 813 (c), and a common-law duty to account. Section 813 (c) requires a trustee to send an account

For the same reasons we have set out above in explaining why the trustees did not have a duty prior to Lillian's death to inform Michael of the trust's existence, they also did not have a duty before Lillian's death to account to him under the MUTC. Specifically, until Lillian died, Michael was neither a distributee, a permissible distributee, nor a "qualified beneficiary." That said, once Lillian died, the trustees did have a duty to account under the MUTC.

They also had a common-law duty to account from the inception of the trust. It has been long established that a trustee has a duty "to keep clear and accurate accounts with respect to the administration of [a] trust[ ]." Akin v. Warner, 318 Mass. 669, 674, 63 N.E.2d 566 (1945). See Briggs v. Crowley, 352 Mass. 194, 199–200, 224 N.E.2d 417 (1967). The trustee bears the burden of accounting for the assets of the trust and demonstrating that there has been no misappropriation of or failure to preserve them. See *523 Akin, supra at 674–675, 63 N.E.2d 566. See also Rugo v. Rugo, 325 Mass. 612, 617, 91 N.E.2d 826 (1950). A trustee who fails to accurately account for the handling of trust property "must stand the loss." Markus v. Markus, 331 Mass. 394, 399, 119 N.E.2d 415 (1954). See Attorney Gen. v. Bedard, 218 Mass. 378, 385–386, 105 N.E. 993 (1914) (trustees "must be charged with everything for which they have not properly accounted" because it is their obligation "to keep the trust fund distinguished from other moneys in their hands"). In an action for an accounting, a court will adjudicate the amount of funds that should be in the possession of a trust, and will determine any amounts for which the trustee is liable to the trust or its beneficiaries. See Milbank v. J.C. Littlefield, Inc., 310 Mass. 55, 61, 36 N.E.2d 833 (1941).

Michael alleges in the FAC that he did not receive an accounting regarding the trust until February 9, 2018, nearly two years after Lillian's death, and that the failure to account resulted in damages (which he does not specify). To the extent Michael's theory of damages rests on his having provided repairs and maintenance to the property before his parents' death, as we have concluded above, the value of that work was provided to Lillian and Mario, not to the trust. To the extent Michael's theory of damages rests on the allegation that

the trustees took various items of personal property (jewelry, electronics, furniture, and cash) from the home after Lillian's death, the claim also falls short because those items are not alleged to have been held by the trust, as opposed to being part of Lillian's estate.[21] But to the extent Michael alleges damages from the trustees' failure to deal properly with the proceeds from the sale of the property, the claim for an accounting was adequately pleaded and should not have been dismissed.

6. Improper distribution of assets. As set out above, Michael alleged that Donna and Denise took Lillian's personal items for themselves after her death. He asserted that "as an heir," he had an interest in these assets, which were part of Lillian's estate. Accepting these allegations as true, Michael has no claim against Donna and Denise -- in their capacity as trustees -- because there is nothing to suggest that the items were ever assets of the trust. We do not mean to suggest that these allegations might not serve as the basis for a viable claim in another type of suit, for example, one based on the administration of Lillian's estate; ***524** however, they fail to ****1005** sustain a viable claim in this action, which was brought via a general trust petition against Donna and Denise acting as trustees.

7. Undue influence. The judge dismissed Michael's undue influence claim on alternate grounds. First, she ruled that the claim required an affidavit before it could proceed. Although the judge gave no citation for this proposition, it appears she may have been relying on G. L. c. 190B, § 1-401 (e), which the trustees argued applied. But that provision is part of the Massachusetts Uniform Probate Code, and concerns objections to the probate of an estate. We decline to import the requirements of the Massachusetts Uniform Probate Code to an action, such as this one, challenging the validity of a trust.

Second, the judge ruled that the FAC failed to state sufficient facts to sustain a claim of undue influence. "Four elements are ordinarily present when undue influence is afoot: that an (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means" (quotation and citations omitted). Goodman v. Atwood, 78 Mass. App. Ct. 655, 658, 940 N.E.2d 514 (2011).

Read through the required liberal lens beneficial to Michael, the FAC alleges that the trust was the result of undue influence based on the following. Mario and Lillian trusted Donna to handle their financial affairs; Donna controlled their finances, and was much more sophisticated than Mario and Lillian. Lillian often complained that Donna would not allow her to use her assets as she wished. For example, in 2015, Lillian lent Michael a nominal sum, but warned him not to tell Donna because she would become angry. To prevent Lillian from spending her money as she wished, Donna would bully Lillian. At the time the trust was created, Mario had been exhibiting signs of dementia. Both Lillian and Mario were "vulnerable and susceptible" to undue influence.

Denise, with Donna, arranged for the lawyer who drafted the trust. Denise was present when the trust was executed. Although both Donna and Denise knew about the trust and its terms, they did not inform Michael or his brothers, who were to receive smaller distributions. Denise fabricated a story to make it appear that only Donna had been involved in influencing Mario and Lillian. Specifically, Denise told Michael that she (Denise) had ***525** walked out of the office when the trust was being discussed because Donna was "pushing her mother to do something that her mother did not desire to do."

Neither Mario nor Lillian understood that the property had been placed in a trust, nor did they understand the effect of the trust's terms. This could be seen from the fact that, in or around 2013, Mario told Michael to sell the house (which neither Mario nor Michael could have done since it was in the trust). Similarly, in 2012, Lillian executed a will that would have created a new trust for the benefit of her husband even though he had already moved to an assisted living facility. According to Michael, this, too, demonstrated that Lillian did not understand that the property had previously been transferred to an irrevocable trust, let alone one created for the specific purpose of avoiding having it counted for Medicaid eligibility.[22] See ****1006** 42 U.S.C. § 1396p(d)(3)(A)(i); 130 Code Mass. Regs. §§ 520.007 & 520.023(C)(d) (1999).

Although this constellation of allegations may not make out the strongest claim of undue influence, it was sufficient to get over the low bar required to withstand a motion to dismiss. See, e.g., Estate of Moretti, 69 Mass. App. Ct. 642, 652-659, 871 N.E.2d 493 (2007) (sufficient evidence of undue influence).

8. Miscellaneous additional matters. Two additional issues may be dealt with briefly. First, Michael argues in the alternative either that (1) the judge did not rule on his second motion to further amend the complaint and that we should allow that motion ourselves, or (2) the motion was constructively denied, and we should reverse that denial as an abuse of discretion. In light of our disposition of the issues we have already discussed, the better course is to allow the judge on remand to consider and rule in the first instance on the second motion to amend. If the judge allows the motion, the judge may also consider whether the proposed amended complaint materially alters or expands the allegations and claims of the FAC such that a new citation and additional service is required under supplemental rule 3.

***526** Second, in light of our decision allowing certain portions of the FAC to proceed, we vacate the award of attorney's fees in favor of the trustees, while offering no opinion as to whether an award of fees and costs is in order after further proceedings on remand. We recognize that the judge ruled on the motion at our request, and that our request caused the already-busy judge additional work. However, the problem stemmed from the fact that the motion remained pending and no final judgment had entered before the parties were allowed to appeal.

Conclusion. The judgment of dismissal entered May 3, 2019, and the further amended judgment entered July 26, 2021 (collectively, judgments), are affirmed with respect to count I (breach of the duty of loyalty), count IV (improper distribution of assets), and count V (quantum meruit). Both judgments are vacated as to count VI (undue influence), as is the award of attorney's fees and costs to the trustees in the July 26, 2021 further amended judgment. The judgments as to count II (breach of the duty of care) and count III (duty to inform and account) are affirmed in part and vacated in part. As to count II, the judgments are affirmed except to the extent that the claim is based on the alleged failure of the trustees to have their attorney timely release the proceeds from the sale of the property. That portion of the judgments on count II is vacated. As to count III, the judgments are affirmed insofar as the claim alleges breach of the duty to inform and breach of the duty to account, except as to the duty to account for the proceeds of the sale of the property. That portion of the judgments on count III is vacated. The matter is remanded for further proceedings consistent with this opinion. [23]

So ordered.

**All Citations**



## Footnotes

1 Shortly before the appeal was argued, the panel realized that final judgment had not entered in the trial court and, moreover, that there remained a pending motion to amend the judgment to award attorney's fees and costs. Accordingly, after oral argument, the panel stayed the appeal and directed the judge to rule on the pending motion so that final judgment could enter and the appeal could proceed. To avoid inefficiency and unnecessary cost and delay for the litigants, we also indicated that the parties could appeal any order regarding the fees, and that any such appeal would be consolidated with this one. For reasons that are unexplained, the Probate and Family Court register's office did not docket our order, or bring it to the judge's attention. Once we became aware of this failure, we issued a second order, which we sent to both the register's office and to the judge herself. The judge then acted with due speed and attention. Thereafter, the petitioner filed a timely notice of appeal of the fee order. The two appeals were consolidated.

2 For convenience, because many of the parties share the same surname, we refer to them by their first names.

3 As we discuss *infra*, there are specific notice requirements for actions that are commenced by filing a general trust petition under § 201. See also G. L. c. 203E, § 201 (d) ("A proceeding brought under this chapter in the probate and family court department to appoint or remove a trustee, to approve the resignation of a trustee,

to review and settle accounts of a trustee or concerning any other matter relating to the administration of a trust may be initiated by filing a petition and giving notice to interested parties, as provided in section 109").

4 Because the action was not begun with a complaint, the document styled an "amended complaint" is more properly considered in essence to be an amended attachment to the trust petition. Nonetheless, for the sake of consistency with the way the parties and the judge have referred to it, we call it the first amended complaint or FAC.

5 The judge took into account the allegations of the FAC, although she never allowed Michael's motion to file it.

6 Michael stipulated to the dismissal of the claims against Diane, and she is not a party to this appeal.

7 The FAC does not allege the specific date the property was transferred into the trust; however, the quitclaim deed is in the appellate record and the parties do not dispute the date.

8 Mario Colecchia died in 2015.

9 Michael does not argue that the sale was for less than fair market value, nor does there appear to be any question that the sale was at arm's length.

10 Michael has not included copies of the motion, or of the memorandum supporting it, in the appellate record. See Mass. R. A. P. 18 (a), as appearing in 481 Mass. 1637 (2019).

11 The judgment did not address count III explicitly.

12 This motion, and the amended judgment resulting therefrom, reflected the explicit dismissal of count III.

13 Supplemental rule 6 provides, in pertinent part:

"C. Service within the Commonwealth. Except where otherwise required by statute or ordered by the court, service of a citation within the Commonwealth shall be given by delivering in hand or by mailing by certified, registered or ordinary first class mail at least fourteen (14) days before the return day.

"D. Service outside the Commonwealth. Except where otherwise required by statute or ordered by the court, if it shall appear from the petition that there is anyone interested who is outside the Commonwealth in any part of the United States, its Commonwealths or territories, service of the citation shall be given by delivering in hand or by mailing by certified, registered or ordinary first class mail at least fourteen (14) days before the return day; if in other parts, one (1) month.

"E. Service When Whereabouts Unknown. Except where otherwise required by statute or ordered by the court, if it shall appear from the petition that there is anyone interested who is of parts unknown, service of the citation shall be given by delivery or mailing to the last known address at least one (1) month before the return day.

"F. Service by Publication. Except where otherwise required by statute or ordered by the court, and in addition to the service requirements above, publication shall be required if any interested person's whereabouts, address or identity is unknown. Publication shall also be required in all formal testacy and appointment proceedings. A copy of the citation shall be published once in a newspaper designated by the register of probate having general circulation in the county where the proceeding is pending at least seven (7) days before the return date."

14 One of the beneficiaries in this case is said to live out of State, and another is said to have no known address.

15 Supplemental rule 3 provides in pertinent part:

> "When notice of a petition has been given by service of a citation, notice of any pleading asserting new or additional claims for relief not asserted in the original petition shall be given by service of a new citation."

16 The preprinted form also refers to Rules 2, 6, and 28 of the Supplemental Rules of the Probate Court. Supplemental rule 2 deals with the filing of appearances, and supplemental rule 28 deals with signatures to pleadings; neither rule has any application to the issues presented in this case.

17 General Laws c. 190B, § 1-401, provides:

> "(a) If notice on any matter is required by reference to this section and except for specific notice requirements as otherwise provided, the court shall fix a return date and issue a citation. The petitioner shall cause notice of the return day of any matter to be given to any interested person or attorney if the appearance is by attorney or the interested person requested that notice be sent to the attorney. Notice shall be given:
>
> "(1) by mailing a copy of the citation at least 14 days before the return date by certified, registered or ordinary first class mail addressed to all interested persons who have not assented in writing or their attorney if the appearance is by attorney or the interested person requested that notice be sent to the attorney at the person's office or place of residence, if known; or
>
> "(2) by delivering a copy of the citation to the person being notified personally at least fourteen days before the return date; or
>
> "(3) by publishing a copy of the citation once in a newspaper designated by the register of probate having general circulation in the county where the proceeding is pending or in a newspaper designated by the register of probate in a county identified by the court, the publication of which is to be at least 7 days before the return date.
>
> "(b) The court for good cause shown may provide for a different method or time of giving notice for any return date."

18 Michael also argues that the trustees breached their duty of care by failing to pursue a claim against the trust's attorney under G. L. c. 221, § 51, which provides in full:

> "An attorney at law who unreasonably neglects to pay over money collected by him for and in behalf of a client, when demanded by the client, shall forfeit to such client five times the lawful interest of the money from the time of the demand."

However, this theory of the claim was not asserted in the original trust petition or in the FAC and, therefore, we will not consider it for the first time now. Michael did raise the claim in his proposed second amended complaint, the filing of which was never allowed. However, the allegations of that subsequent pleading cannot be considered in evaluating the correctness of the judge's rulings dismissing the claims of the earlier complaints.

19 Examples of clauses expressly shielding trustees from liability can be seen in many cases, including, for example, Rutanen v. Ballard, 424 Mass. 723, 725, 678 N.E.2d 133 (1997); New England Trust Co. v. Triggs, 334 Mass. 324, 329, 135 N.E.2d 541 (1956); New England Trust Co. v. Paine, 320 Mass. 482, 484, 70 N.E.2d 6 (1946); Passero, 92 Mass. App. Ct. at 81, 81 N.E.3d 814; Marsman v. Nasca, 30 Mass. App. Ct. 789, 791, 573 N.E.2d 1025 (1991).

20 Section 66 of St. 2012, c. 140, provides:

> "(a) Except as otherwise provided in this act:
>
> "(1) this act shall apply to all trusts created before, on or after the effective date of this act;
>
> "(2) this act shall apply to all judicial proceedings concerning trusts commenced on or after the effective date;
>
> "(3) an action taken before the effective date of this act shall not be affected by this act.
>
> "(b) If a right is acquired, extinguished or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of this act, that statute shall continue to apply to the right even if it has been superseded."

21 Indeed, the FAC appears to acknowledge that those items were part of the estate.

22 We offer no opinion as to whether the terms of the trust would, in fact, shield its res from being counted for Medicaid eligibility, see generally Guilfoil v. Secretary of the Executive Office of Health & Human Servs., 486 Mass. 788, 162 N.E.3d 627 (2021), as that is a matter that is not presented here. The creation of the trust for purposes of Medicaid eligibility is, in the context of the undue influence claim, merely asserted as an example of Lillian's lack of understanding of her affairs when combined with a later will that Michael contends contains inconsistent terms.

23 The trustees' request for appellate attorney's fees pursuant to G. L. c. 215, § 45, is denied.

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103 Mass.App.Ct. 223
Appeals Court of Massachusetts.
Essex.

Dylan JONES
v.
Juliana JONES.

No. 21-P-655
|
Argued September 12, 2022
|
Decided September 6, 2023

**Synopsis**

**Background:** Husband filed complaint for divorce. The Probate and Family Court Department, Essex Division, Theresa A. Bisenius, J., entered a judgment of divorce nisi, and denied wife's subsequent motion to alter or amend the judgment.

**Holdings:** The Appeals Court, Sacks, J., held that:

wife's interest in trust was sufficiently fixed and enforceable under Michigan law to constitute property interest, so as to be included in marital estate for purposes of equitable distribution;

Massachusetts law, and not Michigan law, governed whether wife's indirect interest in certain Michigan real property was includable in marital estate;

wife's interest in assets that were funded with gifts from wife's mother were properly included in marital estate;

due to wife's failure to provide appellate record, Appeals Court could not say that trial court abused its discretion in dividing stock-based assets; and

wife failed to show that trial court abused its discretion in denying her motion to alter or amend to take tax consequences into account.

Affirmed.

**Procedural Posture(s):** On Appeal; Petition for Divorce or Dissolution; Motion to Set Aside, Alter, or Modify a Decree.

**88 Divorce and Separation, Division of property, Amendment of judgment. Trust, Irrevocable trust, Beneficiary, Distribution, Trustee's discretion, Vested interest. Gift. Value.

COMPLAINT for divorce filed in the Essex Division of the Probate and Family Court Department on March 2, 2017.

The case was heard by Theresa A. Bisenius, J.

**Attorneys and Law Firms**

Carolyn Van Tine, for the wife.

W. Sanford Durland, III, for the husband.

Present: Desmond, Sacks, & D'Angelo, JJ.

**Opinion**

SACKS, J.

*224 Juliana Jones (wife) appeals from an amended judgment of divorce nisi (divorce judgment), issued by a judge of the Probate and Family Court after a three-day trial in September 2019, that, among other things, equally divided the marital estate between her and Dylan Jones (husband). The wife argues that it was error to include in the marital estate for purposes of equitable distribution under G. L. c. 208, § 34, her interests in the following assets that originated in gifts from her mother: (1) the Juliana Jones Irrevocable Trust (JJIT or trust); (2) certain real property in Michigan; and (3) a particular certificate of deposit issued by UBS Financial Services Inc. (UBS CD). She argues that her interest **89 in the JJIT is too speculative to constitute marital property, and she contends that all three assets were gifts to her and should not have been treated as marital property. The wife also argues that the judge, in determining the amount the wife was required to pay to the husband to offset the property she retained as part of the equitable distribution, abused her discretion by not accounting for market fluctuations and tax consequences, as the wife requested in her motion to alter or amend the original judgment of divorce nisi. We affirm the amended judgment.

Background. We summarize the trial judge's relevant findings, supplementing them with undisputed facts in the record, and reserving other facts for later discussion. See

Pierce v. Pierce, 455 Mass. 286, 288, 916 N.E.2d 330 (2009). The parties were married in Michigan in August 1998, and the husband filed a complaint for divorce in Massachusetts in March 2017. The parties had two children together during the marriage (born in 1999 and 2001). During the marriage, both parties were employed outside the home, and they contributed equally to raising the children.

The wife's mother made a variety of financial gifts and contributions throughout the years, including, but not limited to, (1) settling a trust for the wife's benefit (the JJIT), (2) gifting substantial funds that were deposited into the UBS CD, and (3) granting the wife a ninety-nine percent interest in a limited liability company (PHR II) that holds title to the marital home and a one-third interest in real property located in Michigan. The wife's mother played a significant role in shaping the marital lifestyle and financial expectations:

> ***225** "The [wife's mother] showered the family with gifts, whether monetary or experiential. [She] created a limited liability company which purchased the marital home and paid for its associated real estate taxes and major repairs/renovations. The parties did not have to budget to meet those expenses and instead put those funds towards frequent travel, summer camp and a lifestyle they would not have otherwise been able to afford. The wife always knew that there was additional money available to meet the family's needs and whims, which she used to supplement their lifestyle. But for [the wife's mother's] generosity and this money, the parties would not have been able to maintain the lifestyle they did on their income from employment alone. [The wife's mother] gifted the funds during the marriage and the family enjoyed that lifestyle throughout the marriage. This was not a situation where, as the wife attempted to maintain, the funds were completely segregated and never accessed by the parties."

The parties "contributed to retirement only minimally, likely due to [the] wife's anticipated inheritance and the significant gifts the parties received during the marriage."[1] Similarly, the judge found that the parties "did not save sufficiently during the marriage" to pay the children's college costs. The judge emphasized that the financial accounts in the wife's name were "utilized throughout [the] marriage ... [and] were woven into the fabric of the marriage." The judge determined that, "[g]iven the length of the marriage and the parties' equal contribution, it [was] not equitable for these assets to be excluded from the marital estate."

****90** Neither party requested alimony, and the judge found that "in lieu of alimony, an assignment of the marital estate will enable each party to support themselves and their children, while maintaining the marital lifestyle." To that end, the divorce judgment provided, in relevant part, that the wife shall (1) retain, among other things, her interests in the JJIT and PHR II; (2) transfer sixty percent of the UBS CD to the husband; and (3) to effectuate an equal division of assets, pay to the husband, "[a]s property division and not as an award of alimony, ... the total sum of $1,173,166.89," over a period of ten years, in annual installments, with interest. The judge explained that "[w]ith the husband's ***226** share of the property division, it [will be] possible for him to maintain the lifestyle of the marriage and reasonable for him to contribute towards college expenses." The present appeal by the wife followed.

Discussion. 1. The JJIT. In 2015, the wife's mother established an irrevocable grantor retained annuity trust (GRAT), a vehicle for transferring money while avoiding Federal gift taxes. See Freedman v. Freedman, 445 Mass. 1009, 1009, 834 N.E.2d 251 (2005). Upon the annuity termination date,[2] the GRAT assets remaining after the payment of the annuity were to be divided into equal shares and placed in separate trusts for the wife and her brother. The judge found that the wife's remainder interest in the GRAT accrued during the marriage and was a "completed gift." In March 2018 (during the pendency of the divorce proceedings), the wife's separate trust (the JJIT) was funded with 22,905 shares of Bank of Nova Scotia common stock from the GRAT. The JJIT is governed by Michigan law and managed by an independent trustee.[3] Funds from the JJIT were used to pay Federal and Michigan State taxes in June 2019; however, at the time of trial in September 2019, the wife had not received any outright distributions from the trust. The judge found that the value of the JJIT was $1,285,263.27, as of July 2019.[4]

One of the central disputed issues at trial was whether the wife's interest in the JJIT was includable in the marital estate for purposes of equitable distribution under G. L. c. 208, § 34. The judge found that although the JJIT is a "discretionary trust, with a spendthrift provision," "the wife's interest in the JJIT is a fixed and enforceable property right" that is includable in the marital estate because the wife is "entitled to the whole trust property," her "share is not susceptible to reduction, ... and the primary intent of the trust is" to benefit the wife. The wife contends that this was error, asserting that

her interest in the JJIT is a mere expectancy and is thus too remote and speculative for inclusion in the marital estate. We are unpersuaded.

***227** "A party's estate for purposes of equitable distribution under G. L. c. 208, § 34, 'includes all property to which a party holds title, however acquired.' " Levitan v. Rosen, 95 Mass. App. Ct. 248, 253, 124 N.E.3d 148 (2019), quoting ****91** Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105, 110, 55 N.E.3d 933 (2016). "Because we are not 'bound by traditional concepts of title or property' in considering whether a particular interest is to be included in the marital estate, we 'have held a number of intangible interests (even those not within the complete possession or control of their holders) to be part of a spouse's estate for purposes of [G. L. c. 208,] § 34' " (citation omitted). Pfannenstiehl, supra at 111, 55 N.E.3d 933. "Whether a trust may be included in the ... marital estate requires close examination of the particular trust instrument to determine whether the interest is a 'fixed and enforceable' property right, ... or 'whether the party's interest is too remote or speculative' to be included." Levitan, supra, quoting Pfannenstiehl, supra at 111-112, 55 N.E.3d 933. "The question turns 'on the attributes' of the specific trust at issue, ... [requiring] evaluation of the facts and circumstances of each case." Levitan, supra, quoting Pfannenstiehl, supra at 112, 55 N.E.3d 933.[5]

a. Attributes of the trust. Our inquiry thus begins by examining the "attributes" of the JJIT. Levitan, 95 Mass. App. Ct. at 253, 124 N.E.3d 148, quoting Pfannenstiehl, 475 Mass. at 112, 55 N.E.3d 933. Although Massachusetts law governs our ultimate determination whether the wife's trust interest may properly be included in the marital estate under § 34, we look to Michigan law when examining the trust to ascertain the nature of the wife's interest therein. See Levitan, supra at 251, 253, 124 N.E.3d 148.[6] "When interpreting the meaning of a trust, [we] must ascertain and abide by the intent of the settlor." In re Miller Osborne Perry Trust, 299 Mich. App. 525, 530, 831 N.W.2d 251 (2013). "[T]he settlor's intent regarding the purpose of the trust's creation and its operation ... [is] determined by examining the trust instrument," and we "must attempt to construe the instrument so ***228** that each word has meaning." In re Kostin Estate, 278 Mich. App. 47, 53, 748 N.W.2d 583 (2008). See Bill & Dena Brown Trust v. Garcia, 312 Mich. App. 684, 694, 880 N.W.2d 269 (2015).

The JJIT contains the following relevant provisions. The wife, who is the sole beneficiary of the JJIT, is entitled to receive two types of distributions: (1) discretionary distributions of trust income and principal that the trustee, in his "sole and absolute discretion, considers to be necessary for the [wife's] best interests and welfare";[7] and (2) a "[m]andatory [d]istribution" of the entire trust corpus that the trustee "shall pay" after the wife's mother's death ****92** (effectively terminating the JJIT).[8] The JJIT grants the wife a power of appointment, allowing her to appoint the trust corpus to the beneficiaries of her will if she were to die before receiving the mandatory distribution. In lieu of "outright distribution[s]" to the wife, the trustee is authorized to instead "expend ... amounts for the [wife's] benefit" to avoid the reach of her creditors and "to give [her] the maximum possible benefit and enjoyment of all of the trust income and principal to which [she] is entitled."

The JJIT also contains two additional provisions designed to avoid the reach of creditors: (1) a spendthrift provision prohibiting assignment of the wife's interest in the trust (except in connection with the exercise of her power of appointment);[9] and (2) a "Postponement of Distributions" provision (postponement provision). The latter provides, in relevant part:

> "Notwithstanding any other provision of the trust, the [t]rustee shall have the power to postpone any principal or ***229** income distribution otherwise required to be made from the trust ... upon or after the ... death of a third person (and to postpone to that extent the termination of such trust which might otherwise be required) if the [t]rustee, in the [t]rustee's sole and absolute discretion, determines that there is a compelling reason to postpone such distribution, such as a beneficiary's serious disability, drug or alcohol abuse, a beneficiary's failure to enter into an appropriate prenuptial agreement, the possibility of divorce, failure to pursue a college education or vocation commensurate with the ability of such beneficiary, potential or pending creditor claims (possibly relating to such distribution), a serious tax disadvantage to such beneficiary (or his or her family) if such distribution were made, or similar substantial cause. Any such postponement of distribution may be continued by such [t]rustee, in whole or in part, from time to time, up to and including the entire lifetime of the beneficiary. While such postponement continues, all of the other provisions previously applicable to such trust shall continue in effect, except that such beneficiary shall only

> receive distributions from time to time of such amounts from such principal and the net income therefrom as the [t]rustee, in the [t]rustee's sole and absolute discretion, deems necessary or appropriate for the best interests of such beneficiary." (Emphases added.)

The wife claims error in the judge's determination that she "will ultimately receive the whole of the trust property," contending that the judge disregarded the broad discretion afforded to the trustee. It is true that the JJIT contains a "discretionary trust provision," Mich. Comp. Laws § 700.7103(d), [10] granting the trustee ****93** "sole and absolute discretion" to make distributions of income and principal "necessary for the [wife's] best interests and welfare," and that, under Michigan law, a beneficiary "has no right to any amount of trust income or principal that may be distributed only in the exercise of the trustee's discretion." ***230** Mich. Comp. Laws § 700.7815(1). See In re Johannes Trust, 191 Mich. App. 514, 517, 479 N.W.2d 25 (1991). See also Levitan, 95 Mass. App. Ct. at 253, 254, 124 N.E.3d 148 ("[i]nterests in discretionary trusts generally are treated as ... too remote for inclusion in a marital estate ... because ... the beneficiary must rely on the trustee's exercise of discretion ... and cannot compel distributions" [citation omitted]). Nevertheless, even if "a trustee's discretion is 'uncontrolled,' " that fact "does not necessarily preclude a trust's inclusion in the marital estate." Id. at 254, 124 N.E.3d 148. Here, moreover, while the trust clearly contains discretionary components, the wife largely ignores the mandatory distribution language and the limits on the trustee's discretion to postpone such a distribution. We turn to the issue of the trustee's discretion regarding the mandatory distribution.

b. Mandatory distribution. The JJIT is not a pure discretionary trust, see Coverston v. Kellogg, 136 Mich. App. 504, 508-510, 357 N.W.2d 705 (1984), because it also provides for a "mandatory distribution" of the entire trust corpus that the trustee "shall pay" to the wife upon her mother's death, see Black's Law Dictionary 1151 (11th ed. 2019) (defining "mandatory" as "[o]f, relating to, or constituting a command; required, preemptory"); Black's Law Dictionary 1653 (defining "shall" as "[h]as a duty to; more broadly, is required to"). See also In re Kostin Estate, 278 Mich. App. at 54, 748 N.W.2d 583 (where trust does not define essential term, "we look to a dictionary definition"). [11]

Notwithstanding this mandatory distribution clause, the wife asserts that "the trustee's discretion includes the power to defeat the [w]ife's interest in the trust by not making any distributions to her." We conclude otherwise. While the trustee does have the "power to postpone" the wife's enjoyment and possession of the mandatory distribution (pursuant to the postponement provision), [12] the trustee does not have the power to divest the wife of her interest in the trust corpus. Compare Black's Law Dictionary 1413 (defining "postpone" as "[t]o put off to a later time"), with Black's Law Dictionary 601 (defining "divestment" as "[t]he ***231** complete or partial loss of an interest in an asset"). Even if the trustee is permitted to postpone the mandatory distribution indefinitely for the wife's "entire lifetime," his power is limited to determining the timing of the mandatory distribution -- but not the wife's ultimate entitlement to it. See ****94** Coverston, 136 Mich. App. at 509-510, 357 N.W.2d 705. The wife retains the power to appoint the trust corpus to the beneficiaries of her estate, even if she dies before the mandatory distribution is made. See id. at 510, 357 N.W.2d 705. [13] The wife's interest in the trust corpus is therefore vested and "fixed." Levitan, 95 Mass. App. Ct. at 253, 124 N.E.3d 148.

c. Enforceability. Moreover, the wife's right to receive the mandatory distribution is "enforceable." Levitan, 95 Mass. App. Ct. at 253, 124 N.E.3d 148. The trustee may postpone the mandatory distribution only for a "compelling reason." The postponement provision lists several circumstances that could qualify as a "compelling reason":

> "[the wife's] serious disability, drug or alcohol abuse, [the wife's] failure to enter into an appropriate prenuptial agreement, the possibility of divorce, [14] [the wife's] failure to pursue a college education or vocation commensurate with [her] ability ..., potential or pending creditor claims (possibly relating to such distribution), a serious tax disadvantage to [the wife] (or ... her family) if such distribution were made, or similar substantial cause."

In short, the trustee may postpone the mandatory distribution to the wife only if he determines that one of the listed compelling reasons (or a "similar substantial cause") exists. While this determination ***232** is left to the trustee's "sole and absolute discretion," the discretion is nevertheless narrower than that afforded to the trustee when making regular distributions. [15] See Restatement (Third) of Trusts § 87 comment a (2007) ("a power is discretionary except to

the extent its exercise is directed by the terms of the trust or compelled by the trustee's fiduciary duties").

Where the trustee's exercise of discretion is governed by a specific standard (sometimes expressed as an "ascertainable standard"[16]), the standard is judicially enforceable and the trustee must adhere to it. See In re Mendelson's Estate, 391 Mich. 706, 711, 220 N.W.2d 33 (1974). See also Mich. Comp. Laws § 700.7801 ("the trustee shall administer the trust ... in accordance with its terms"); **95 Mich. Comp. Laws § 700.7815(1)(c) (trustee's failure to exercise judgment "in accordance with the terms and purposes of the trust" is abuse of discretion);[17] Estate of Weinstein v. United States, 820 F.2d 201, 205 (6th Cir. 1987) (under Michigan law, "trustee must ... exercise his discretion in accordance with any standards set forth in the trust instrument or reasonably inferable from its terms"). And the presence of terms such as "uncontrolled discretion" or "sole discretion" is not inconsistent with the establishment of an enforceable interest. In re Mendelson's Estate, supra. See Estate of Weinstein, supra (same).[18] Here, the requirement that a trustee make a mandatory distribution unless there is a *233 "compelling reason" not to do so provides a standard to guide the trustee, one that courts will enforce, and thus the wife has an enforceable interest.[19] Cf. Matter of the Estate of Kettle, 73 A.D.2d 786, 786, 423 N.Y.S.2d 701 (1979) (under New York law, where trust provided that stock should not be sold in absence of "compelling reason," and trustee sold stock without showing compelling reason, beneficiary successfully brought action against trustee to restore stock to trust).

In summary, the wife is the sole beneficiary (in a closed beneficiary class) of an irrevocable trust; her interest in the trust is not susceptible to reduction or divestment; she is eligible to receive discretionary distributions of income and principal that the trustee deems in her "best interests and welfare," and she may also have payments made on her behalf by the trustee (in lieu of outright distributions); her right to receive a mandatory distribution of the entire trust corpus upon her mother's death is vested and fixed; and she has the power to appoint trust assets to the beneficiaries of her estate if she dies before receiving the mandatory distribution. **96 To the extent that the trustee has the discretion to "postpone" distributions for a "compelling reason," that discretion is subject to judicially enforceable limits.

Upon examining the trust instrument as a whole, see Bill & Dena Brown Trust, 312 Mich. App. at 694, 880 N.W.2d 269, it is apparent that the settlor's intent, and the overriding purpose of the trust, is to benefit the wife rather than "subsequent generations," Levitan, 95 Mass. App. Ct. at 254, 124 N.E.3d 148, and to ensure that she receives "the maximum *234 possible benefit and enjoyment of all of the trust income and principal to which [she] is entitled" by shielding trust assets from creditors.[20] The wife contends that including the trust in the marital estate disregards the settlor's intent for the trust to solely benefit her, because its inclusion indirectly benefits the husband in contravention of the settlor's intent. However, the fact that the trust is primarily intended to benefit the wife undermines her argument that her interest in the trust is too speculative to constitute a property interest for purposes of § 34. See Levitan, 95 Mass. App. Ct. at 254-255, 124 N.E.3d 148 (settlor's primary intent for trust to benefit beneficiary spouse, rather than subsequent generations, weighed in favor of treating spouse's trust interest as property subject to equitable distribution under § 34). Moreover, the settlor's intent to benefit the wife does not prevent the JJIT's inclusion in the marital estate so long as the wife, rather than the husband, retains the trust interest (to avoid running afoul of the spendthrift provision). See id. at 255, 124 N.E.3d 148.

d. Trust case law. The wife's interest in the JJIT shares attributes with other trust interests that our courts have deemed sufficiently fixed and enforceable for inclusion in the marital estate. See, e.g., Levitan, 95 Mass. App. Ct. at 254-255, 124 N.E.3d 148 (wife's trust interest includable in marital estate because she was sole beneficiary, beneficiary class was closed, her share was "not susceptible to reduction," "the 'primary intent' of the trust [was] to provide for the wife rather than for subsequent generations," and although "trustee's discretion [was] not guided by an ascertainable standard, there [was] some degree of predictability built into the trust by virtue of the wife's annual right to withdraw five percent of the trust principal, albeit subject to the spendthrift provision" [citation omitted]); Comins v. Comins, 33 Mass. App. Ct. 28, 30-31 & n.4, 595 N.E.2d 804 (1992) (wife's interest in discretionary trust with ascertainable standard deemed sufficiently certain to include in marital estate where she was sole beneficiary and had power to *235 appoint recipients of trust corpus upon her death).[21]

**97 By contrast, the trust interests that our courts have deemed too remote or speculative for inclusion in the marital estate are readily distinguishable from the trust interest at issue here. See, e.g., Pfannenstiehl, 475 Mass. at 114, 55 N.E.3d 933 (beneficiary husband's "right to distributions ... [was] speculative, because the terms of the trust permit[ted] unequal distributions among an open class that already include[d] numerous beneficiaries, and because his right 'to receive anything [was] subject to the condition precedent of the trustee having first exercised his discretion' in determining the needs of an unknown number of beneficiaries" [citation omitted]); D.L. v. G.L., 61 Mass. App. Ct. 488, 498-500, 811 N.E.2d 1013 (2004) (husband's contingent remainder interest in trust too remote or speculative for inclusion in marital estate because he would receive his share only if he were still alive on April 10, 2011, and his father had died before that particular date).

We therefore conclude that the wife's interest in the JJIT is sufficiently "fixed and enforceable" to constitute a property interest (rather than "too remote or speculative"). Levitan, 95 Mass. App. Ct. at 253, 124 N.E.3d 148, quoting Pfannenstiehl, 475 Mass. at 111-112, 55 N.E.3d 933. Accordingly, the judge permissibly included the JJIT in wife's estate, and assigned it to her, for purposes of equitable distribution under G. L. c. 208, § 34. See Levitan, supra at 255, 124 N.E.3d 148.

2. Michigan real property. The wife argues that the judge should have applied Michigan law in determining whether the wife's $72,633 indirect interest in certain Michigan real property[22] was includable in the marital estate. Under Michigan law, according to the wife, the property was separate from the marital *236 estate and not subject to distribution. The argument misses the mark.

As we have previously stated, the Massachusetts equitable distribution statute, G. L. c. 208, § 34 -- not Michigan law -- governs the property division in this case. Section 34 permits a judge to assign property owned by either spouse "whenever and however acquired," Rice v. Rice, 372 Mass. 398, 400, 361 N.E.2d 1305 (1977), including real property located outside Massachusetts, see id. at 399, 402, 361 N.E.2d 1305 (affirming award of husband's interest in Canadian real property to wife); Rolde v. Rolde, 12 Mass. App. Ct. 398, 399, 425 N.E.2d 388 (1981) (affirming property division that included order requiring wife to convey interest in Maine real property to husband). See also 2A C.P. Kindregan, Jr., M. McBrien, & P.A. Kindregan, Family Law and Practice § 56:4 (4th ed. 2013) ("the power of the court to hold the person in contempt if he or she fails to comply with the order is the ultimate basis of the court's jurisdiction to order an assignment of out-of-state property"). Thus, the wife's indirect interest in the Michigan real property was properly included in the marital **98 estate for the purposes of equitable division.[23]

3. Source of assets. The wife argues that the judge erred by including three particular assets in the marital estate, where those assets originated with the wife's mother, were kept separate from other marital assets, and assertedly were not relied upon by the parties in maintaining their lifestyle during the marriage. The three assets at issue are the wife's interest in the JJIT, the Michigan real property, and the UBS CD.[24] But the wife points to no reason why these assets could not be so included. See Levitan, 95 Mass. App. Ct. at 253, 124 N.E.3d 148 (party's estate for purposes of equitable distribution includes all property to which party holds title, however acquired). Indeed, the judge's inclusion of the three assets in the estate, for potential division, appears unassailable. See Williams v. Massa, 431 Mass. 619, 625, 728 N.E.2d 932 (2000) ("no question that [assets gifted to or inherited by husband from his parents] comprised *237 part of the marital estate for purposes of possible division under G. L. c. 208, [§] 34").

The wife asserts that Williams supports her position. In Williams, however, the judge considered the source of certain assets not for the purpose of determining what to include in the marital estate, but only to determine how to equitably divide that estate. Id. at 626, 728 N.E.2d 932. The wife's reliance on Williams is misplaced.

The wife also suggests that the judge should have treated the three assets as "kept outside the marital partnership by tacit agreement of the parties." Bak v. Bak, 24 Mass. App. Ct. 608, 621, 511 N.E.2d 625 (1987). The judge found, however, that the availability of gifts from the wife's mother, both present and anticipated, allowed the parties to enjoy an otherwise unaffordable lifestyle and to forgo saving for anticipated future expenditures such as retirement. Even if the parties did not actually have occasion during the marriage to

draw upon the three specific assets the equitable division of which the wife now challenges, the judge could reasonably conclude that their existence was "woven into the fabric of the marriage" and enabled a higher current standard of living for both parties. [25]

4. Market fluctuations. The wife argues that the judge abused her discretion by equitably dividing several of the wife's assets without taking into account how market fluctuations in stock prices ****99** could affect the value of those assets. [26] The wife suggests that the judge should have divided those assets by percentage, rather than by using values computed as of a date several months before trial, but which rose by the time of trial and then fell ***238** sharply after the entry of judgment nisi. See generally Gazelle vs. Gazelle, 102 Mass. App. Ct. 764, 766-767, 769, 213 N.E.3d 94 (2023) (determination of appropriate valuation date for marital property left to judge's sound discretion: no error in valuing property as of date of appraisals conducted before trial, notwithstanding fluctuations in value during trial and at time of divorce judgment).

The short answer to this argument is that the wife has not included in the record appendix the proposed judgment using percentage values that she says was submitted to the judge. Her brief cites only to her motion to alter or amend the judgment under Mass. R. Dom. Rel. P. 59(e), and although that motion refers to a previously submitted proposed judgment containing percentages, we do not have the proposed judgment itself. It is "a fundamental and long-standing rule of appellate civil practice" that the appellant, here the wife, has an obligation "to include in the appendix those parts of the [record that] are essential for review of the issues raised on appeal." Shawmut Community Bank, N.A. v. Zagami, 30 Mass. App. Ct. 371, 372-373, 568 N.E.2d 1163 (1991), S.C., 411 Mass. 807, 586 N.E.2d 962 (1992). On the inadequate record the wife has supplied, we cannot say that the judge abused her discretion in declining to follow whatever approach the wife proposed. [27]

5. Tax consequences. Finally, the wife argues that the judge abused her discretion by not considering the adverse tax consequences to the wife of the order to pay the husband $1,173,166.89 over a ten-year period. The wife's motion to alter or amend the judgment requested, among other things, that the judge minimize the tax consequences of the asset sales the wife would have to undertake in order to make the payments to the husband. The judge allowed the motion in some respects but made no amendments to address tax issues.

***239** In dividing marital assets, "where the issue of tax consequences has been raised and the judge has been provided with appropriate evidence in the record, ... the judge should consider the tax consequences arising from a judgment" (citation and quotation omitted). L.L.S. v. J.E.S., 464 Mass. 346, 350, 982 N.E.2d 1160 (2013). "In some circumstances, tax consequence issues may be raised during trial; in others, the issues may be more appropriately raised in a postjudgment ****100** motion to amend the judgment under Mass. R. Dom. Rel. P. 59 (e) ...." Id. at 350-351, 982 N.E.2d 1160. But "[i]f parties do not request the judge to consider particular tax consequences and do not introduce reasonably instructive evidence bearing on those tax issues, the probate judge is not bound to grapple with the tax issues." Fechtor v. Fechtor, 26 Mass. App. Ct. 859, 866, 534 N.E.2d 1 (1989).

Here, the wife's postjudgment motion offered no evidentiary support for her claim that she would be obligated to liquidate assets, and pay corresponding taxes, in order to make the payments to the husband. Her motion did assert that she had already paid all of the taxes due on her assets for the year in which the case was tried (2019), and she asked that her required payment to the husband be reduced by one-half of the amount of those tax payments. But she failed to assert (let alone offer evidence of) what specific amounts she had actually paid in taxes, giving the judge insufficient information with which to amend the judgment.

As for future taxes, she requested in general terms that she "be permitted to transfer assets valued at the yearly payout amounts to [the husband] and he should then be responsible for the taxes associated with any transfer or liquidation." But she failed to specify what taxes she anticipated would need to be paid. This deprived the husband of the information necessary to evaluate the consequences to him of her proposal, and it deprived the judge of the information necessary to determine whether her proposal was equitable. The wife's motion stated that a proposed order was submitted therewith, but she has not included any such proposed order in the record appendix. See Shawmut Community Bank, N.A., 30 Mass. App. Ct. at 372-373, 568 N.E.2d 1163. In these circumstances, the wife has not shown that the judge abused her discretion in denying the motion to alter or amend the judgment to take account of tax consequences.

Amended judgment of divorce nisi affirmed.

All Citations

103 Mass.App.Ct. 223, 218 N.E.3d 85

## Footnotes

1 The wife, for example, reported two individual retirement accounts (IRAs) valued at a total of $30,562.26, but "ha[d] not saved toward retirement in any meaningful way otherwise."

2 The annuity termination date fell on the second anniversary of the date on which the assets were first transferred to the original trust.

3 The trust provides that Michigan law "govern[s] [its] validity, construction and all rights and obligations" set forth therein, and that the trustee "shall have all powers conferred by Michigan law, including all powers granted under Michigan Statutes sections 700.7816 through 700.7819."

4 This figure comprised the market value of the 22,905 Bank of Nova Scotia stock shares ($1,222,668.90) and cash ($62,594.37).

5 "If an interest in a trust is determined after such examination to be speculative or remote rather than fixed and enforceable, and thus more properly characterized as an expectancy, the interest is to be considered under the G. L. c. 208, § 34, criterion of 'opportunity of each [spouse] for future acquisition of capital assets and income.' " Levitan, 95 Mass. App. Ct. at 253, 124 N.E.3d 148, quoting Pfannenstiehl, 475 Mass. at 112, 55 N.E.3d 933.

6 Interpretation of the trust, and the determination whether the wife's interest is includable in the marital estate, are questions of law we review de novo. See Levitan, 95 Mass. App. Ct. at 251-253, 124 N.E.3d 148. See also In re Theodora Nickels Herbert Trust, 303 Mich. App. 456, 458, 844 N.W.2d 163 (2013); In re Reisman Estate, 266 Mich. App. 522, 526, 702 N.W.2d 658 (2005).

7 Article IV, paragraph A, of the JJIT, entitled "Distribution Standard," provides that "[t]he [t]rustee may pay to [the wife] (or apply for [her] benefit) such amounts of trust net income and principal (including all, part or none) ... as the [t]rustee, in the [t]rustee's sole and absolute discretion, considers to be necessary for the [wife's] best interests and welfare .... In making distribution decisions, the [t]rustee may, but shall not be required to, consider [the wife's] other financial resources."

8 Article IV, paragraph B, of the JJIT, entitled "Mandatory Distribution," provides that "[u]pon the death of [the wife's mother], the [t]rustee shall pay to [the wife] ... the entire balance of the trust assets upon the written request of [the wife]."

9 The JJIT's spendthrift provision provides that "[t]o the extent permitted by law, no beneficiary's interest shall be subject to liabilities or creditor claims or to assignment or anticipation. However, this paragraph shall not prevent the exercise of any power of appointment granted in this [trust]." See Mich. Comp. Laws § 700.7103(j) (" 'Spendthrift provision' means a term of a trust that restrains either the voluntary or involuntary transfer of a trust beneficiary's interest"). See also Mich. Comp. Laws § 700.7502.

10 " 'Discretionary trust provision' means a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion and regardless of whether the trust contains

a spendthrift provision, that provides that the trustee has discretion ... to determine [one] or more of the following: (i) [w]hether to distribute to or for the benefit of an individual ... the income or principal or both of the trust"; "(ii) [t]he amount, if any, of the income or principal or both of the trust to distribute to or for the benefit of an individual." Mich. Comp. Laws § 700.7103(d).

11 The Michigan trust code does not provide a general definition for "mandatory distribution." See Mich. Comp. Laws § 700.7103.

12 By its terms, the postponement provision applies, notwithstanding any other trust provision, to all "distribution[s] otherwise required" (including any distributions upon the death of a third person or that would terminate the trust). Although the term "mandatory distribution" is not specifically used in the postponement provision, we think it reasonable to infer that the preceding language regarding an "otherwise required" distribution encompasses the mandatory distribution.

13 Under Michigan law, trust property subject to a testamentary general power of appointment is treated as a property interest reachable by the beneficiary's creditors upon the beneficiary's death. See Mich. Comp. Laws § 556.123(3) ("If a donee has at the time of his or her death a general power of appointment, whether or not he or she exercises the power, the personal representative or other legal representative of the donee may reach on behalf of creditors any interest that the donee could have appointed to the extent that the claim of a creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient").

14 There has not been any postponement here on these or any other grounds. Nor was there any evidence that the wife ever requested, or would need to request, a distribution in order to make any of the payments to the husband required by the amended judgment of divorce. To the extent the "possibility of divorce" provision was intended to preclude the husband from obtaining any of the trust assets themselves, or assets directly traceable thereto, the amended judgment of divorce has not been shown to contravene that intent.

15 We note that the circumstances qualifying as a "compelling reason" set forth in the postponement provision may be temporary in nature or within the wife's control, further limiting the scope of the trustee's power to postpone.

16 The Michigan trust code defines "[a]scertainable standard" as "a standard relating to an individual's health, education, support, or maintenance within the meaning of [§] 2041(b)(1)(A) or 2514(c)(1) of the [I]nternal [R]evenue [C]ode of 1986, 26 [U.S.C. §§] 2041 and 2514." Mich. Comp. Laws § 700.7103(b). See also G. L. c. 203E, § 103 (defining "[a]scertainable standard").

17 Michigan also provides statutory remedies for a trustee's breach of trust. See Mich. Comp. Laws § 700.7901.

18 Despite the discretion conferred on the trustee, we conclude that the JJIT sets forth a judicially enforceable standard with specific parameters guiding the trustee's exercise of discretion. See A. Newman, G.G. Bogert, & G.T. Bogert, Trusts and Trustees § 560 (3d ed. 2010); Restatement (Third) of Trusts § 87 comment d (2007). We note for comparison that in Massachusetts, "even very broad discretionary powers are to be exercised ... with reasonable regard for usual fiduciary principles," and "[a] fair reading of the whole of most trust instruments will reveal a 'judicially enforceable ... standard' for the exercise of even broadly expressed fiduciary powers" (citations omitted). Briggs v. Crowley, 352 Mass. 194, 200-201, 224 N.E.2d 417 (1967) The difference between language conferring "extended discretion" (e.g., "sole and absolute" or "absolute

and uncontrolled" discretion) and language conferring "simple discretion" is "one of degree more than of kind" (quotation omitted). Morse v. Kraft, 466 Mass. 92, 98 n.9, 992 N.E.2d 1021 (2013).

19 In an unpublished decision involving a postponement provision remarkably similar to the postponement provision in the JJIT, the Court of Appeals of Michigan held that the trustee's "power to postpone" could not be invoked in the absence of a "compelling reason," and there were "only limited circumstances ... that would amount to a 'compelling reason' or 'substantial cause' by which the trustee could postpone, but not deny," a distribution. In re Ernest W. Hamady Trust, Nos. 319900, 319901, slip op. at 5-6, 2015 WL 4599486 (Mich. Ct. App. July 30, 2015) (Hamady). In Michigan, "an unpublished opinion has no precedential value," but it may be followed if a court "finds the reasoning persuasive." Zaremba Equip., Inc. v. Harco Nat'l Ins. Co., 280 Mich. App. 16, 42 n.10, 761 N.W.2d 151 (2008). Although we recognize that Hamady is not binding on the Michigan courts or on us, its reasoning is persuasive and, in the absence of published Michigan case law on the specific issue before us, it is the best indication we have of Michigan law on that issue. Cf. Mich. Ct. R. 7.215(C)(1) (2023) (permitting citation of unpublished decisions if party explains reason for citing and relevance of decision).

20 In addition to the spendthrift provision, the postponement provision is clearly designed to shield trust assets from creditor claims. Michigan law permits creditors to reach an undistributed mandatory distribution after the distribution date unless it is subject to the trustee's exercise of discretion. See Mich. Comp. Laws § 700.7507 (allowing creditors to reach undistributed mandatory distributions after distribution date, unless distribution is subject to exercise of trustee's discretion -- even if "[t]he direction is expressed in the form of a standard of distribution," or "[t]he terms of the trust authorizing a distribution use language of discretion and language of direction").

21 See also Lauricella v. Lauricella, 409 Mass. 211, 216-217, 565 N.E.2d 436 (1991) (husband's vested, one-half beneficial interest in trust was includable under § 34 as husband occupied two-family house owned by trust, beneficiary class was closed, and husband was likely to outlive trust's natural termination date and receive share of trust property); S.L. v. R.L., 55 Mass. App. Ct. 880, 883-884 & n.10, 774 N.E.2d 1179 (2002) (wife's one-fifth remainder interests in four trusts were includable in marital estate as wife's interest was fixed at minimum of one-fifth and could increase if certain events occurred); Davidson v. Davidson, 19 Mass. App. Ct. 364, 371-372, 474 N.E.2d 1137 (1985) (husband's remainder interest in father's testamentary trust, which granted trustees "uncontrolled discretion" and contained spendthrift provision, was part of marital estate because husband's remainder interest was fixed at time of divorce, even though value was uncertain).

22 At the time of trial, the wife held a ninety-nine percent interest (apparently transferred to her by her mother) in a Michigan limited liability company, PHR II LLC, which in turn held a one-third interest in another Michigan entity, RJP3 Investment Company, LLC, which in turn held a $220,100 equity interest in an office building and surrounding land in Troy, Michigan. The judge found that the value of the wife's interest in PHR II was $72,633.

23 The judge did not order the interest itself divided or transferred to the husband. The wife retains "all right, title and interest" in the two intermediary entities through which she holds her indirect interest in the property.

24 The UBS CD was funded with a total of $300,000 in gifts from the wife's mother to the wife, which the parties had neither added to nor withdrawn from during the marriage. At the time of trial, the account was valued at $310,683.54.

25 Bak is distinguishable for a second reason. There, a judge left the husband in possession of certain real estate, which had long been used by his family, in part so that the property could serve "as security for the payments of alimony" the husband was ordered to make to the wife. Bak, 24 Mass. App. Ct. at 621, 511 N.E.2d 625. Here, in contrast, neither party requested nor did the judge order alimony. Rather, the judge ordered a property division "in lieu of alimony" that would allow the husband, as well as the wife, to continue to enjoy the standard of living each enjoyed during the marriage. Under § 34, "the court may assign to one party in a divorce proceeding all or part of the separate nonmarital property of the other in addition to or in lieu of alimony." Rice, 372 Mass. at 401, 361 N.E.2d 1305. The Alimony Reform Act of 2011 amended § 34 to expressly direct the court to consider, in addition to other factors, "the amount and duration of alimony, if any, awarded under sections 48 to 55, inclusive." G. L. c. 208, § 34, as amended by St. 2011, c. 124, § 2.

26 The assets at issue are the JJIT, which consists largely of shares of stock in the Bank of Nova Scotia; and PHR II, which the wife's brief asserts is heavily invested in stock in the same bank.

27 We add that the wife has not established that the amended judgment nisi requires the sale at any particular time of any of the wife's assets that are subject to fluctuations in market value. Moreover, from all that appears, such fluctuations may inure to the wife's benefit. At the time any sales are required, it may turn out that fewer shares must be liquidated in order to make the required payment to the husband than if the judgment had awarded him a percentage, rather than a fixed amount, of the value of the assets in question. Finally, the wife misplaces reliance on Baccanti v. Morton, 434 Mass. 787, 752 N.E.2d 718 (2001). That case involved how to divide assets, such as unvested stock options, where their "present valuation is uncertain or impractical." Id. at 802, 752 N.E.2d 718. There was nothing uncertain about the present value of the bank stock at issue here. The wife's brief furnishes exact share values as of dates prior to trial, at trial, and after the entry of judgment.

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102 Mass.App.Ct. 1101
Unpublished Disposition


Appeals Court of Massachusetts.

Michael T. VELLOTTI & another [1]
v.
Anthony R. VELLOTTI, individually and as trustee, [2] & another. [3]

21-P-838

Entered: November 21, 2022

By the Court (Meade, Wolohojian & Singh, JJ. [4])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** Anthony Vellotti appeals from a judgment, after a bench trial, finding him liable for breach of trust and awarding damages and attorney's fees and costs jointly and severally with John Vellotti, his brother and cotrustee. [5] Anthony raises two primary arguments on appeal. First, he contends that the claims should have been dismissed because the statute of limitations had run. Second, he argues that the terms of the trust, specifically its exculpatory clause, precluded imposition of joint and several liability. We affirm.

Marcella and Michele Vellotti established a trust for the sole benefit of their developmentally disabled son, Michael Vellotti. They named their other two sons, Anthony and John, as trustees. The trust was initially funded by the transfer of the Vellotti family home (property). When that property was later sold in 2006, the net proceeds from the sale (approximately $500,000) were distributed to the trust, with small payments to Marcella, Anthony, and John. In 2014, Anthony told Michael that the trust funds were depleted.

Anthony argues that the claims were time-barred because the complaint was not filed until more than three years after Michael was informed that the trust was depleted. [6], [7] See G. L. c. 203E, § 1005 (b). [8] "[A] cause of action accrues for limitations purposes when a plaintiff knows (or in the case of the discovery rule, should know) facts sufficient to make a causative link between the fiduciary's conduct and the beneficiary's actual injury." Doe v. Harbor Sch., Inc., 446 Mass. 245, 256 (2006). Thus, it is knowledge of the injury, "not knowledge of the consequences of that injury (i.e., a legal claim against the fiduciary), [that] sets the three-year statute of limitations in play." Id. at 256-257.

Although framed as a denial of the defendants' motion to dismiss, the judge's determination "that the statute of limitations did not begin to run in 2014 and the instant action was timely filed" involved both findings of fact and conclusions of law. "We review a judge's findings of fact under the clearly erroneous standard and [her] conclusions of law de novo." Casavant v. Norwegian Cruise Line Ltd., 460 Mass. 500, 503 (2011).

***2** Here, after hearing the evidence, the judge found that, although Michael was informed in 2014 that the trust was depleted, he did not know that the reason the trust was depleted was because of amounts the trustees improperly paid to themselves. The judge also found that, because the trustees never provided Michael with accountings, he had no reason to know about the improper withdrawals from the trust, or to be on notice of them. Moreover, Michael did not have access to the statements or balances for the trust's bank accounts. In the circumstances, we see no error in the judge's conclusion that "[t]he knowledge in question is of breach of trust, not of a trust account balance," and that the notice given to Michael in April of 2014 was not the type of notice contemplated by G. L. c. 203E, § 1005 (b).

We also see no error in the judge's conclusion that the trust's exculpatory clause did not preclude imposition of joint and several liability. The judge found that, from 2006 to 2014, Anthony took a total of $58,000 from the trust, and John

took a total of $83,000, for a combined total of $141,000. Anthony does not contest that the judge could properly find "by clear and convincing evidence, that the trustees acted in bad faith by utilizing over a quarter of the [t]rust corpus for their own benefit, in violation of the settlors' intent in forming the [t]rust, which was to take care of Michael." The evidence also amply supported the judge's finding "that Anthony and John largely acted in concert and by agreement"; on that basis, the judge properly concluded that they could be held jointly and severally liable. See Rutanen v. Ballard, 424 Mass. 723, 731 (1997).

Nonetheless, Anthony argues that, despite these findings, joint and several liability could not be imposed because of the trust's exculpatory clause, which provides that "[n]o Trustee shall be liable or responsible for the acts or omissions of another Trustee." Anthony places great weight on the inclusion of the term "or responsible" as evidencing the settlor's intent to prevent joint and several liability.

Ultimately, though, the language of the exculpatory clause is not material. Massachusetts law is clear that "[a] term of a trust relieving a trustee of liability for breach of trust shall be unenforceable to the extent that it: (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries." G. L. c. 203E, § 1008 (a). See New England Trust Co. v. Paine, 317 Mass. 542, 550 (1945) ("[E]xculpatory provisions ... are generally held effective except as to breaches of trust committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary" [quotation and citation omitted]). The judge found that Anthony and John acted in bad faith, and that finding is supported by the record. As a result, the judge's conclusion that the trust's exculpatory clause could not relieve the trustees of joint and several liability was correct. [9]

Judgment affirmed.

**All Citations**

102 Mass.App.Ct. 1101, 199 N.E.3d 890 (Table), 2022 WL 17086458

**Footnotes**

1 Marcella P. Vellotti, whose claims were dismissed because she was not a proper party to the litigation. See Mass. R. Civ. P. 21, 365 Mass. 767 (1974).

2 Of the Vellotti Trust.

3 John F. Vellotti, individually and as trustee of the Vellotti Trust.

4 The panelists are listed in order of seniority.

5 John Vellotti has not appealed. Because the parties share the same last name, we will refer to them by their first names to avoid confusion.

6 The parties agree that for purposes of the statute of limitations issue, the operative filing date is April 18, 2017, even though the original action was dismissed and later refiled.

7 The defendants' motion to dismiss was denied on November 24, 2017. The defendants renewed the motion shortly before trial. The renewed motion was decided as part of the findings and rulings made by the judge after trial.

8 General Laws c. 203E, § 1005 (b), provides that "a beneficiary may not commence a proceeding against a trustee for breach of trust more than 3 years after the date the beneficiary or a representative of the beneficiary knew or reasonably should have known of the existence of a potential claim for breach of trust."

9 Michael's request for appellate attorney's fees and double costs is denied.

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102 Mass.App.Ct. 825
Appeals Court of Massachusetts,
Middlesex.

Gregory K. SCHWALM & others [1]

v.

Karen SCHWALM, trustee. [2]

No. 22-P-783

Argued May 10, 2023

Decided July 7, 2023

**Synopsis**

**Background:** Remainder beneficiaries of trust, who were trust settlor's adult children from prior marriage, sought declaratory judgment and injunction that trustee of trust, who was settlor's wife who became lifetime beneficiary of trust upon settlor's death, was required to produce certain trust documents and complete inventory and accounting for all trust assets under common law duty of trustees. The Probate and Family Court Department, Middlesex County, Christine D. Anthony, J., allowed trustee's motion to dismiss for failure to state a claim. Remainder beneficiaries appealed.

The Appeals Court, Blake, J., held that trustee did not have any duty to provide trust records to trust's remainder beneficiaries.

Affirmed.

**Procedural Posture(s):** On Appeal; Motion for Declaratory Judgment; Motion for Permanent Injunction; Motion to Dismiss for Failure to State a Claim; Motion for Attorney's Fees.

*619 Trust, Trustee's accounts, Trustee's discretion, Beneficiary. Uniform Trust Code. Declaratory Relief.

COMPLAINT filed in the Middlesex Division of the Probate and Family Court Department on October 8, 2020.

A motion to dismiss was heard by Christine D. Anthony, J.

**Attorneys and Law Firms**

Joshua Looney (Mark Swirbalus also present, Boston) for the plaintiffs.

Patricia Keane Martin, Wellesley, for the defendant.

Present: Meade, Blake, & Brennan, JJ.

**Opinion**

BLAKE, J.

*620 In this case we are asked to determine whether a trustee has a common-law duty to account to remainder beneficiaries who are not yet qualified beneficiaries under G. L. c. 203E, § 103. See Matter of the Colecchia Family Irrevocable Trust, 100 Mass. App. Ct. 504, 180 N.E.3d 988 (2021) (Colecchia). We conclude that the common-law duty to account is limited to the trustee's obligation to maintain books and records, and does not require the trustee to provide that information to nonqualified beneficiaries. Accordingly, we affirm the judgment of dismissal.

Background. On September 13, 2018, William J. Schwalm created the William J. Schwalm Retirement Plan Trust (trust), naming his wife, Karen Schwalm, as trustee. William [3] died on December 29, 2019, at which time Karen became the beneficiary of the trust during her lifetime. The plaintiffs are William's adult children from a prior marriage, Gregory, Paul, and Peter Schwalm (children). The children are the remainder beneficiaries of the trust, and they are entitled to any remaining trust property upon Karen's death. [4] As relevant here, the trust provides that it shall be administered "with efficiency, ... and with freedom from judicial intervention." The trust contains a so-called privacy provision that states the trustee has "sole and absolute discretion, to provide any information to a Permissible Distributee or Qualified Beneficiary" and "may exclude any information that [she] determines is not directly applicable to the beneficiary receiving the information."

Following William's death, the children requested that Karen provide them with certain documents, including statements of accounts and life insurance policies that funded the trust, changes to the beneficiaries of those accounts, an inventory and accounting of the trust, and a copy of the prenuptial agreement between William and Karen. [5] Karen

did not provide the documents. The children filed an "Equity Complaint for Declar[at]ory Judgment" in the Probate and Family Court seeking a declaration that Karen is required to produce the requested information and an injunction requiring Karen to deliver to the children a "complete inventory of and accounting for all assets" in William's name or held for his benefit at the time of his death. Karen filed a motion to dismiss under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), with a supporting memorandum, which the children opposed. After a nonevidentiary hearing, the judge, in a margin notation, allowed the motion to dismiss, stating, "The Trust is clear and unambiguous regarding the Trustee's ***621** discretion to provide information to the Beneficiaries." A judgment of dismissal without prejudice entered. This appeal followed.

Discussion. 1. Declaratory relief. The children argue on appeal that the probate judge erred by implicitly concluding that they were not entitled to a declaratory judgment. Karen contends that the children failed to set forth an actual controversy sufficient to create jurisdiction under the declaratory judgment act. See G. L. c. 231A, § 1. Where, as here, the subject of a motion to dismiss is a claim for declaratory relief, we employ a two-step process. See Buffalo-Water 1, LLC v. Fidelity Real Estate Co., LLC, 481 Mass. 13, 18, 111 N.E.3d 266 (2018). First, we determine whether a claim for declaratory relief is "properly brought." Id. A claim is properly brought when the plaintiff demonstrates "that an actual controversy exists, ... that the plaintiff has legal standing to sue, ... and that all necessary parties have been joined." Id. If a claim is "properly brought," we next determine "whether the facts alleged by the plaintiff in the complaint, if true, state a claim for declaratory relief that can survive a defendant's motion to dismiss." Id. Cf. Caputo v. Moulton, 102 Mass. App. Ct. 251, 258, 204 N.E.3d 1009 (2023). Assuming without deciding that the complaint set forth an actual controversy, we turn to the question whether Karen had an obligation to provide the children with information concerning the trust, and if she did, what information the children are entitled to receive.

2. Duty to account.[6] The Massachusetts Uniform Trust Code (MUTC) became effective July 8, 2012. See St. 2012, c. 140, § 56. Because the MUTC was effective six years before the trust was established, we assume William was aware of the relevant aspects of the MUTC as it related to the trustee's obligations to the trust beneficiaries. See Boston Safe Deposit & Trust Co. v. Wilbur, 431 Mass. 429, 435, 728 N.E.2d 264 (2000), quoting Johnson v. Johnson, 215 Mass. 276, 285, 102 N.E. 465 (1913) ("The testator ... may be fairly assumed to rely upon the law of this Commonwealth for the rules to be applied in the interpretation of his testamentary words").

As relevant here, the MUTC provides that a trustee has a duty to account to qualified beneficiaries. See G. L. c. 203E, § 813 (c). We first must determine whether the children are qualified beneficiaries under the trust. " '[T]he date the beneficiary's qualification is determined' ... under the terms of [a] trust instrument, [is the date] on which an event occurs to trigger a beneficiary's entitlement under the trust." Colecchia, 100 Mass. App. Ct. at 506, 180 N.E.3d 988, quoting G. L. c. 203E, § 103. This principle was reaffirmed in Sacks v. Dissinger, 488 Mass. 780, 788-789, 178 N.E.3d 388 (2021), in which the court held that only qualified beneficiaries are entitled to information about a trust. Here, we conclude, and the parties agree, that the children are not qualified beneficiaries, and they will not be so qualified until Karen's death.

This does not end our analysis, however, as the children contend, under Colecchia, that Karen has a common-law duty to account and therefore they are entitled to the requested documents. In so arguing, they point to our decision in Colecchia wherein we reversed the dismissal of the ***622** plaintiff's claims for a breach of the common-law duty to account for "damages from the trustees' failure to deal properly with the proceeds from the sale of the property." Colecchia, 100 Mass. App. Ct. at 523, 180 N.E.3d 988. However, the property at issue in Colecchia was sold after the settlors died, and therefore after the plaintiff became a qualified beneficiary. See id. at 510, 180 N.E.3d 988.

Also relying on Colecchia, the children point to our recital of the long-standing principle that a trustee has a duty "to keep clear and accurate accounts with respect to the administration of [a] trust[ ]." Colecchia, 100 Mass. App. Ct. at 522-523, 180 N.E.3d 988, quoting Akin v. Warner, 318 Mass. 669, 674, 63 N.E.2d 566 (1945). We do not disagree with the children that the common-law duty to account arises "from the inception of the trust." Colecchia, supra at 522, 180 N.E.3d 988. But that principle requires a trustee only to maintain the books and records of the trust, nothing more. See Akin, supra. Generally speaking, the books and records should reflect what the trust has received and expended and, if

there are beneficiaries in succession, should demonstrate what expenditures are allocated to income and what are allocated to principal. See 3 A.W. Scott & M.L. Ascher, Scott and Ascher on Trusts § 17.4, 1314-1315 (6th ed. 2021). The trustee's duty to provide those records to the beneficiaries is a separate obligation. It does not extend to nonqualified beneficiaries, and Colecchia does not hold otherwise. See G. L. c. 203E, § 813 (c). Had the Legislature intended to include a duty to account to nonqualified beneficiaries, it could have done so. Instead, the MUTC limited the right to receive information to qualified beneficiaries. See Guardianship of B.V.G., 474 Mass. 315, 323, 52 N.E.3d 988 (2016), citing Globe Newspaper Co., petitioner, 461 Mass. 113, 117, 958 N.E.2d 822 (2011) ("Legislature presumably is aware of statutory and common law that governs matter which it is enacting").

The children's interpretation would require us to expand the common-law duty to account despite the limiting language of the MUTC.[7] Much as "[w]e do not read into [a] statute a provision which the Legislature did not see fit to put there, nor add words that the Legislature had an option to, but chose not to include," Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 126, 842 N.E.2d 926 (2006), we also decline, particularly given the Legislature's relatively recent and thorough treatment of the issue in the MUTC, to achieve the same result by simply adopting that provision as a matter of common law. We also note that unlike Massachusetts, many States that have adopted their own version of the Uniform Trust Code have specifically included nonqualified beneficiaries as among the parties that a trustee has a duty to inform and report to. See, e.g., Mich. Comp. Laws § 700.7814(3); N.M. Stat. Ann. § 46A-8-813(C); Va. Code Ann. § 64.2-775(C).

Our holding is also consistent with William's stated goals. In section 9.14 of the trust, William clearly and distinctly advised his beneficiaries of the importance of privacy and carefully laid out the duties of the trustee to "inform, account, and report." See Ferri v. Powell-Ferri, 476 Mass. 651, 654, 72 N.E.3d 541 (2017) (trust instrument construed to give effect to donor's intention). Although divided into a marital trust and a family trust, the primary ***623** purpose of the family trust was "to provide for the well-being of [Karen] and the preservation of principal [was] not as important as the accomplishment of [that] objective." See Gershaw v. Gershfield, 52 Mass. App. Ct. 81, 87, 751 N.E.2d 424 (2001) (where primary purpose of trust instrument was to provide lifetime support for settlor's child, with discretionary disbursement to settlor's grandchildren, grandchildren were not entitled to equal shares despite trust having insufficient resources to fulfill settlor's intent). See also Sacks, 488 Mass. at 788, 178 N.E.3d 388 ("revocable trusts have become such popular will substitutes precisely because they typically remain out of probate, providing greater administrative ease and privacy"). In prioritizing his privacy, William provided Karen with limited obligations toward the children as remainder beneficiaries, to avoid just the situation at issue here.[8]

Judgment affirmed.

**All Citations**

102 Mass.App.Ct. 825, 213 N.E.3d 618

## Footnotes

1 Paul W. Schwalm and Peter J. Schwalm.

2 Of the William J. Schwalm Retirement Plan Trust.

3 As the parties share a surname, we use first names to avoid confusion.

4 Pursuant to Article Six, section 6.0.1, of the trust, Gregory and Paul will each receive 47.5 percent of the remaining trust property, and Peter will receive five percent of the remaining trust property after Karen's death.

5 At oral argument the children conceded that they are not entitled to a copy of the prenuptial agreement under the common-law duty to account.

6 The children complain that the judge dismissed the case with a margin endorsement and without a rationale for her decision, including an analysis of the applicability of Colecchia, 100 Mass. App. Ct. at 522-523, 180 N.E.3d 988. While this would have been helpful to the parties, particularly where the decision was dispositive of the case, our review is de novo and therefore the lack of a rationale is not an issue.

7 Section 813 (c) of the MUTC provides that "[a] trustee shall send an account ... to other qualified beneficiaries who request it, at least annually and at the termination of the trust." G. L. c. 203E, § 813 (c).

8 Each party's request for attorney's fees and costs is denied.

End of Document

102 Mass.App.Ct. 38
Appeals Court of Massachusetts,
Norfolk.

In the MATTER OF the LEO KAHN REVOCABLE TRUST.

No. 21-P-929
|
Argued October 13, 2022.
|
Decided December 12, 2022.

**Synopsis**

**Background:** Widow brought action to remove stepson as co-trustee of her late husband's trust. The Probate and Family Court Department, Norfolk Division, Elaine J. Moriarty, J., granted stepson's motion to dismiss. Widow appealed.

**Holdings:** The Appeals Court, Englander, J., held that:

provision in trust code that set forth a basis for the removal of a trustee based on the consent of trust beneficiaries could be overridden by terms of trust, if trust terms precluded such basis for removal, and

trust provision was ambiguous as to whether provision in trust code that set forth consent of trust beneficiaries as basis for removal of trustees, could be used by widow to remove her stepson as trustee.

Vacated and remanded.

**Procedural Posture(s):** On Appeal; Motion to Dismiss.

**1005 Uniform Trust Code. Trust, Removal of trustee, Revocable trust. Statute, Construction. Probate Court, Trust. Practice, Civil, Motion to dismiss.

PETITION filed in the Norfolk Division of the Probate and Family Court Department on May 5, 2020.

A motion to dismiss was heard by Elaine M. Moriarty, J.

**Attorneys and Law Firms**

Tyler E. Chapman, Boston, for the petitioner.

Mathilda McGee-Tubb, (Catherine S. Lombardo also present), Boston, for the respondent.

Present: Green, C.J., Henry, & Englander, JJ.

**Opinion**

ENGLANDER, J.

*38 This case requires us to consider a trust instrument, and its relationship to the Massachusetts Uniform Trust Code (trust code), G. L. c. 203E, in determining whether the petitioner Emily Kahn, a beneficiary and trustee of the trust, has a claim to remove the other trustees. The sole basis Emily relies upon for removal is **1006 § 706 (b) (4) of the trust code, which states that a court may remove a trustee if "removal is requested by all of the qualified beneficiaries" and, among other requirements, removal "is not inconsistent with a material purpose of the trust."

The respondent trustee, Joseph Kahn, who is the petitioner's stepson, opposes removal, arguing that under the trust he may be removed only "for cause," and that the basis set forth in § 706 (b) (4) does not qualify as a for cause removal. On a motion *39 to dismiss, a Probate and Family Court judge agreed with Joseph [1] and dismissed the petition. We vacate the dismissal because we do not agree, at the motion to dismiss stage, that the trust instrument unambiguously prohibits use of § 706 (b) (4) as a viable basis of removal. We remand for further proceedings.

Background. Leo Kahn, the settlor of the Leo Kahn Revocable Trust (trust) and Emily's late husband, executed the trust instrument in 2006. The trust provides that Emily, Joseph, and Theodore Samet [2] would serve together as trustees upon the settlor's death. Also upon the settlor's death, the trust was to be split into two "shares," the "Spousal Share" and the "Donor's Family Share," with Emily being a lifetime beneficiary of each. [3] Leo passed in 2011, thus triggering Emily's interests in the shares and rendering her, Joseph, and Samet the trustees.

After Leo died, Emily, Joseph, and Samet served as cotrustees for approximately nine years until Emily filed a petition in May 2020, seeking to remove Joseph and Samet as trustees of the spousal share, invoking § 706 (b) (4). That statute provides, as relevant here:

> "The court may remove a trustee if ... removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust and a suitable co-trustee or successor trustee is available."

G. L. c. 203E, § 706 (b) (4).[4]

Joseph moved to dismiss the petition, arguing that the terms of the trust prevent his removal under § 706 (b) (4). Joseph's arguments ***40** relied on two sections of the trust in particular. The first is article 16.06, which provides for removal of any trustee "for cause." Article 16.06 also expressly defines "cause" -- it "shall mean any one of" a list of thirteen reasons. The first twelve reasons, reprinted in the margin,[5] are fairly specific, and generally ****1007** (though not exclusively) relate to some form of trustee disability or malfeasance, such as "dishonesty, fraud, [or] embezzlement." The thirteenth reason, however, is broader; under article 16.06(13), "cause" also includes "[a]ny other reason for which a state court of competent jurisdiction would remove a trustee."

The second removal provision is article 16.11, which will become operative after Emily dies. It provides that

> ***41** "[a]fter the death of the Donor's Spouse, the Beneficiary of a trust share may at any time or from time to time remove any Trustee of such Beneficiary's trust, (other than a Trustee or Successor Trustee named by the Donor), with or without cause ..." (emphasis added).

Article 16.11 thus draws a distinction between removal with cause, and removal "without cause," although it does not further define "without cause."

Joseph argued that articles 16.06 and 16.11, read together, prevented his removal "without cause," since he is a "Trustee named by the Donor"; he further argued that § 706 (b) (4) is a "without cause" form of removal, and that accordingly he cannot be removed under § 706 (b) (4). The judge agreed, and this appeal followed.

Discussion. The question before us, broadly stated, is whether the trust precludes resort to § 706 (b) (4) as a basis for removal of Joseph as trustee. This question, however, must be addressed in two steps: (1) if the trust instrument is inconsistent with a provision of the trust code, does the trust provision prevail, and (2) assuming that the trust provision would prevail in the event of inconsistency, does the trust instrument here prevent resort to § 706 (b) (4)?

As to the first question, the terms of the trust would prevail if it is ultimately determined that the trust precludes removal on bases such as that set forth in § 706 (b) (4). The trust code, G. L. c. 203E, § 105 (b), sets forth the general rule that "[t]he terms of a trust shall prevail over any provision of" the trust code. There are exceptions to this general rule; that is, there are provisions of the trust code that cannot be obviated by the trust instrument -- in particular, the powers granted to courts in G. L. c. 203E, §§ 410-412 and 414-415. Emily claims that § 706 (b) (4) qualifies by analogy for such an exception and cannot be overridden by the trust. See G. L. c. 203E, § 105 (b) (1)-(10).[5] We do not agree with Emily's contention here, because the specific language of § 706 (b) (4) tells us that the trust instrument would prevail if Joseph's reading of the trust is ****1008** correct; § 706 (b) (4) states that it can be invoked only if it is "not inconsistent with a material purpose of the trust." G. L. c. 203E, § 706 (b) (4). Accordingly, if the trust provisions are construed as precluding removal under a basis such as § 706 (b) (4), then such would be a material purpose ***42** of the trust, and § 706 (b) (4) would not apply.[6] See Wilson v. Elkhorn Valley Bank & Trust (In re Fenske), 303 Neb. 430, 438-443, 930 N.W.2d 43 (2019) (settlor's chosen trustee was material purpose of trust, precluding resort to Nebraska's version of § 706 [b] [4]).

That brings us to the second question, which requires construction of the trust instrument to determine whether it precludes removal of a trustee pursuant to § 706 (b) (4). Applying a de novo standard of review, see Poulos v. Poulos, 100 Mass. App. Ct. 40, 43, 175 N.E.3d 406 (2021), we conclude that the trust is ambiguous as to whether removal under § 706 (b) (4) would constitute a "for cause" or "without cause" reason for removal, and that it was therefore error to dismiss Emily's petition for failure to state a claim.

Trust instruments are subject to the same rules of interpretation as written contracts. See Ferri v. Powell-Ferri, 476 Mass. 651, 654, 72 N.E.3d 541 (2017). Thus, in ascertaining whether trust language is clear or ambiguous we "first examine the language ... by itself, independent of extrinsic evidence concerning the drafting history or the intention of the parties" (citation omitted). Id., quoting Bank v. Thermo Elemental Inc., 451 Mass. 638, 648, 888 N.E.2d 897 (2008). An ambiguity exists if, after this examination, the "phraseology can support a reasonable

difference of opinion as to the meaning of the words employed." See [illegible] Bank, supra, quoting [illegible] President & Fellows of Harvard College v. PECO Energy Co., 57 Mass. App. Ct. 888, 896, 787 N.E.2d 595 (2003). When ascertaining ambiguity, "we do not read words in isolation and out of context." [illegible] Hillman v. Hillman, 433 Mass. 590, 593, 744 N.E.2d 1078 (2001). Rather, we review "the trust instrument as a whole." [illegible] Id. In construing the trust, our goal always is to "strive to discern" and give effect to "the settlor's intent." [illegible] Id.

Turning to the language of the trust, article 16.06(13) expressly states that "for cause" includes "[a]ny other reason for which a state court of competent jurisdiction would remove a trustee." On its face, this language includes § 706 (b) (4), which constitutes a ***43** "reason for which" a Massachusetts court "would remove a trustee." Although the trust code was enacted in 2012 and thus the Massachusetts version of § 706 (b) (4) postdates the trust's creation in 2006, we cannot for that reason exclude § 706 (b) (4) from falling within article 16.06's definition of "for cause." For one thing, the trust code (with limited exceptions not implicated here) applies "to all trusts created before, on or after [its] effective date" and "to all judicial proceedings concerning trusts commenced on or after the effective date" ****1009** (emphasis added). See St. 2012, c. 140, § 66(a); [illegible] Matter of the Colecchia Irrevocable Family Trust, 100 Mass. App. Ct. 504, 520 & n.20, 180 N.E.3d 988 (2021). Moreover, and in any event, as of 2006 Massachusetts courts had fairly broad discretion to remove trustees if "such removal [was] for the interests of the beneficiaries," even absent trustee malfeasance. [illegible] G. L. c. 203, § 12, repealed by St. 2008, c. 521, § 26. See also [illegible] Matter of the Trusts Under the Will of Crabtree, 449 Mass. 128, 136, 865 N.E.2d 1119 (2007) ("Dismissal of a trustee need not be predicated on the trustee's dishonest or selfish actions"). [7]

Joseph's response, which the judge adopted, is that removal under § 706 (b) (4) constitutes removal "without cause," and that the trust prohibits removal without cause as to him. The argument is not without force, but the difficulty is that neither § 706 (b) (4) nor the trust instrument label removal for reasons like § 706 (b) (4) as removal "without cause." [8] Section 706 (b) (4) has four requisites that must be met, including that all beneficiaries request removal and that the court find that removal "best serves the interests of all of the beneficiaries." Nothing about those concepts says that the resulting removal is "without cause." True, those grounds are not close analogs of fraud, misuse of trust ***44** assets, or other such common reasons for removing a trustee. But Joseph points us to no authority that defines removal "without cause," or that places § 706 (b) (4) within such a category. [9]

Nor does the trust document establish that the grounds of § 706 (b) (4) are "without cause." As already discussed, in defining "cause" article 16.06(13) is written broadly, and its plain language encompasses § 706 (b) (4). Joseph urges that the first twelve definitions of "cause" in article 16.06 all have to do with trustee suitability, and that accordingly the catch-all in article 16.06(13) must be constrained similarly, to encompass only like reasons for removal. Article 16.06, however, also lists reasons for removal that go beyond the most common forms of trustee unsuitability, to include ****1010** others rooted in prudence or common sense -- for example, "[t]he failure of a corporate trustee to appoint a senior officer with at least five (5) years of experience in the administration of trusts" (article 16.06[9]) or "[t]he relocation by a Trustee away from the location where the Trust operates" (article 16.06[11]). Because article 16.06's list embraces such reasons, its "any other reason" clause also can be read to include other, unenumerated bases for removal recognized in law. [10] We accordingly cannot, on the basis of the trust document alone, exclude the notion that § 706 (b) (4) qualifies as a "for cause" reason under the trust.

We do not agree with Joseph that article 16.11 conclusively ***45** alters the above calculus. See Watson v. Baker, 444 Mass. 487, 491, 829 N.E.2d 648 (2005) ("language of the whole instrument" must be "considered"). Article 16.11 generally permits trustee removal "with or without cause" after Emily's death, but article 16.11 does not apply to those trustees, like Joseph, appointed by the settlor. The implication of this provision, when read together with article 16.06, is that the settlor did in fact intend to differentiate between "for cause" and "without cause" removal. Article 16.11's language, however, does not elucidate what that difference is; it does not define or describe what constitutes "without cause" reasons, or how they differ from the "other reason[s]" encompassed in article 16.06(13).

We conclude, accordingly, that the trust instrument is ambiguous as to whether § 706 (b) (4) can provide a basis for removing Joseph, and that further proceedings are required in which the judge may take evidence, in particular regarding the settlor's intent, to help resolve the ambiguity. See Berman

v. Sandler, 379 Mass. 506, 510, 399 N.E.2d 17 (1980) ("Consideration of ... extrinsic evidence is proper where ... a trust [is] ambiguous"). The judgment is therefore vacated, and the case is remanded to the Probate and Family Court for further proceedings.

So ordered.

**All Citations**

102 Mass.App.Ct. 38, 200 N.E.3d 1004

## Footnotes

1 As the parties and the trust settlor share the same surname, we sometimes refer to them by their first names to avoid confusion.

2 Samet passed away while Emily's petition was pending. The decision below and the parties' briefing focused solely on Joseph's removal. We therefore do the same, referring to Joseph as the sole respondent.

3 The distribution of the assets in the two shares, however, will differ upon Emily's death. Emily can appoint the beneficiaries of the spousal share, with any undesignated portion of the spousal share to be distributed to her children. The other share, the donor's family share, will be divided and allocated "into as many equal shares as there are children of [Leo] then living and children of [Leo] then deceased leaving issue then living, adjusting for advancements."

4 Emily averred in her petition that her two adult daughters are the only other qualified beneficiaries of the spousal share, and that they had assented to Joseph's removal.

5 The first twelve reasons constituting "for cause" removal are:

"1. The legal incapacity of a Trustee.

"2. The willful or negligent mismanagement by the Trustee of the Trust's assets.

"3. The abuse or abandonment of, or inattention to, the Trust by the Trustee.

"4. A federal or state charge against the Trustee involving the commission of a felony or serious misdemeanor.

"5. An act of stealing, dishonesty, fraud, embezzlement, moral turpitude, or moral degeneration by the Trustee.

"6. The use of narcotics or excessive use of alcohol by the Trustee.

"7. The poor health of the Trustee such that the Trustee is physically, mentally, or emotionally unable to devote sufficient time to administer the Trust.

"8. The failure by the Trustee to comply with a written fee agreement or other written agreement in the operation of the Trust.

"9. The failure of a corporate trustee to appoint a senior officer with at least five (5) years of experience in the administration of trusts to handle the trust account.

104 Mass.App.Ct. 1126
Unpublished Disposition

Appeals Court of Massachusetts.

In the MATTER OF the ROBERT A. KANGAS TRUST.

23-P-1261

Entered: October 10, 2024

By the Court (Shin, Grant & Smyth, JJ. [1])

1 The panelists are listed in order of seniority.

MEMORANDUM AND ORDER
PURSUANT TO RULE 23.0

***1** Rosemary A. Portrait appeals from a decree and order of the Probate and Family Court, on the petition of her brother Kurt Kangas, removing her as trustee of the Robert A. Kangas Trust (the trust) and ordering her to file an inventory and accounting of income and assets of the trust. [2] We affirm.

2 Because many of the parties share the same surname, we refer to them by first names.

Background. On July 26, 2012, spouses Robert A. Kangas and Mary V. Kangas executed several documents in furtherance of an estate plan. Mary deeded her interest in their home in Medford (the property) to Robert. Robert established the trust, which was irrevocable, and then deeded the property to the trust. Article 2.1 of the trust document provides that the trust was "for the benefit of ... Mary ... for the term of her life." Article 2.4 provides that upon Mary's death, the trust "shall terminate" and the property and any accumulated income "shall be distributed" to their children Rosemary and Kurt. On the same date, Rosemary signed a trustee's certificate, agreeing to serve as trustee of the trust.

Robert died in August 2012. In 2018, Mary executed a deed (2018 deed) that purported to transfer the property to Rosemary. Mary died in September 2022.

In January 2023, Kurt filed a general trust petition requesting that the Probate and Family Court remove Rosemary as trustee and appoint a successor trustee, order Rosemary as trustee to provide an accounting of the trust property, and declare the 2018 deed void. Rosemary filed an affidavit of objections asserting that that it was Mary's intent that Rosemary should inherit the property. Kurt moved for summary judgment, which Rosemary opposed. [3] After a hearing, a judge entered a decree removing Rosemary as trustee and appointing a successor trustee who was ordered to terminate the trust by selling the property and distributing the proceeds. The judge also ordered Rosemary to file an inventory and accounting of all income and assets of the trust from September 1, 2012, to the date of the accounting. The judge found that the 2018 deed was invalid, as it purported to convey the property that Mary did not own. This appeal ensued. [4]

3 On the day before the summary judgment hearing, Rosemary filed a memorandum in opposition that largely reiterated the arguments in her affidavit of objections. On Kurt's motion, the judge struck the memorandum as untimely filed. Rosemary has moved to expand the appellate record to include that memorandum. Having reviewed the memorandum, we discern no error in the judge's order striking it, particularly because the arguments in it are cumulative of those elsewhere in the record.

4 Pending this appeal, Rosemary moved for a stay of the Probate and Family Court decree, which the judge denied. Rosemary then moved pursuant to Mass. R. A. P. 6 (a), as appearing in 481 Mass. 1608 (2019), for a single justice of this court to issue a stay pending appeal. The single justice denied the motion for a stay, and Rosemary did not appeal from the denial. In those circumstances, we do not

consider any issue as to the denial of a stay pending appeal.

***2** Discussion. We review de novo the judge's decree and order on the petitioner's motion for summary judgment. See Barbetti v. Stempniewicz, 490 Mass. 98, 107 (2022).

Power of successor trustee to sell the property. Rosemary argues that the judge erred in ordering the successor trustee to sell the property. She contends that the judge lacked the authority to do so because the trust document did not authorize a sale of the property once the trust was terminated, and Kurt did not request in his trust petition that the property be sold.

The interpretation of a trust "is a matter of law to be resolved by the court." Ferri v. Powell-Ferri, 476 Mass. 651, 654 (2017). "When interpreting trust language, ... we do not read words in isolation and out of context. Rather we strive to discern the settlor's intent from the trust instrument as a whole." Hillman v. Hillman, 433 Mass. 590, 593 (2001). "[W]here the language of a trust is clear, we look only to that plain language." Ferri, supra.

Rosemary does not dispute that during Mary's lifetime the trustee had the power to sell the property. However, Rosemary argues that Article 2.4 of the trust narrows the trustee's powers after Mary's death, precludes the successor trustee from selling the property and limits the successor trustee to conveying the property to Rosemary and Kurt jointly. We are not persuaded. Reading the trust document as a whole, and giving due weight to all of its language, we conclude that it permits the successor trustee to sell the property.

Article 2 of the trust, titled "Distribution of Trust," explains how the trust is to be distributed. Article 2.4 states that upon Mary's death, "the Trust hereunder shall terminate, and the then-remaining Trust Property, together with accumulated income, if any, shall be distributed to Rosemary ... and Kurt." Merely because Article 2.4 uses the verb "distribute" does not preclude the successor trustee from selling the property. Indeed, Article 2.2 provides:

> "The Trustee shall have the power ... to sell or retain such real estate as may be a part of this Trust Estate as my said Trustee shall deem necessary or advisable[;] ... provided however, my Trustee shall have the power to retain or dispose of any real estate which may be a part of the Trust herein created, which in the sole discretion of the Trustee, is necessary or advisable for the benefit of the beneficiary."

Because Article 2.2 plainly empowers the successor trustee to sell the property, we conclude that the term "distribute" in Article 2.4 encompasses the sale of the property.

Moreover, the trust document provides that the powers of the trustee enumerated in Article 10 are "in addition to and not in limitation of all common law and statutory authority." Thus the trust document incorporates the powers granted to a trustee pursuant to the Massachusetts Uniform Trust Code (MUTC), which became effective on July 8, 2012, less than three weeks before Robert established the trust. St. 2012, c. 140, § 56. See Schwalm v. Schwalm, 102 Mass. App. Ct. 825, 827 (2023). Pursuant to the MUTC, the trustee has "any ... powers appropriate to achieve the proper ... distribution of the trust property," G. L. c. 203E, § 815, including the power to "sell property," G. L. c. 203E, § 816 (2), and, upon termination of the trust, has "the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it." G. L. c. 203E, § 816 (27). We conclude that the successor trustee's powers include the authority to sell the property.

***3** Rosemary misplaces her reliance on T.W. Nickerson, Inc. v. Fleet Nat'l Bank, 456 Mass. 562, 572-574 (2010), and Heard v. Read, 171 Mass. 374, 378 (1898). Those cases predate the enactment of the MUTC. Prior to the MUTC, when a trust terminated, "absent a specific grant of authority in the trust, the trustee ha[d] the power and obligation only to preserve the trust property while winding up the trust and delivering any trust property to the beneficiary." T.W. Nickerson, Inc., supra at 572-573. See also Heard, supra at 377-378 (on termination of a trust, "the trustees ... have ... no power ... to sell the real estate for the purpose of dividing the proceeds"). Because the MUTC grants a trustee broad authority including the power to "sell property," G. L. c. 203E, § 816 (2), those cases are inapposite.

Beyond that, on the facts of this case the MUTC permitted the judge to order the successor trustee to sell the property as a remedy for Rosemary's breach of her duties as trustee. The MUTC provides that, as remedy for breach of trust, a judge may order "any ... appropriate relief." G. L. c. 203E, § 1001 (b) (10). The judge found that Rosemary committed a breach of trust because she "refused to ... distribute the assets" of the trust and "inappropriately advance[ed] ... that the property ... should not be disbursed as required by the terms of the Trust but rather to her in her name individually." We conclude that the judge properly ordered the successor trustee to sell the property and distribute the proceeds.

  

Rosemary argues that the judge could not order the sale of the property because Kurt's general trust petition did not request it. The argument is unavailing. The MUTC provides that a court "may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person." G. L. c. 203E, § 201. Although Kurt's general trust petition did not specifically request the court to order the sale of the property, it did assert that "appointment of a successor Trustee is necessary to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with [the MUTC]." That good-faith administration of the trust plainly encompassed sale of the property. See Matter of Colecchia Family Irrevocable Trust, 100 Mass. App. Ct. 504, 508 (2021) (Colecchia) ("[A] general trust petition may be used to invoke the court's jurisdiction over any matter of trust administration").

Trustee's obligation to provide accounting. Rosemary argues that the judge erred in ordering her to file an accounting of the trust assets. She does not dispute that after Mary's death in September 2022, the trust instrument required her as trustee to provide Kurt with an annual accounting, but she contends that the judge erred in ordering an accounting from the period beginning September 1, 2012, because such an accounting would be unduly burdensome.

As trustee, Rosemary had "a common-law duty to account from the inception of the trust." Colecchia, 100 Mass. App. Ct. at 522. That included the "duty 'to keep clear and accurate accounts' " of the assets of the trust. Id., quoting Akin v. Warner, 318 Mass. 669, 674 (1945). See also Schwalm, 102 Mass. App. Ct. at 622. "The trustee bears the burden of accounting for the assets of the trust and demonstrating that there has been no misappropriation of or failure to preserve them." Colecchia, supra.

Rosemary's duty as trustee to maintain the records of the trust's receipts and expenditures is "a separate obligation" from her duty to provide those records to the beneficiaries. Schwalm, 102 Mass. App. Ct. at 622. Article 6.1 of the trust required Rosemary as trustee to render an accounting of the trust to the beneficiary "annually." And the MUTC required Rosemary as trustee to render an accounting "at least annually and at the termination of the trust" to distributees of trust income or principal and to other qualified beneficiaries who request it. G. L. c. 203E, § 813 (c). See Colecchia, 100 Mass. App. Ct. at 522.

***4** Once Kurt became a qualified beneficiary of the trust upon Mary's death, he was entitled to request an accounting of the trust, as he did in his general trust petition. See Schwalm, 102 Mass. App. Ct. at 622; Colecchia, 100 Mass. App. Ct. at 521-522. The judge did not abuse her discretion in ordering Rosemary to provide that accounting to Kurt for the period dating back to September 1, 2012. Ordering Rosemary to fulfill an obligation she already had at common law, under the terms of the trust, and pursuant to the MUTC is not unduly burdensome. [5]

5 Kurt's request for attorney's fees and costs is denied.

Decree and Order of general Trust Petition affirmed.

**All Citations**

104 Mass.App.Ct. 1126, 245 N.E.3d 1075 (Table), 2024 WL 4455452

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399 Mass. 650
Supreme Judicial Court of Massachusetts,
Suffolk.

H. Burton POWERS, Trustee,
v.
Margaret K. WILKINSON et al. [1]

Argued Oct. 8, 1986.
|
Decided April 16, 1987.

**Synopsis**

Trustee of inter vivos trust brought action seeking declaratory judgment that child born out of wedlock to donor's granddaughter was "issue" of donor's children for purposes of trust. On statement of agreed facts, the Suffolk Division of the Probate and Family Court Department, Mary C. Fitzpatrick, J., reported case to Appeals Court. Upon granting request for direct review, the Supreme Judicial Court, Liacos, J., held that: (1) under law at time donor created trust, "issue" was presumed to exclude nonmarital descendants, in absence of evidence of donor's intent to contrary; (2) rule creating presumption of exclusion did not violate rights of nonmarital descendants to equal protection; but (3) presumption that word "issue" includes all biological descendants, absent any evidence of donor's intent to the contrary, would be established, to apply prospectively only.

Order issued.

Abrams, J., concurred in part, dissented in part and filed opinion, in which Hennessey, C.J., and Nolan, J., joined.

West Headnotes (3)

[1] **Trusts** Cestuis Que Trust

Under law at time donor established inter vivos trust, child born out of wedlock to donor's granddaughter was not "issue" of donor's children for purposes of trust, absent any extrinsic evidence establishing that donor ascribed special meaning to term "issue."

15 Cases that cite this headnote

[2] **Constitutional Law** Private Persons and Entities

Rule of construction that was applicable at time donor created inter vivos trust, that donor's intent was presumed to exclude nonmarital descendants from term "issue," absent extrinsic evidence that donor ascribed special meaning to term, did not violate rights of nonmarital descendants to equal protection; neither donor's action in creating trust nor court's action in applying rules of construction constituted state action. U.S.C.A. Const.Amend. 14.

13 Cases that cite this headnote

[3] **Trusts** Cestuis Que Trust

Absent clear intention of inter vivos trust donor to ascribe special meaning to term "issue," word "issue" must be construed to include all biological descendents; overruling *Fiduciary Trust Co. v. Mishou*, 321 Mass. 615, 75 N.E.2d 3.

9 Cases that cite this headnote

**Attorneys and Law Firms**

***651** ****842** H. Burton Powers (Gerald B. O'Grady, III, Boston, with him), for plaintiff.

Paul B. Sargent, Gloucester, guardian ad litem, for the minor defendants and persons unborn or unascertained.

Before ***650** HENNESSEY, C.J., and WILKINS, LIACOS, ABRAMS, NOLAN, LYNCH and O'CONNOR, JJ.

**Opinion**

LIACOS, Justice.

The trustee of an inter vivos trust brought this action in the Probate and Family Court Department for Suffolk County, seeking a declaratory judgment that a child born out of wedlock to the donor's granddaughter is "issue" of the donor's children for purposes of the trust. The nonmarital child remains illegitimate because her paternity has never been acknowledged and her parents have never intermarried. [2]

****843** The parties named as defendants include all the living beneficiaries of the trust. None has answered, although all have been served with notice. A guardian ad litem (guardian) was appointed to represent the interests of the donor's minor issue, and he has opposed the relief prayed for by the trustee. A guardian ad litem also was appointed to represent the nonmarital child; he has adopted the arguments advanced by the trustee. The parties signed a statement of agreed facts, and the Probate Court judge granted their joint motion pursuant to Mass.R.Civ.P. 64, 365 Mass. 831 (1974), for reservation and report of the case to the Appeals Court. We granted direct appellate review.

***652** The facts agreed are these. On May 7, 1959, the donor established an inter vivos trust that, by its terms, was to be construed according to the laws of the Commonwealth. The trust instrument provided for payment of income to the donor for life, then to her surviving children in equal shares for the duration of their lives, and then to the children's "issue" by right of representation. The indenture of trust also authorized the trustee "to pay to or for the benefit of the children of the Donor and their issue such amounts of principal as the Trustee ... may deem necessary for comfort, maintenance, support and education without reduction of the interest of the recipient in income and principal." The trust is to terminate twenty-one years after the death of the donor's last surviving child, whereupon the trustees are to convey the share of each of the donor's children to that child's issue by right of representation, notwithstanding prior unequal distributions of principal.

The donor died on August 5, 1969. She was survived by one son and two daughters, one of whom still survives, and nine grandchildren, all of whom survive.[3] On July 14, 1973, an unmarried granddaughter of the donor gave birth to a daughter (nonmarital child). The nonmarital child has never been the subject of legitimation, paternity, or adoption proceedings. She has resided with her mother in Vermont, in close proximity to her maternal relatives, who have accepted her as a member of their family circle.

Distributions of principal to the nonmarital child are sought to provide for her support and education. Such distributions were made in the past on joint requests from the child's mother and grandmother, the trustees then being unaware of the child's nonmarital status.[4] It is undisputed that the nonmarital child is illegitimate, both by the law of this Commonwealth and by the law of Vermont, the State of her birth and the only domicil she has known.

The trustee advances several alternative arguments in support of the declaration he seeks.[5] We discuss each in turn.

***653** 1. *The donor's intent.* "It is fundamental that a trust instrument must be construed to give effect to the intention of the donor as ascertained from the language of the whole instrument considered in the light of circumstances known to the donor at the time of its execution." *Groden v. Kelley,* 382 Mass. 333, 335, 415 N.E.2d 850 (1981), relying on *Dana v. Gring,* 374 Mass. 109, 117, 371 N.E.2d 755 (1977), and cases cited. Our review of the trust instrument confirms what is undisputed here, that the instrument itself contains no indication of the donor's intent to use the word "issue" so as to include or exclude nonmarital descendants. Additionally, assuming that evidence of external family circumstances ****844** would be competent, we note that the existence of the nonmarital child was not known to the donor at the time she executed the instrument, the child having been born after the donor's death.

**[1]** In these circumstances, the trustee argues that, absent extrinsic evidence establishing that the donor ascribed a special meaning to the term "issue," her intent "must have been to use [it] in its usual and customary meaning as generally used, meaning biological issue, regardless of legitimacy, 'progeny' or 'offspring,' " citing Webster's New Int'l Dictionary (2d ed. 1947). While we take judicial notice that the dictionary meaning of "issue" does not exclude nonmarital children, and it did not at the time the donor executed her indenture of trust, we know of no legal authority for the proposition that contemporaneous dictionary meanings must be read into the ambiguous words of trust instruments. Additionally, the statutory law of this Commonwealth is not wholly consistent with the dictionary definition of "issue" which the trustee urges upon us. General Laws c. 4, § 7, Sixteenth (1984 ed.), provides: " 'Issue', as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor."[6] The common law rule is squarely contrary to the trustee's position. We have stated that "[t]he word issue ... must be interpreted against a background ***654** of statutory phraseology and construction which has remained wholly consistent for well over a century." *Fiduciary Trust Co. v. Mishou,* 321 Mass. 615, 635, 75 N.E.2d 3 (1947). Dealing with the question whether an illegitimate child was included within the expression, "the issue of my deceased children," we stated

  

further: "We can hardly regard this as an open question in this Commonwealth. It cannot be doubted that by the common law of a few generations ago such words as issue, children, descendants, and so forth as descriptive of a class in a grant, devise, or legacy, in the absence of anything indicating a contrary intent, meant only persons of the class who were born in lawful wedlock." *Id.* at 634, 75 N.E.2d 3. This rule of construction was operative at the time the trust in question was executed, and it concludes the question of the donor's intent. Because nothing indicates an intent by the donor to include nonmarital issue, precedent requires us to presume that the donor intended, in accordance with the law extant at the time the instrument was executed, to exclude nonmarital descendants from the class denoted by her use of the word "issue."

2. *Equal protection analysis.* The trustee argues that application of the rule of construction stated in *Mishou, supra,* would violate the rights of the nonmarital child to equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. [7] We disagree.

It is the trustee's contention that the rule of construction as to a donor's intent discriminates against nonmarital children because, taken in tandem with G.L. c. 190, § 7 (1984 ed.) (see note 2 *supra* ), it impermissibly excludes from trust participation as "issue" all nonmarital children not expressly included unless their parents have intermarried. We do not view this argument as persuasive. The guarantees of the equal protection clause of the Fourteenth Amendment are directed solely to limiting the actions of government. See *Commonwealth v. Hood,* 389 Mass. 581, 584-586, 452 N.E.2d 188 (1983), and cases cited.

***655** ****845** The trustee argues, nevertheless, that the rule of construction set forth in *Mishou, supra,* is subject to scrutiny under the Fourteenth Amendment because the United States Supreme Court has said that "[s]tate action ... refers to exertions of state power in all forms." *Shelley v. Kraemer,* 334 U.S. 1, 20, 68 S.Ct. 836, 845, 92 L.Ed. 1161 (1948). We do not believe that the holding in *Shelley* is relevant here. "In *Shelley,* neighboring property owners sought to enforce a private, racially restrictive agreement to prevent the sale of a house by a white seller to a black purchaser. The Court held that judicial enforcement of the agreement constituted State action." *Hood, supra,* 389 Mass. at 588, 452 N.E.2d 188. However, "[t]he Supreme Court has not developed *Shelley* beyond these facts...." *Id.*

**[2]** *Shelley* is inapposite on its facts. In *Shelley,* the Court had no doubt that State action was involved because it was clear that "but for the active intervention of the state courts, supported by the full panoply of state power, [the black] petitioners would have been free to occupy the properties in question without restraint." *Shelley, supra,* 334 U.S. at 19, 68 S.Ct. at 845. State action was found because judicial enforcement of the "private law" of restrictive covenants effectively barred blacks from participation in a significant segment of the housing market. In *Mishou,* the court reaffirmed a definition for a word whose meaning, as judicial experience repeatedly showed, would remain ambiguous without judicial clarification. Under the court's ruling, donors and testators enjoyed freedom to use the word "issue" without explication, confident that we would enforce the instrument containing it to exclude nonmarital children. Similarly, donors have been free to modify the word by stating an additional, contrary intent, in which case we have enforced the instrument to honor that intent. When "issue" is used in a legal instrument, with or without explication, it is the donors and testators who act, not this court nor any other arm of the State. [8] Thus, we hold ***656** that State action is not involved, nor is the equal protection clause of the Fourteenth Amendment implicated, when courts apply rules of construction to wills or trust instruments. Accord *Hanson v. Markham,* 371 Mass. 262, 265, 356 N.E.2d 702 (1976); *Boston Safe Deposit & Trust Co. v. Fleming,* 361 Mass. 172, 179 n. 7, 279 N.E.2d 342 (1972). [9] Therefore, no constitutional rights ****846** would be violated if the rule stated in *Mishou* were to be applied in this case. [10]

***657** 3. *Obsolescence of the rule of construction.* The trustee argues that the *Mishou* rule should not be applied because it is no longer appropriate to do so in light of current social mores and modern legal developments. [11]

The *Mishou* decision was handed down almost forty years ago. In the interim, this court does not appear to have reconsidered the utility or propriety of its rule that, absent clear expressions of a contrary intent, the term "issue" must be read to exclude nonmarital descendants. Indeed, the *Mishou* court itself did not state the principles underlying this rule of construction; rather, it merely treated the applicability of the rule as a closed question in this jurisdiction. *Mishou,*

*supra,* 321 Mass. at 634, 75 N.E.2d 3. Nor was the rationale for the rule subjected to judicial scrutiny in any of the decisions relied upon in *Mishou.* See *Mishou, supra,* at 634-635, 75 N.E.2d 3, citing *Green v. Kelley,* 228 Mass. 602, 606, 118 N.E. 235 (1917); *Sanford v. Marsh,* 180 Mass. 210, 211, 62 N.E. 268 (1902); *Hayden v. Barrett,* 172 Mass. 472, 474, 52 N.E. 530 (1899); *Adams v. Adams,* 154 Mass. 290, 292, 28 N.E. 260 (1891).

All these decisions treat the rule as sound because it was well settled in English and American law. We must turn to a ***658** decision written in 1827 for what appears to be the most recent judicial airing of the reasons for the rule:

> "[T]here seems to be no maxim of [the common] law less questionable than that a bastard is *filius nullius*.... No doubt the law [barring illegitimates from inheriting as next of kin] was so established on higher principles than the interest of individuals. It was to render odious illicit commerce between the sexes, and to stamp disgrace on the fruits of it; and though the punishment usually falls upon the innocent, yet it was thought wise to prohibit them from tracing their birth to a source which is deemed criminal by law and by religion. It is enough that ... the authors of this misfortune have the power to repair it by will or by gift; the law will not interpose."

*Cooley v. Dewey,* 4 Pick. 93, 94 (1827) (Parker, C.J.).

It is questionable whether the attitudes expressed by Chief Justice Parker were ****847** representative even of his own era; within two years after *Cooley,* the Legislature had mitigated the nonmarital child's status as filius nullius by enacting a statute which made such children heirs of their mothers for purposes of intestate succession. See St.1828, c. 139, codified at G.L. c. 190, § 5 (legislating, as well, a result contrary to the primary holding in *Cooley, supra); Monson v. Palmer,* 8 Allen 551, 554-555 (1864).

Moreover, while the "source" of nonmarital birth is still deemed criminal in this Commonwealth, see G.L. c. 272, § 14 (1984 ed.) (adultery), and § 18 (1984 ed.) (fornication), "[i]t seems beyond dispute that the statutes defining or punishing [these] crimes ... have fallen into a very comprehensive desuetude." *Fort v. Fort,* 12 Mass.App.Ct. 411, 417, 425 N.E.2d 754 (1981). But see *Commonwealth v. Stowell,* 389 Mass. 171, 449 N.E.2d 357 (1983) (upholding constitutionality of G.L. c. 272, § 14). In this context, we question the practicality of trying to enforce morality or to preserve traditional family values by rules of construction ***659** embedded in the law of trusts. Indeed, the quixotic nature of any such attempt is suggested by the facts that, while the *Mishou* rule has been in effect, the nationwide number of nonmarital births yearly had risen to 715,200 by 1982, and the rate of such births had more than tripled since 1960. United States Department of Commerce, Statistical Abstract of the United States 62 (106th ed. 1986).

The justice of punishing innocent children for the actions of their parents has long been questioned. Indeed, doubt was expressed in several decisions relied on by the court in *Mishou.* "Removal of the obstacles to the legitimation of innocent children, who have no responsibility for the circumstances of their birth, and thus ameliorating some of the apparent harshness of the common law, has been the progressive policy of our law as illustrated by statutes and decisions." *Green, supra,* 228 Mass. at 605, 118 N.E. 285. See *Gritta's Case,* 236 Mass. 204, 207, 127 N.E. 889 (1920) (holding nonmarital offspring not "children" within the meaning of the Workmen's Compensation Act, but "dependents" where they were members of an employee's family). Acceptance of the idea that justice requires nonpunitive treatment of nonmarital children is reflected in numerous Federal statutes that, over the years before and since *Mishou,* have guaranteed more nearly equal treatment.[12] Similarly, ****848** although not controlling here, ***660** both Federal and State decisions of more recent years give witness to a reconsideration of the harshness of the law's treatment ***661** of illegitimate children. See notes 8, 9, and 11 *supra.* Finally, we note that our own Legislature recently has declared in another context: "Children born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children." G.L. c. 209C, § 1, inserted by St.1986, c. 310, § 16.

  

Thus, if the rule excluding nonmarital children from judicial construction of the word "issue" was not archaic when this court reiterated it in 1947, it has become so. We cannot say that the attitudes underlying that rule, as expressed in *Cooley, supra,* are so widely held in this Commonwealth today as to warrant our imputation of them to donors and testators who use the word "issue" without explication. Rather, we think that the following sentiment, voiced by the United States Supreme Court almost fifteen years ago, comes much nearer to the mark:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual-as well as an unjust-way of deterring the parent." (Footnote omitted.)

*Weber v. Aetna Casualty & Sur. Co.,* 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed.2d 768 (1972).

[3] Ours is an era in which logic and compassion have impelled the law toward unburdening children from the stigma and the disadvantages heretofore attendant upon the status of illegitimacy. Consequently, we think it more appropriate henceforth to place the burden of exclusion on those donors who insist on it. Therefore, we overrule so much of *Mishou* as depends ***662** upon the traditional rule of construction; [13] and we conclude that the word "issue," absent clear expressions of a contrary intent, must be construed to include all biological descendants. [14]

A crucial question remains concerning the applicability of the rule we announce today to the parties at bar. "[T]he general rule is in favor of retroactive application of a change in decisional law, ... [but] [p]rimarily because of concern for litigants and ****849** others who have relied on existing precedents, judicial changes in Massachusetts contract and property law have been given only prospective effect." (Citations omitted.) *Payton v. Abbott Labs,* 386 Mass. 540, 565, 437 N.E.2d 171 (1982), and cases cited. See also *Sullivan v. Burkin,* 390 Mass. 864, 870-871, 460 N.E.2d 572 (1984) (statutory interpretation allowing surviving spouse to reach assets placed in inter vivos trust by deceased spouse held to apply only prospectively). The rule stated in *Mishou* appears to have been controlling in the Commonwealth for 150 years or more. As was said in *Sullivan, supra,* "The rule of *Kerwin v. Donaghy* [317 Mass. 559, 59 N.E.2d 299 (1945) ] has been adhered to in this Commonwealth for almost forty years.... The Bar has been entitled reasonably to rely on that rule in advising clients. In the area of property law, the retroactive invalidation of an established principle is to be undertaken with great caution." ***663** We conclude, then, that the new rule of construction applies only to trust instruments executed after the date of this opinion. [15]

The case is remanded to the Probate and Family Court for Suffolk County for entry of a declaration that, under the law applicable when the trust instrument was executed, the unexplained word "issue" is presumed to encompass only lawful lineal descendants of the donor.

*So ordered.*

ABRAMS, Justice (concurring in part and dissenting in part, with whom HENNESSEY, C.J., and NOLAN, J., join).

I join in the court's decision to announce the new rule of construction which defines "issue" to include all biological descendants regardless of the marital status of the parents, overruling the rule of construction of *Fiduciary Trust Co. v. Mishou,* 321 Mass. 615, 75 N.E.2d 3 (1947). I cannot agree, however, with the court's determination that the new rule not apply in this case. [1] There are two compelling reasons to apply the rule announced in a decision to the litigants involved.

First, by merely announcing the new rule without applying it, the court's action amounts to no more than dictum. *Myers v. Drozda,* 180 Neb. 183, 141 N.W.2d 852 (1966). *Kojis v. Doctors Hosp.,* 12 Wis.2d 367, 373-374, 107 N.W.2d 131 (1961). *Molitor v. Kaneland Community Unit Dist. No. 302,* 18 Ill.2d 11, 28, 163 N.E.2d 89 (1959), cert. denied, ***664** 362 U.S. 968, 80 S.Ct. 955, 4 L.Ed.2d 900 (1960). Note, The Retroactivity of Minnesota Supreme Court Personal Injury Decisions, 6 Wm. Mitchell L.Rev. 179, 184 (1980); Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U.L.Rev. 631, 638 (1967).

  

The court is commenting on an issue which is irrelevant to the disposition of the case. Currie, Suitcase Divorce in the Conflict of Laws: *Simons, Rosenstiel,* and *Borax,* 34 U.Chi.L.Rev. 26, 61 (1966).

Second, and more importantly, prospective overruling results in excluding the particular plaintiff and has the potential to remove any incentive to bring challenges to existing precedent because the appellant is deprived of the benefit for the work and expense involved in challenging the old rule, which is admittedly erroneous. See *Molitor, supra* at 28, 163 N.E.2d 89; *Myers, supra,* 180 Neb. at 187, 141 N.W.2d 852; *Kojis, supra,* 12 Wis.2d at 373, 107 N.W.2d 131. To encourage parties in future cases to raise issues which reform and rid the law of antiquated legal doctrines, ****850** they should be given the benefit of the new rule. Schaefer, *supra.*

Courts in other States have applied a new rule or a change in the law to the plaintiff challenging the rule. See, e.g., *Nga Li v. Yellow Cab Co. of Cal.,* 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226 (1975); *Dawson v. Olson,* 94 Idaho 636, 639-640, 496 P.2d 97 (1972); *Barker v. St. Louis County,* 340 Mo. 986, 104 S.W.2d 371 (1937); *Myers v. Drozda,* 180 Neb. 183, 141 N.W.2d 852 (1966).[2] Moreover, where the issue has arisen either explicitly or implicitly in the various contexts, from negligence and charitable immunity[3] to estate and family law to the property ***665** rules dealing with the problem of surface water, courts have applied the new rule to the appellant. See *In re Marriage of Brown,* 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561 (1976) (community property); *Nga Li, supra* (negligence); *Matter of Hoffman,* 53 A.D.2d 55, 385 N.Y.S.2d 49 (1976) (wills' construction); *State v. Deetz,* 66 Wis.2d 1, 224 N.W.2d 407 (1974) (common enemy rule of property); *Kojis, supra* (charitable immunity). Courts apply the new rule to the case at issue, in part because of the public policy consideration of encouraging litigants to initiate challenges which bring about needed changes in the law.[4] See *Nga Li, supra,* 13 Cal.3d at 829-830, 119 Cal.Rptr. 858, 532 P.2d 1226; *Molitor, supra; Barker, supra,* 340 Mo. at 1003, 104 S.W.2d 371.

The court's primary concern in declining to apply the rule announced today to the parties here appears to be the reliance interest of the Bar.[5] I agree with the court that in the areas of contract and property law "retroactive invalidation of an established principle is to be undertaken with great caution." *Sullivan v. Burkin,* 390 Mass. 864, 871, 460 N.E.2d 572 (1984). But, by applying the decision retroactively to the parties before the court, the court does not sacrifice the caution so important in the development of new rules in this area of the law.

The court relies on *Sullivan, supra,* to conclude that the new rule of construction is not determinative of this case. In *Sullivan,* ***666** a widow sought a determination that the assets held in an inter vivos trust were part of her husband's estate for purposes of establishing her statutory share. The old rule did not permit the surviving spouse to reach assets in an inter vivos ****851** trust. It is clear that the husband in *Sullivan,* through the organization of his affairs and the contents of his will, seemed to be fully aware of this old rule and explicitly sought its protection to prevent his wife from obtaining any of his assets. Therefore, due to the reliance on this old rule, the court denied the widow relief, although the rule was altered prospectively to permit a surviving spouse to reach assets in an inter vivos trust. *Id.*

Unlike the situation in *Sullivan,* the intent of this donor in 1959 when she established this trust is far from clear. In fact, it is likely that the donor did not have any "intention at all with respect to the question facing us in this case."[6] *Boston Safe Deposit & Trust Co. v. Fleming,* 361 Mass. 172, 186, 279 N.E.2d 342 (Braucher, J., dissenting), appeal dismissed, 409 U.S. 813, 93 S.Ct. 46, 34 L.Ed.2d 69 (1972). Similarly, the New York Appellate Division, in facing an analogous question, noted that it cannot "be said with any degree of assurance that at the time [the testatrix] executed her will she was provided with an explanation of the word 'issue' which appeared on the typewritten pages of that document." *Matter of Hoffman,* 53 A.D.2d 55, 63, 385 N.Y.S.2d 49 (1976). See *Matter of the Estate of Best,* 66 N.Y.2d 151, 153, 495 N.Y.S.2d 345, 485 N.E.2d 1010 (1985) (accepting *Hoffman* definition of issue to include legitimate and illegitimate children), cert. denied sub nom. *McCollum v. Reid,* 475 U.S. 1083, 106 S.Ct. 1463, 89 L.Ed.2d 720 (1986).

Similarly, the Wisconsin court, in carving out an exception to the traditional rule of construction if the illegitimate child is a member of the family circle, noted that once statutes and legal presumption are put aside, there is nothing in the record to indicate that the donor would not have intended to include this particular child.[7] ***667** *In re Trust of Parsons,*

56 Wis.2d 613, 617, 203 N.W.2d 40 (1973). Because the donor's intent cannot be discerned from the trust instrument and the court today seeks to "unburden [ ] children from the stigma and the disadvantages heretofore attendant upon the status of illegitimacy," *ante* at 848, I would not perpetuate the harshness of the traditional rule of construction to deny this nonmarital child [8] participation in the donor's trust.

By giving relief in this case, the court does not harm the reliance interest of the Bar. [9]

It is hard to understand why the Bar's reliance should come before the interests of the child, and the reason articulated by the court does not compel such an unjust result. In fact, the court, by not granting relief in this case removes the incentive of the Bar to change rules which are no longer useful or relevant. The potential negative ramifications which flow from the court's decision today on the incentive of attorneys to challenge outmoded legal doctrine may be avoided by granting relief in this case. Although the court criticizes the injustice of the law's treatment of nonmarital children in the past, claiming that "[o]urs is an era in which logic and compassion" ****852** dictate that nonmarital children should no longer be stigmatized, it imposes punitive treatment on this particular nonmarital child. The cruel irony of the court's decision is that not only does this child not receive the benefit of the change she brought about in the law, but, prior to this decision, she was receiving payment from the trust and now, as a result of the decision, she can no longer receive these payments. I respectfully dissent on the failure of the court to apply the new rule to this case.

**All Citations**

399 Mass. 650, 506 N.E.2d 842, 55 USLW 2637

## Footnotes

1 Polly Patscheck, Lucy Patscheck (minor), Bruce R. Kent, Polly K. Campion, Kieren J. Campion (minor), Ashley K. Campion (minor), Timothy R. Kent, Nicholas Kent, Janet T. Ancell, Andrew Ancell (minor), Aaron Ancell (minor), Olivia Gay, Susan Tarshis, Julie Elizabeth Tarshis (minor), Andrew Tarshis, and Rosamond K. Sprague.

2 The statute governing legitimacy in this Commonwealth is G.L. c. 190, § 7 (1984 ed.), which reads in relevant part: "An illegitimate person whose parents have intermarried and whose father has acknowledged him as his child or has been adjudged his father under chapter two hundred and seventy-three shall be deemed legitimate...."

3 The statement of agreed facts was filed on October 9, 1985. The status of the trust's beneficiaries as "surviving" or "deceased" was current as of that date.

4 The grandmother of the nonmarital child died on March 26, 1985. At that time, the child's mother succeeded (together with each of her siblings) to a one-twelfth share of the income from the trust.

5 The trustee raised several of these arguments in an earlier case involving other parties, but we reach these questions for the first time. See *Powers v. Steele,* 394 Mass. 306, 309 n. 5, 475 N.E.2d 395 (1985).

6 The trustee argues that G.L. c. 190, § 5 (1984 ed.), must be construed to create equal status for persons born out of wedlock where, as here, the nonmarital child claims through a female beneficiary. In pertinent part, § 5 reads as follows: "An illegitimate person is heir of his mother and of any person from whom his mother might have inherited, if living...." It is undisputed that the trust at issue here involves a gift, not an inheritance. The nonmarital child is not her mother's heir until the mother's death. *First Agricultural Nat'l Bank v. Shea,*

  

351 Mass. 1, 3, 217 N.E.2d 779 (1966). A similar argument was rejected in *Fiduciary Trust Co. v. Mishou, supra,* 321 Mass. at 635-636, 75 N.E.2d 3; thus, we cannot conclude that § 5 applies to the question at bar.

7 In relevant part, the Fourteenth Amendment reads as follows: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

8 But see *Estate of Dulles,* 494 Pa. 180, 190, 431 A.2d 208 (1981) (statutory rule of will construction amounts to State action in manner identical to an intestacy statute because in both instances the State steps in to supply a presumed intent, with the result that "the state and not the decedent dictates the method of distribution"). Cf. *Trimble v. Gordon,* 430 U.S. 762, 774, 97 S.Ct. 1459, 1467, 52 L.Ed.2d 31 (1977).

9 We note that the trustee's equal protection argument relies primarily on *Trimble v. Gordon, supra,* which invalidated an intestacy statute, not a judicially created rule. While we do not deny that rules applying to what has traditionally been thought of as the area of "private law" may trench upon equal protection concerns, it is instructive to note that no decision by the United States Supreme Court ever has invalidated a common law rule of construction on the ground that it violated the equal protection clause by discriminating impermissibly against nonmarital children. The liberalizing decisions handed down by the Supreme Court in recent years have all been directed at statutory discriminations. See *Reed v. Campbell,* 476 U.S. 852, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986) (intestacy statute); *Pickett v. Brown,* 462 U.S. 1, 103 S.Ct. 2199, 76 L.Ed.2d 372 (1983) (statute of limitations on paternity suits); *Mills v. Habluetzel,* 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982) (same); *United States v. Clark,* 445 U.S. 23, 100 S.Ct. 895, 63 L.Ed.2d 171 (1980) (Civil Service Retirement Act); *Lalli v. Lalli,* 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978) (intestacy statute); *Trimble v. Gordon, supra* (same); *Mathews v. Lucas,* 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976) (Social Security Act); *Jimenez v. Weinberger,* 417 U.S. 628 (1974) (same); *New Jersey Welfare Rights Org. v. Cahill,* 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed.2d 543 (1973) (State statute providing assistance to families of the working poor); *Gomez v. Perez,* 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973) (paternal support statute); *Weber v. Aetna Casualty & Sur. Co.,* 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972) (Workmen's Compensation Act); *Labine v. Vincent,* 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971) (intestacy statute); *Glona v. American Guarantee & Liab. Ins. Co.,* 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968) (wrongful death statute); *Levy v. Louisiana,* 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968) (same); *Beaty v. Weinberger,* 478 F.2d 300 (5th Cir.1973), aff'd, 418 U.S. 901, 94 S.Ct. 3190, 41 L.Ed.2d 1150 (1974) (Social Security Act); *Griffin v. Richardson,* 346 F.Supp. 1226 (D.Md.), aff'd, 409 U.S. 1069, 93 S.Ct. 689, 34 L.Ed.2d 660 (1972) (same); *Davis v. Richardson,* 342 F.Supp. 588 (D.Conn.), aff'd, 409 U.S. 1069, 93 S.Ct. 678, 34 L.Ed.2d 659 (1972) (same).

10 The trustee concedes that the Equal Rights Amendment to the Constitution of the Commonwealth does not apply to this case. See note 11 *infra.* Nonetheless, he claims that "[t]he common law disabilities of birth outside of wedlock require mitigation under Art. 1 of the Constitution of the Commonwealth," due to its provision that all people "are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right ... of acquiring, possessing and protecting property...." It is not clear from the trustee's brief, however, whether he asserts that art. 1 is applicable in the absence of State action. No authority is cited in support of that proposition. Compare *Batchelder v. Allied Stores Int'l, Inc.,* 388 Mass. 83, 445 N.E.2d 590 (1983) (art. 9 of the Massachusetts Declaration of Rights is not by its terms directed only

against governmental action), with *Commonwealth v. Aves,* 18 Pick. 193, 209-210 (1836) (Shaw, C.J.) (if slavery was not effectively abolished in the Commonwealth by colonial law, it was abolished by enactment of art. 1). In this state of underdevelopment, the argument is not one we would be prudent to reach. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

11 The trustee argues that reversal of the *Mishou* rule is required by our holding in *Lowell v. Kowalski,* 380 Mass. 663, 405 N.E.2d 135 (1980). In that decision, G.L. c. 190, § 7, as amended through St.1943, c. 72, § 1, was held to be unconstitutional under the Commonwealth's Equal Rights Amendment, art. 106 of the Amendments to the Massachusetts Constitution, to the extent that § 7 required, as to heirs of the father, parental intermarriage (in addition to paternal acknowledgment or an adjudication of paternity) as a prerequisite to legitimation for purposes of intestate succession. Cf. G.L. c. 190, § 5 (right of illegitimate child to inherit from mother's estate). The trustee concedes that the Equal Rights Amendment does not apply by its terms to nonmarital children. See art. 106 (suspect classifications are only those of "sex, race, color, creed or national origin"). Here we deal not with statutory construction, but with the interpretation of the intent of a donor. We do not see the relevance of *Lowell* to the question at bar, which we decide solely on the basis of our traditional authority to alter or enforce common law rules pertaining to private acts.

12 A representative list of such statutes was compiled in *Matter of Hoffman,* 53 A.D.2d 55, 62-63 n. 7, 385 N.Y.S.2d 49 (1976):

| "Statute | Purpose | Effective Date |
|---|---|---|
| US Code, tit 33, § 902, subd (14) | Longshoremen's and Harbor Workers' Compensation Act. Defines a child as including an acknowledged illegitimate child dependent upon the deceased. | 1927 |
| US Code, tit 42, § 416, subd (h), par (3), cl (A) | Social Security. Defines a child of an insured individual as one who[m] the insured person has acknowledged in writing as his child or has been decreed by the court to be the father of such child. | 1935 |
| US Code, tit 8, § 1409 | Nationality and Citizenship. Children born out of wedlock. A child born out of wedlock of a service parent is also to be considered a national and citizen of the United States at birth. | 1952 |
| US Code, tit 8, § 1432 | A child born out of wedlock to an alien mother may become a citizen in certain circumstances when such mother is naturalized prior to the sixteenth birthday of said child. | 1952 |
| US Code, tit 38, § 101, subd (4), par (C) | Veterans Benefits Act. Defines a child as including an illegitimate if the father has acknowledged the child in writing or has | 1958 |

| | | |
|---|---|---|
| | been judicially decreed to be the father of such child. | |
| US Code, tit 38, § 765 | Payment of servicemen's life insurance under group policy. Benefits may be made to certain specified persons and defines 'child' in the following manner: 'An illegitimate child as to the mother, or an illegitimate child as to the alleged father' if he has acknowledged said child in writing or has been judicially decreed to be the father of such child. | 1971 |
| US Code, tit 37, § 401 | Allowances. In connection with military pay and allowances the word 'dependent' includes an illegitimate child whose alleged father, a member of the armed forces [,] has been judicially decreed to be the father. | 1973 |
| US Code, tit 42, § 654 | Social Security. Provides that in a State plan for child support the State will undertake to establish the paternity of a child 'born out of wedlock'." | 1975 |

13 In *Mishou,* the court stated: "If this rule of construction is deemed too harsh, the remedy is not to be found in sudden and unheralded changes by judicial decision in the meanings of words which have long been established and accepted and in reliance upon which wills have been drafted and settlements of property effected." *Mishou, supra,* 321 Mass. at 636, 75 N.E.2d 3. Now, almost forty years later, we do not think the change we announce is sudden or unheralded in any way. As will become clear, *infra,* our limitation of the new rule to prospective application effectively obviates the *Mishou* court's concern for the reliance interests of donors and testators now deceased.

14 In *Mishou,* it was observed that the traditional rule of construction was contrary to the Restatement of Property §§ 265, 286, and 292 (1940). *Mishou, supra* at 636, 75 N.E.2d 3. While abandoning the traditional rule, we do not adopt these sections of the Restatement. The rule we do adopt is substantially in accord with § 292, but these sections of the Restatement treat questions not reached here-for example, whether the term "children" is to be construed as including or excluding nonmarital descendants. See, e.g., §§ 286 and 292 comment a.

15 We note that the dissent relies primarily on authorities from other jurisdictions, and also that many of those authorities do not involve property law, where reliance on existing precedent plays a significant role in settling the rights of parties. Additionally, we have a well established body of law on the issue of retroactive application of a new rule of civil law.

1 There is no constitutional problem in applying the new rule to the child in this case. *Great N. Ry. v. Sunburst Oil Ref. Co.,* 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932). See, e.g., *Molitor v. Kaneland Community Unit Dist. No. 302,* 18 Ill.2d 11, 28, 163 N.E.2d 89 (1959), cert. denied, 362 U.S. 968, 80 S.Ct. 955, 4 L.Ed.2d 900 (1960); *Parker v. Port Huron Hosp.,* 361 Mich. 1, 26-27, 105 N.W.2d 1 (1960); Case Comment, Prospective-Retroactive Overruling: Remanding Cases Pending Legislative Determinations of Law, 58 B.U.L.Rev. 818 (1978).

  

2 Many courts apply the new rule to the parties without extended discussions. See, e.g., *In re Estate of Mertes,* 34 Ill.App.3d 557, 340 N.E.2d 25 (1975) (trust construction); *Farmers Bank & Capital Trust Co. v. Hulette,* 293 S.W.2d 458 (Ky.1956) (wills' construction); *Cooper v. Government Employees Ins. Co.,* 51 N.J. 86, 237 A.2d 870 (1968) (contracts); *Pendergrast v. Aiken,* 293 N.C. 201, 236 S.E.2d 787 (1977) (property); *Pickering v. American Employers Ins. Co.,* 109 R.I. 143, 282 A.2d 584 (1971) (contracts).

3 In *Payton v. Abbott Labs.,* 386 Mass. 540, 565, 437 N.E.2d 171 (1982), we noted that the reliance interest plays a much smaller part in tort law than in property or contract law. But, at least as to tort decisions involving the abolition of immunities, courts have noted that the reliance interest is fairly great. See, e.g., *Myers, supra; Terracciona v. Magee,* 53 N.J.Super. 557, 148 A.2d 68 (1959). Due to this reliance, courts have adopted innovative solutions to the question of retroactivity, see *Myers, supra* (decision partially retroactive as to all insured charities), while still applying the new rule to the instant case.

4 Uneven treatment arguably results if only the litigant is benefited by the new rule and similarly situated individuals are not benefited, having to proceed instead under the old rule. But, as the Supreme Court stated, "the fact that the parties involved are chance beneficiaries [is] an insignificant cost for adherence to sound principles of decision-making." *Stovall v. Denno,* 388 U.S. 293, 301, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967). One commentator has explained this inequity in treatment by suggesting that the individual "who successfully challenges existing legal doctrine can be, and has been, regarded as having thereby set himself apart." Schaefer, *supra,* at 638.

5 There is some indication that this reliance interest has been overemphasized by courts. One commentator quotes Justice Cardozo as saying that "[m]y impression is that the instances of honest reliance and genuine disappointment are rarer than they are commonly supposed to be by those who exalt the virtues of stability and certainty." Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 946 n. 194 (1962), quoting Cardozo, Address Before the New York State Bar Association, 55 Rep. N.Y. State Bar Ass'n 263, 295 (Jan. 22, 1932). See Levy, Realist Jurisprudence and Prospective Overruling, 109 U.Pa.L.Rev. 1, 28-29 (1960).

6 While the attorney perhaps understood the legal significance of the terms he selected, it is not clear on this record that the donor had any such understanding.

7 Moreover, all of the living beneficiaries of this trust have been notified of this action, and the record before us indicates that those beneficiaries have not objected to the inclusion of this child as a beneficiary.

8 It is of no consequence that this suit was initiated by the trustee instead of the child. As has happened in the past, the trustee may bring an action to resolve a question concerning the distribution of a trust. See *Boston Safe Deposit & Trust Co. v. Fleming,* 361 Mass. 172, 279 N.E.2d 342 (1972).

9 In fact, the court itself questions whether the attitudes expressed in *Cooley v. Dewey,* 4 Pick. 93, 94 (1827), were representative of that era. If that case were not a reflection of the attitude at the time it was written and it surely is not representative of current views, it is difficult to understand why this reliance interest should control the outcome in this case. The stated reason for this result, the reliance of the Bar, is more than adequately protected by allowing the Bar to adhere to the old rule for trusts executed prior to the date of this decision, while applying the new rule to the person making a successful challenge.

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95 Mass.App.Ct. 144
Appeals Court of Massachusetts,
Dukes.

In the MATTER OF the MACMACKIN NOMINEE REALTY TRUST.

No. 17-P-1573
|
Argued October 2, 2018
|
Decided April 10, 2019

**Synopsis**

**Background:** Trustee of nominee trust brought action to terminate trust, alleging that trust, which was established to hold six vacant lots for benefit of settlor's children and grandchildren in order to facilitate family compound, no longer served any useful purpose and lacked financial assets to meet requirements of administration, and that trust should be dissolved and ownership converted to tenancies in common. Following trial, the Probate and Family Court Department, Dukes County Division, Robert A. Scandurra, J., determined that trust's material purpose was no longer viable and that continuation of trust was not necessary to achieve any material purpose of trust, ordered termination of trust and distribution of lots, and awarded trustee $21,385.28 in legal fees and costs. Beneficiaries appealed.

**Holdings:** The Appeals Court, Neyman, J., held that:

Massachusetts Uniform Trust Code applied;

purpose of trust was to facilitate family compound;

termination of trust and distribution of three lots to each beneficiary furthered purposes of trust; and

trustee's motion to amend judgment to award attorney fees was timely served.

Affirmed.

**Procedural Posture(s):** On Appeal; Judgment; Motion to Alter or Amend Judgment; Motion for Attorney's Fees.

****2** Trust, Termination, Nominee trust, Construction, Attorney's fees. Practice, Civil, Attorney's fees. Uniform Trust Code.

PETITION filed in the Dukes County Division of the Probate and Family Court Department on January 19, 2016.

The case was heard by Robert A Scandurra, J., and a motion to alter or amend judgment was considered by him.

**Attorneys and Law Firms**

Daniel C. Perry, New Bedford, for the respondents.

Eric L. Peters for the petitioner.

Present: Massing, Neyman, & Ditkoff, JJ.

**Opinion**

NEYMAN, J.

***144** In this appeal, we are asked to review a decree issued by a judge of the Probate and Family Court terminating a nominee trust under the Massachusetts Uniform Trust Code (MUTC), G. L. c. 203E. We conclude that termination was warranted pursuant to § 412 (a) of the MUTC, and thus affirm.

Background. The present case involved six vacant lots located "adjacent to and between" two summer cottages on Martha's Vineyard. For many decades, the cottages and the lots were owned by, or held in trust for the benefit of, members of the MacMackin family, including Alice MacMackin (Alice) and her husband Stuart ***145** MacMackin (Stuart). Alice and Stuart had two daughters, Cynthia [1] and Janet. Cynthia married Ivo Meisner (Ivo) in 1967 and they had two sons, Eerik and Ian (collectively, the Meisners). Cynthia and Ivo divorced in 2006. Janet married James Wansack and they had three children, Andrew, Heather, and Karen (collectively, the Wansacks). ****3** While Alice and Stuart were alive, the cottages and lots were used as a family compound. [2] Stuart died in 1983, and Alice died in 2009.

Following Alice's death, disputes arose between the Meisners and the Wansacks over the vacant lots and two cottages. In 2015, the sides resolved the quarrel over the two cottages by a settlement agreement, through which Janet purchased the Meisners' interest in both cottages. However, the dispute over the vacant lots, which were held in the nominee trust discussed infra, lingered and triggered the present litigation.

  

We begin with a brief overview of the legal instruments related to the disposition of the vacant lots.

1. Stuart's will and testamentary trust. Under the terms of his will, Stuart established a testamentary trust and devised to this trust the cottages and vacant lots. His will expressed his "wish if practicable that these summer homes and lots be kept undivided in the family and used as they are now for as long as that is possible and practicable." His will further expressed his desire, "if that be practicable under the circumstances," that, upon the death of Cynthia and Janet, the testamentary trust continue and the cottages and lots be maintained for the benefit of his grandchildren.[3] Despite these provisions, the parties did not dispute that upon Stuart's death in 1983, the vacant lots passed directly to Alice and were not governed by the provisions of Stuart's will or ***146** testamentary trust.[4] The cottages, however, remained in the testamentary trust until Janet purchased the Meisners' interest in both cottages in 2015.

2. MacMackin Nominee Realty Trust. On December 23, 1994, Alice and Ivo,[5] as trustees, created the MacMackin Nominee Realty Trust[6] (MacMackin trust),[7] to which Alice transferred the vacant lots.[8] The vacant lots were the only assets of the MacMackin trust, which was never otherwise ****4** funded, apart from a nominal ten dollars.

The MacMackin trust provided that the trustees held any trust property for the sole benefit of the beneficiaries and acted only as directed by all of the beneficiaries. The trust further provided that it may be terminated at any time by agreement of all of the beneficiaries but, in any event, shall terminate twenty years after the death of Alice or Ivo, whichever is later. The operative schedule of beneficiaries specified that the Wansacks together held fifty percent of the beneficial interest, while Cynthia's two sons and Ivo held the other fifty percent.[9] Janet and Cynthia paid the taxes on the vacant lots until 2001, thereafter Stuart's testamentary trust paid the taxes through 2013, and Cynthia and Janet subsequently shared the tax payments until the summer of 2015. The judge found that the combined yearly real estate taxes for the vacant lots were $ 6,447.

3. Petition to terminate the MacMackin trust. As discussed supra, Janet purchased the Meisners' interest in the two cottages, at which time they were deeded to Janet and the testamentary trust ***147** was terminated.[10] However, the Wansacks and Meisners wrangled over the appropriate disposition of the vacant lots held in the MacMackin trust. Their ongoing dispute led to the present litigation. Specifically, Ivo, in his capacity as trustee and beneficiary of the MacMackin trust, and with the assent of his sons, filed a petition in the Probate and Family Court to terminate the trust. The petition alleged that termination was proper under G. L. c. 203E, §§ 411, 412, and 414. In an attachment to the petition, Ivo asserted that the MacMackin trust "no longer serves any useful purpose, ... lacks any financial assets to meet the requirements of administration, ... [and] should be dissolved and the ownership thereof converted to tenancies in common, in the respective percentages of the beneficiaries." The Wansacks opposed the termination of the trust and any sale or development of the vacant lots.

After a trial, the judge issued written findings in which he concluded that Alice and Stuart wanted to create a place for family gatherings, but that Alice, the settlor of the MacMackin trust, did not anticipate one daughter's family "buying out" the other daughter's family interest in both cottages "for a significant purchase price." The judge further found that, upon the "sale of the cottages to Janet Wansack, the Meisners no longer have cause or desire to vest any funds into the preservation of the vacant lots (i.e., payment of real estate taxes) and therefore, the [MacMackin trust] would be rendered unproductive and uneconomical." Citing to §§ 411 and 412 of the MUTC, the judge determined that "[t]he material purpose for which the [MacMackin trust] was created, to facilitate a family compound, is no longer viable and therefore, continuation of the [MacMackin trust] is not necessary to achieve any material purpose of the [MacMackin trust]."[11] Through an amended decree, the ****5** judge ordered termination of the MacMackin trust and distribution of the three lots closest to the cottages ***148** to the Wansacks and the other three lots to the Meisners, according to their beneficial interests. The judge also awarded $ 21,385.28 in legal fees and costs to Ivo pursuant to G. L. c. 215, § 45, noting that he, the judge, had taken into consideration the written settlement offer extended by Ivo before trial. The Wansacks have appealed from the amended decree.

Discussion. The Wansacks contend on appeal that the judge erred in terminating the MacMackin trust because (1) Stuart and Alice did in fact anticipate one daughter's family purchasing the other daughter's family interest in the cottages, and (2) Stuart and Alice intended to conserve the lots in their natural state. They maintain that the vacant lots were always intended to protect the privacy and enjoyment of the cottages, preserving privacy is a material purpose of the

MacMackin trust, termination would violate the purpose of the trust and flout Alice's and Stuart's intent on maintaining a family compound, and thus the MacMackin trust should continue pursuant to its terms.

The Meisners respond that (1) the evidence at trial showed that Alice only intended that both families share equal ownership in the cottages and vacant lots, and (2) there was no conservation purpose to the MacMackin trust. They further contend that now that the Wansacks own both cottages, the vacant lots provide no benefit to the Meisners, and continuation of the MacMackin trust would be impracticable or wasteful as it no longer serves any useful purpose. We agree with the position articulated by the Meisners, and hold that the judge properly terminated the MacMackin trust under G. L. c. 203E, § 412 (a).

1. Termination of the MacMackin trust. a. Applicability of the MUTC. In determining whether the judge properly terminated the MacMackin trust, we first look to the plain language of the trust instrument. See Ferri v. Powell-Ferri, 476 Mass. 651, 654, 72 N.E.3d 541 (2017). As discussed infra, the MacMackin trust provides that it may be terminated (1) by agreement of all of the beneficiaries, or (2) twenty years after the later of the death of Alice or Ivo. Neither condition for termination had been met when Ivo filed his petition to terminate the trust.

Having determined that the MacMackin trust could not be terminated pursuant to its own terms, we next consider whether there was another legal basis for termination. This requires us to consider whether the MUTC applies to the present case. For the reasons delineated below, we conclude that it does.

First, both parties conducted their analysis under the MUTC, and neither disputes its applicability to the MacMackin trust. Indeed, ***149** the Wansacks contend that, as "it is undisputed that the [MacMackin] trust was created by Alice MacMackin for donative purposes, chapter 203E appears to govern its administration." We agree.

The MUTC, effective July 8, 2012, provides distinct statutory bases for termination of trusts in certain circumstances. See G. L. c. 203E, §§ 410-412, 414. Although the MUTC states the general rule that the terms of a trust prevail over any provision of the MUTC, a specific exception to that rule is "the power of the court to modify or terminate a trust under sections 410 to 416, inclusive." ****6** G. L. c. 203E, § 105 (b) (4). Pursuant to its enabling legislation, "[e]xcept as otherwise provided in this act," the MUTC's provisions "shall apply to all trusts created before, on or after the effective date of this act." St. 2012, c. 140, § 66 (a) (1). Furthermore, the MUTC provides, in relevant part, that "[t]his chapter applies to express trusts, charitable or non-charitable, of a donative nature." G. L. c. 203E, § 102. See Passero v. Fitzsimmons, 92 Mass. App. Ct. 76, 79-81, 81 N.E.3d 814 (2017) (MUTC governed dispute over administration of revocable trust).

The parties do not dispute that the MacMackin trust, created by Alice and Ivo, is an express trust. See Restatement (Second) of Trusts § 2 & comment a (1959) ("A trust ... is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.... The term 'express trust' is used to indicate a trust as here defined whenever it is desirable to emphasize the contrast between a trust as here defined on the one hand and a resulting trust or a constructive trust on the other hand"); Black's Law Dictionary 1650 (9th ed. 2009) (defining "express trust" as "A trust created with the settlor's express intent, [usually] declared in writing"). See also Amory v. Trustees of Amherst College, 229 Mass. 374, 385-386, 118 N.E. 933 (1918) (contrasting express trust with implied or constructive trust created by operation of law). See generally H.J. Alperin, Summary of Basic Law § 17:4 (5th ed. 2018) (describing types of trusts, including express, implied, resulting, and constructive).

Furthermore, there is no dispute that the MacMackin trust was ***150** of a donative nature.[12] See 4 Restatement (Second) of Property: Donative Transfers, Division III Introductory Note, at 3 (1992) ("The underlying requirement to effectuate a donative transfer is the intention on the part of the donor that some interest in property of the donor move from the donor to the intended donee, either during the donor's lifetime or on the donor's death"); Maloney & Rounds, The Massachusetts Uniform Trust Code: Context, Content, and Critique, 96 Mass. L. Rev. 27, 41 (2014) ("A nominee trust may or may not be covered [by the MUTC], depending upon whether the shares of beneficial interests are created incident to a donative transfer"). Accordingly, we hold that the MUTC applies to the present case and we interpret the termination of the MacMackin trust thereunder.[13]

b. Legal standards for trust interpretation. We review the legal standards for trust interpretation as they are key to our

  

resolution of the issue before us. Pursuant to § 412 (a) of the MUTC, a court may terminate a trust "if, because of circumstances not anticipated by the settlor ... termination will further the purposes of the trust." Determination of the purposes of the trust hinges "on what the intent of the trust instrument was, for that intention 'is the "controlling consideration" in determining the rights' of the parties under the trust." **7 Steele v. Kelley, 46 Mass. App. Ct. 712, 732, 710 N.E.2d 973 (1999), quoting Dumaine v. Dumaine, 301 Mass. 214, 218, 16 N.E.2d 625 (1938).

"[T]he interpretation of a written trust is a matter of law to be resolved by the court." Ciampa v. Bank of Am., 88 Mass. App. Ct. 28, 31, 35 N.E.3d 765 (2015), quoting Redstone v. O'Connor, 70 Mass. App. Ct. 493, 499, 874 N.E.2d 1118 (2007). "[W]hen interpreting trust language, ... we do not read words in isolation and out of context. Rather we strive to discern the settlor's intent from the trust instrument as a whole and from the circumstances known to the settlor at the time the instrument was executed." Ferri, 476 Mass. at 654, 72 N.E.3d 541, quoting Hillman v. Hillman, 433 Mass. 590, 593, 744 N.E.2d 1078 (2001). Indeed, the MUTC defines "[t]erms of a trust" as "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument *151 or as may be established by other evidence that would be admissible in a judicial proceeding." G. L. c. 203E, § 103.

We are in as good a position as the trial judge to interpret the trust to give effect to the intention of the settlor "as ascertained from the language of the whole instrument considered in the light of the attendant circumstances." Ciampa, 88 Mass. App. Ct. at 31, 35 N.E.3d 765, quoting Redstone, 70 Mass. App. Ct. at 499, 874 N.E.2d 1118. "We do, of course, defer to a trial judge's findings of fact where he has had the opportunity to observe and evaluate witnesses," unless the findings are clearly erroneous. General Dynamics Corp. v. Assessors of Quincy, 388 Mass. 24, 29, 444 N.E.2d 1266 (1983). See Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996).

Of further note, at trial in the present case both parties relied, in part, on extrinsic evidence to demonstrate Alice's intent in forming the MacMackin trust. See Redstone, 70 Mass. App. Ct. at 501, 874 N.E.2d 1118. Neither party contends on appeal that extrinsic evidence was inadmissible, and neither party contends that the language of the MacMackin trust was free from ambiguity as applied to the subject matter of this case. See Ferri, 476 Mass. at 654, 72 N.E.3d 541 ("[E]xtrinsic evidence may be admitted when a contract is ambiguous on its face or as applied to the subject matter" [citation omitted] ).

With these principles in mind, we look to the purposes of the MacMackin trust.

c. Purposes of the MacMackin trust. Relying on the terms of Stuart's testamentary trust, the terms of the MacMackin trust, the historical use of the cottages and vacant lots, and testimony that Alice shared her husband's wishes for the cottages, the judge concluded that the material purpose of the MacMackin trust was to facilitate a family compound. He further concluded that, upon Janet's purchase of the Meisners' interest in the cottages, the family compound concept -- intended to encompass both the Meisners and Wansacks -- was no longer viable and, therefore, continuation of the MacMackin trust was not necessary to achieve any material purpose of that trust. Finally, the judge found that upon Janet's purchase, "the Wansack family obtained sole use and occupancy of not only the cottages but also, inadvertently, use and occupancy of the adjacent vacant lots.... These facts alone create a set of circumstances which the Court finds that [Alice] did not anticipate."

Stuart's will indeed states his "wish" that the testamentary trust continue, "if that [is] practicable under the circumstances," to support an ongoing family compound. However, it is the MacMackin *152 trust that we interpret in this case, not Stuart's will. See **8 Hillman, 433 Mass. at 593, 744 N.E.2d 1078 ("we strive to discern the settlor's intent from the trust instrument as a whole and from the circumstances known to the settlor at the time the instrument was executed"). Even so, we discern no error in the judge's determination that a material [14] purpose of the MacMackin trust was to facilitate a family compound. The evidence adduced at trial to identify the purposes of the trust, which was credited by the judge, supported his conclusion that Alice shared her husband's desires vis-à-vis the property. The evidence also supported the judge's determination that the goal of facilitating a family compound is no longer practicable.

Our analysis does not end there. The facilitation of a family compound was not the only purpose of the trust. As provided in the instrument itself, the identified purposes of the MacMackin trust included that it qualify as a nominee trust for Federal and State income tax purposes, and that it hold the legal title to the trust estate for the benefit of the beneficiaries. Also, the trial evidence showed that a purpose of the trust was to achieve estate planning objectives by removing the vacant lots from Alice's estate. These purposes have been achieved.

Moreover, through the express terms of the trust instrument, Alice ensured that each daughter's family held fifty percent of the beneficial interest in the MacMackin trust, and thus, fifty percent of the interest in the properties held by the MacMackin trust during its term and upon its termination. This equal split of the beneficial interest evinces Alice's intention of treating her daughters equally. As noted supra, the MacMackin trust required unanimous consent of "all" the beneficiaries prior to the trustees taking any action. These requirements limited the possibility of one family controlling the MacMackin trust. Thus, in view of the terms of the instrument and all of the surrounding circumstances, a critical purpose of the MacMackin trust was for each family to have equal ***153** use, enjoyment, and control of the properties. See Redstone, 70 Mass. App. Ct. at 499, 874 N.E.2d 1118, quoting Schroeder v. Danielson, 37 Mass. App. Ct. 450, 453, 640 N.E.2d 495 (1994) (appellate court is in as good position as trial judge to interpret trust to give effect to intention of settlor "as ascertained from the language of the whole instrument considered in the light of the attendant circumstances").

d. Termination under § 412 (a) of MUTC. With the above-referenced purposes of the MacMackin trust in mind, we return to the provisions pertaining to the termination of trusts in the MUTC. Under G. L. c. 203E, § 412 (a), "[t]he court may ... terminate the trust if, because of circumstances not anticipated by the settlor, ... termination will further the purposes of the trust." Although we agree with the Wansacks that Alice, like her husband, may have anticipated that one of the families might, by agreement, purchase the other family's interest in the vacant lots, there is nothing in the record to suggest that Alice anticipated that one family would buy the cottages but not the vacant lots. We discern no error, therefore, in the judge's conclusion that unanticipated circumstances eliminated the Meisner family's ****9** ability to enjoy the benefits of the trust property. Continuing the MacMackin trust to allow the Wansacks to enjoy the privacy provided by the vacant lots, while the Meisners enjoy no benefits from the vacant lots, would contravene Alice's intention that the two families have equal control and enjoyment of the trust property. By contrast, termination of the MacMackin trust and distribution of the assets to the beneficiaries at this time, when the Meisners no longer have any interest in the cottages and derive no benefit from the vacant lots, furthers the remaining purpose of the trust that is capable of being achieved -- equal treatment of the families of Alice's two daughters. The requirements for termination under § 412 (a) were met. Otherwise said, "because of circumstances not anticipated by [Alice], ... termination will further the purposes of the trust." G. L. c. 203E, § 412 (a). Thus, termination pursuant to § 412 (a) was warranted. [15]

2. Conservation claim. The Wansacks raise the separate argument that the judge erred in failing to find that Stuart and Alice ***154** intended to conserve the vacant lots in their natural state. We disagree. In January of 1994, Alice wrote a letter to Janet stating that she, Alice, was considering several options in regard to the vacant lots. They included (1) doing nothing and keeping the lots in her estate, (2) making an outright gift to Cynthia and Janet allowing them to choose whether to keep the lots, gift them to conservation, or some combination of those two choices, or (3) putting them all "into conservation." The undisputed evidence at trial revealed that Alice chose to give two lots to the Vineyard Open Land Foundation, a Massachusetts charitable trust. See note 8, supra. She also chose to create the MacMackin trust to hold the other vacant lots for her daughters and their families such that each family owned fifty percent of the beneficial interest. She chose not to restrict the vacant lots. Had Alice desired that the lots be kept vacant, she was aware that there were options available to accomplish that goal. Therefore, even accepting that Alice and her husband purchased the vacant lots, at least in part, to provide privacy for the summer cottages, Alice inserted no language to suggest that preserving the lots as open space was a purpose of the trust. The judge did not err in rejecting the Wansacks' argument. [16]

3. Motion to amend. The Wansacks also contend that the judge erred in ****10** awarding attorney's fees to Ivo because his motion to amend the decree to award attorney's fees was served late. See Mass. R. Civ. P. 59 (e), 365 Mass. 827 (1974) (rule 59 [e] ) ("A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment"). This conclusory assertion, in a footnote, does not rise to the level of appellate argument. See Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975). See also Commonwealth v. F.W., 465 Mass. 1, 2 n.4, 986 N.E.2d 868 (2013) ***155** (conclusory assertion does not rise to level of acceptable appellate argument); Commonwealth v. Lydon, 413 Mass. 309, 317-318, 597 N.E.2d 36 (1992), overruled on other grounds by Commonwealth v. Britt, 465 Mass. 87, 100, 987 N.E.2d 558 (2013) ("Arguments relegated to a footnote do not rise to the level of appellate argument"). Nonetheless, the argument is unavailing.

The date the judgment was entered in the docket, in this case December 15, 2016, not the date of the judgment, is

the effective date for calculating the ten days allotted for serving a motion to amend the judgment under rule 59 (e). See Reporters' Notes to Rule 58, Mass. Ann. Laws Court Rules, Rules of Civil Procedure, at 1209-1210 (LexisNexis 2018) ("For purposes of the other rules the date of effective entry is crucial.... The specific date of the notation of the judgment by the clerk pursuant to Rule 79[a] constitutes the date of effective judgment for purposes of [Rule 59(e) ]"). Cf. Commonwealth v. Mullen, 72 Mass. App. Ct. 136, 138, 889 N.E.2d 52 (2008) (interpreting Mass. R. A. P. 4 [b], as amended, 378 Mass. 928 [1979], and concluding that date of entry is date judgment or order is actually entered on docket). That the December 15, 2016 docket entry notes that the decree "entered" on December 13, 2016, does not change the "entry" date for purposes of calculating the ten days allowed to serve a motion to amend the judgment. Ivo served his motion on December 27, 2016. Because Monday, December 26, 2016, was a trial court legal holiday, [17] the motion was timely served. See Mass. R. Civ. P. 6 (a), 365 Mass. 747 (1974) (if last day of designated period of time is Saturday, Sunday, or legal holiday, period runs until end of next day that is not Saturday, Sunday, or legal holiday). [18]

Amended decree affirmed.

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**All Citations**

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## Footnotes

1 Cynthia's name is "Alice Cynthia," but she is known as "Cynthia."

2 There was evidence at trial that Stuart and Alice had purchased the vacant lots in the 1950s to maintain the privacy of the cottages.

3 Although Stuart's will expressed his desire that the cottages be used as summer homes for as long as possible, it also provided for the contingency that circumstances might arise, "for any reason which may now not be foreseen," to cause one daughter to purchase the other daughter's interest in the cottages. The will further recognized that Stuart's children and grandchildren, "by reason of the occupations and professions in which their husbands are occupied may become resident at long distances and that these circumstances may render [Stuart's] present desires with respect to these summer properties impracticable." Stuart's testamentary trust was to terminate when the youngest grandchild then living reached the age of thirty, with the remainder to be divided equally among his grandchildren.

4 The vacant lots passed to Alice upon Stuart's death because Stuart had acquired title to these lots jointly with Alice.

5 At that time Ivo was married to Alice's daughter, Cynthia.

6 "A 'nominee trust' is '[a]n arrangement for holding title to real property under which one or more persons or corporations, pursuant to a written declaration of trust, declare that they will hold any property that they acquire as trustees for the benefit of one or more undisclosed beneficiaries.' " Berish v. Bornstein, 437 Mass. 252, 255 n.10, 770 N.E.2d 961 (2002), quoting Black's Law Dictionary 1072, 1517 (7th ed. 1999). See generally Birnbaum & Monahan, The Nominee Trust in Massachusetts Real Estate Practice, 60 Mass. L.Q. 364 (1976).

7 Ivo served as Alice's estate planning attorney and drafted the MacMackin trust.

8 On December 30, 1994, Alice transferred two additional nearby lots to the Vineyard Open Land Foundation, a Massachusetts charitable trust.

9 Cynthia transferred her interest in the MacMackin trust to her sons in 2015. Cynthia's two sons each held an 18.75 percent interest and Ivo held a 12.5 percent interest. Janet, her husband, and her three children each held a ten percent interest.

10 Janet's purchase of the Meisners' interest in the cottages evolved through additional litigation involving Martha's Vineyard Savings Bank, the successor trustee of Stuart's testamentary trust. The details of that litigation are not essential to the analysis herein.

11 In his decision, the judge quoted from §§ 411 and 412 of the MUTC, and he noted that Ivo had sought termination of the MacMackin trust under those two sections as well as § 414. See G. L. c. 203E, § 411 ("Modification or termination of non-charitable irrevocable trust by consent"); G. L. c. 203E, § 412 ("Modification or termination because of unanticipated circumstances or inability to administer trust effectively"); G. L. c. 203E, § 414 ("Modification or termination of uneconomic trust").

12 Each "Assignment of Beneficial Interest" document accompanying the trust instrument, states, in relevant part: "I, Alice P. MacMackin, ... in consideration of blood and affection, as a gift, hereby assign and grant to [the beneficiary] ... [a] percent interest in and to the premises."

13 While we determine that the MUTC applies to the termination of the MacMackin trust, the parties do not contend, and we do not hold, that the MUTC applies to all nominee trusts. See note 6, supra.

14 The judge's use of the term "material" stemmed from his analysis of termination under both §§ 411 and 412 of the MUTC. Section 411 (b) authorizes a court to terminate a trust where, among others, continuance of a trust "is not necessary to achieve any material purpose of the trust." Section 412 (a) authorizes a court to terminate a trust "if, because of circumstances not anticipated by the settlor, ... termination will further the purposes of the trust." Here, where we hold that termination was warranted under § 412 (a), the judge's use of the word "material" does not affect our analysis.

15 Given our decision under § 412, we need not decide whether termination was also warranted under §§ 411 and 414. We note, however, that given the lack of monetary funding of the MacMackin trust and the absence of provisions requiring the beneficiaries to maintain the properties, the judge was warranted in concluding that the trust had become uneconomical. See G. L. c. 203E, § 414 (b) ("The court may modify or terminate a trust ... if it determines that the value of the trust property is insufficient to justify the cost of administration").

16 The Wansacks also argue that Ivo, as drafter and trustee of the MacMackin trust, had unclean hands, and thus the judge should not have allowed the petition to terminate the MacMackin trust. See Fidelity Mgt. & Research Co. v. Ostrander, 40 Mass. App. Ct. 195, 200, 662 N.E.2d 699 (1996). See also G. L. c. 203E, § 106 (MUTC is supplemented by general principles of equity). "[T]he question whether to deny relief on the basis of [Ivo's] conduct was a matter committed to the broad discretion of the judge." Fales v. Glass, 9 Mass. App. Ct. 570, 575, 402 N.E.2d 1100 (1980). By ordering termination and distribution of the MacMackin trust assets, the judge implicitly rejected the claim that Ivo had unclean hands warranting the denial of equitable relief. See id. We discern no abuse of discretion. Although there is animus between the parties and although Ivo may, as the Wansacks argue, benefit from the termination, he will benefit only in proportion to his designated distribution percentage, under which the Meisners receive fifty percent of the trust assets.

17 We take judicial notice that December 26, 2016, was a trial court legal holiday. See G. L. c. 4, § 7, Eighteenth ("Legal holiday" includes day following Christmas day when Christmas day falls on Sunday); Mass. G. Evid. § 202(a)(1) (2018) (court must take judicial notice of General Laws of the Commonwealth). See also Merchant's Discount Co. v. Simon, 289 Mass. 62, 64, 193 N.E. 561 (1935) ("That August 15, 1926, was Sunday was a fact to be noted judicially"); Mass. G. Evid., supra at § 201(b)(2) (court may judicially notice fact not subject

to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

18 We decline Ivo's request for appellate attorney's fees and costs pursuant to G. L. c. 215, § 45. However, we do not disturb the award of fees and costs by the trial judge.

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# DE PRINS v. MICHAELES (2020)

**Supreme Judicial Court of Massachusetts,**

**Harry DE PRINS v. Michael J. MICHAELES, personal representative,1& others.2**

**SJC-12865**

**Decided: October 20, 2020**

**Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.3**

**Michael J. Rossi for the defendants. J. Mark Dickison, Boston (Ryan A. Ciporkin also present) for the plaintiff.**

The United States Court of Appeals for the First Circuit has certified a question to this court, pursuant to S.J.C. Rule 1:03, as appearing in 382 Mass. 700 (1981). We are asked whether, on the undisputed facts of this case, the assets of a self-settled discretionary spendthrift [4] irrevocable trust governed by Massachusetts law are protected from a reach and apply action by the deceased settlor's creditors. We answer the question "no," based on the circumstances presented here. Consistent with the well-established public policy of the Commonwealth, we conclude that where, as here, a settlor creates a self-settled spendthrift irrevocable trust and a judgment-creditor's cause of action accrues prior to the settlor's death, a judgment-creditor of the settlor's estate may reach and apply the trust's assets after the settlor's death. We do not address what the result might be in other circumstances.

Background. We recite the undisputed facts as established by the First Circuit in its opinion accompanying the certified question. See De Prins v. Michaeles, 942 F.3d 521, 523-525 (1st Cir. 2019). In 2000, Donald Belanger and his wife moved from Massachusetts to Arizona. In 2005, a dispute with their neighbors, Armand and Simonne De Prins (the De Prinses), over shared water rights gave rise to litigation. In 2007, the De Prinses prevailed in their lawsuit against Belanger and his wife. In 2008,

Belanger and his wife moved to California, where the wife committed suicide on October 4, 2008. Immediately thereafter, Belanger returned to Arizona with his daughter. That same month, Belanger created the Donald A. Belanger Irrevocable Trust Dated October 28, 2008 (trust), which included a spendthrift clause and provided that Belanger could not "alter, amend, revoke, or terminate" the trust. Belanger named himself as the sole beneficiary during his lifetime and his attorney, Michael J. Michaeles (defendant), as the sole trustee. On Belanger's death, his daughter would become the sole beneficiary. Immediately after signing the trust on November 3, 2008, Belanger conveyed substantially all his assets to the defendant as trustee.

Four months later, on March 2, 2009, Belanger shot and killed the De Prinses. On March 3, 2009, Belanger shot and killed himself after being stopped by a police officer in New Mexico. The defendant, as personal representative of Belanger's estate, probated the estate in Arizona.

On June 10, 2010, the De Prinses' son, the plaintiff, Harry De Prins, brought a wrongful death action against the defendant as personal representative of Belanger's estate. That action was removed from Arizona State court to the United States District Court for the District of Arizona.

In November 2014, after learning about the existence of the trust through the wrongful death action, the plaintiff brought a separate action in the United States District Court for the District of Arizona to reach and apply assets of the trust toward any judgment he may receive in the wrongful death action. In July 2015, the plaintiff settled the wrongful death action against Belanger's estate for $750,000. In the action probating Belanger's estate, the plaintiff and the defendant stipulated that (1) the plaintiff's collection of the wrongful death judgment would be against the trust exclusively, through the pending reach and apply action, and (2) the reach and apply action would be transferred to the United States District Court for the District of Massachusetts.

After the action was transferred pursuant to the stipulation, the plaintiff amended the complaint to state a single claim to reach and apply the trust's assets to satisfy the $750,000 wrongful death judgment against Belanger's estate. On cross motions for summary judgment, judgment entered for the plaintiff, with the judge concluding that the plaintiff satisfied the three elements required for a reach and apply action under Massachusetts common law.[5] The District Court judge further concluded that a settlor may not use a self-settled spendthrift trust to protect his assets from creditors. The defendant appealed. On appeal, the First Circuit held that (1) Massachusetts's statute of limitations for creditors' claims against a decedent's estate or trust did not apply to bar the plaintiff's claim against the trust;[6] and (2) the defendant was not collaterally estopped from arguing that the plaintiff could not collect against the trust for the wrongful death judgment, despite the stipulation in the probate action that collection of the judgment could be enforced only against the trust's assets. The First Circuit certified to this court the following question:

"On the undisputed facts of this record, does a self-settled spendthrift irrevocable trust that is governed by Massachusetts law and allowed unlimited distributions to the settlor during his lifetime protect assets in the irrevocable trust from a reach and apply action by the settlor's creditors after the settlor's death?"

The well-established legal maxim that one must be just before being generous compels us to conclude that it does not. See Foster v. Hurley, 444 Mass. 157, 172, 826 N.E.2d 719 (2005) (Greaney, J., dissenting in part); Hill v. Treasurer & Receiver Gen., 229 Mass. 474, 477, 118 N.E. 891 (1918); Chase v. Redding, 13 Gray 418, 420, 79 Mass. 418 (1859).

Discussion. The answer to the certified question depends, in part, on whether the common law or the Massachusetts Uniform Trust Code (MUTC), G. L. c. 203E, §§ 101 et seq., controls. When interpreting a statute, we are bound by the Legislature's intent. Rotondi v. Contributory Retirement Appeal Bd., 463 Mass. 644, 648, 977 N.E.2d 1042 (2012). Where a statute's plain meaning is unambiguous, the statutory text may be dispositive as to legislative intent. Id. Where the language of the statutory provision is ambiguous, however, we must look for legislative intent in the statute as a whole, and in "extrinsic sources, including the legislative history and other statutes" (citation omitted). Ciani v. MacGrath, 481 Mass. 174, 178, 114 N.E.3d 52 (2019). See Rotondi, supra. "[W]e do not construe a statute 'as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed.' " Suffolk Constr. Co. v. Division of Capital Asset Mgt., 449 Mass. 444, 454, 870 N.E.2d 33 (2007), quoting Riley v. Davison Constr. Co., 381 Mass. 432, 438, 409 N.E.2d 1279 (1980).

Although we determine that the common law applies to the present facts, an overview of the MUTC is warranted. General Laws c. 203E, § 505, addresses when a creditor can reach a trust's assets to satisfy a claim against the trust's settlor and applies regardless of whether a trust contains a spendthrift provision. Section 505 (a) (1) provides that a creditor can reach the assets of a revocable trust during the settlor's lifetime. Section 505 (a) (3) provides that a creditor can reach the assets of a revocable trust after the settlor's death.

Section 505 (a) (2) addresses a creditor's ability to reach the assets of an irrevocable trust. It does not specify whether it applies only during a settlor's lifetime or whether it applies after a settlor's death. G. L. c. 203E, § 505 (a) (2). It provides that, where a settlor has created an irrevocable trust, including one that contains a spendthrift provision, a creditor "may reach the maximum amount that can be distributed to or for the settlor's benefit." Id. Where a settlor may reach the assets of an irrevocable trust, the settlor's creditors may also reach those assets. Therefore, as the defendants concede, if Belanger were still alive today, the plaintiff could reach the entirety of the trust's assets because the defendant trustee could, under the express terms of the trust, distribute all such assets to Belanger or for Belanger's benefit.

Because it is unclear from the statutory language whether § 505 (a) (2) addresses a creditor's ability to reach the assets of an irrevocable trust after the settlor's death, we look to the other sections of the

statute as well as the legislative history. See Ciani, 481 Mass. at 178, 114 N.E.3d 52; Rotondi, 463 Mass. at 648, 977 N.E.2d 1042. When Massachusetts was considering adopting the Uniform Trust Code, an ad hoc committee was created to review and revise it for adoption. Report of the Ad Hoc Massachusetts Uniform Trust Code Committee 1-2 (rev. July 18, 2012) (Report). The committee's comment to G. L. c. 203E, § 505, however, does not shed any additional light as to whether § 505 (a) (2) was intended to allow a creditor to reach an irrevocable trust's assets after the settlor's death or only during the settlor's lifetime.[7]

Looking to the other provisions in the statute, G. L. c. 203E, § 106, provides that the MUTC is to be supplemented by the "common law of trusts and principles of equity." The committee's comment to this section further clarifies that "the [MUTC] is not intended to replace the common law of trusts in Massachusetts except where the [MUTC] modifies it." Report, supra at 7. It is clear, then, that the common law continues to apply where the MUTC does not address the situation at issue, and that the court may apply "principles of equity" to such cases. See G. L. c. 203E, § 106. In accordance with principles of equity, two sections of the MUTC specify that a trust may not be created that is contrary to public policy. See G. L. c. 203E, §§ 105 (b) (3), 404.[8]

The trust at issue here is an irrevocable, self-settled, spendthrift trust. A trust is self-settled where "the settlor is also the person who is to receive the benefits from the trust." Black's Law Dictionary 1824 (11th ed. 2019). General Laws c. 203E, § 102, provides that the MUTC applies to express trusts "of a donative nature." The committee's comment to this section explains that the MUTC "will not apply to business trusts or other non-donative trust arrangements." Report, supra at 4. "[D]onative" is defined as "[o]f, relating to, or characterized by a donation." Black's Law Dictionary, supra at 617. "[D]onation" is defined as "[a] gift, [especially] to a charity; something, [especially] money, that someone gives to a person or an organization by way of help." Id. A "donative trust" is defined as one "that establishes a gift of a beneficial interest in property for a beneficiary." Id. at 1819. See Matter of the MacMackin Nominee Realty Trust, 95 Mass. App. Ct. 144, 149-150, 122 N.E.3d 1 (2019), quoting 4 Restatement (Second) of Property: Donative Transfers, Division III Introductory Note, at 3 (1992) ("The underlying requirement to effectuate a donative transfer is the intention on the part of the donor that some interest in property of the donor move from the donor to the intended donee, either during the donor's lifetime or on the donor's death").

Given the authorities discussed above, to the extent that a trust is self-settled such that the settlor retains the beneficial interest in the trust's assets and does not give such interest to another, it appears that the committee did not intend the MUTC to apply.

In accordance with settled principles of statutory construction, and because the MUTC both (1) expressly provides that it does not replace the common law and (2) fails to address the situation here

(i.e., the ability of a creditor to reach the assets of an irrevocable self-settled trust after the settlor's death), we conclude that the common law applies.

In Massachusetts, there are both statutory and nonstatutory reach and apply actions. See G. L. c. 214, § 3 (6); Cavadi v. DeYeso, 458 Mass. 615, 624-625, 941 N.E.2d 23 (2011). The statute provides this court and the Superior Court with equity jurisdiction to decide

"[a]ctions by creditors to reach and apply, in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, within or without the commonwealth, which cannot be reached to be attached or taken on execution although the property sought to be reached and applied is in the possession or control of the debtor independently of any other person or cannot be reached and applied until a future time or is of uncertain value, if the value can be ascertained by sale, appraisal or by any means within the ordinary procedure of the court."

G. L. c. 214, § 3 (6).[9]

A nonstatutory reach and apply action is also considered an equitable action and "remains broader than the available statutes." Cavadi, 458 Mass. at 626, 941 N.E.2d 23. See Pacific Nat'l Bank v. Windram, 133 Mass. 175, 177 (1882); In re Rare Coin Galleries of Am., Inc., 862 F.2d 896, 903-904 (1st Cir. 1988). As equitable actions that, when brought pursuant to statute, expressly invoke a court's equity jurisdiction, such actions are often determined by equitable, rather than legal, principles.

"The established policy of this Commonwealth long has been that a settlor cannot place property in trust for his own benefit and keep it beyond the reach of creditors." Ware v. Gulda, 331 Mass. 68, 70, 117 N.E.2d 137 (1954), quoting Merchants Nat'l Bank of New Bedford v. Morrissey, 329 Mass. 601, 605, 109 N.E.2d 821 (1953).[10] The Commonwealth has disfavored the self-settled trust as a tool to protect one's assets from creditors, as it is seen as an attempt by a settlor to "hav[e his] cake and eat[ ] it too." Cohen v. Commissioner of the Div. of Med. Assistance, 423 Mass. 399, 414, 668 N.E.2d 769 (1996), cert. denied sub nom. Kokoska v. Bullen, 519 U.S. 1057, 117 S.Ct. 687, 136 L.Ed.2d 611 (1997); Nile v. Nile, 432 Mass. 390, 400, 734 N.E.2d 1153 (2000) ("it would violate established authority and public policy for an individual to have an estate to live on, but not an estate from which his debts could be paid").

The prohibition against using a self-settled trust to protect one's assets against creditors applies both to current and future creditors. Forbes v. Snow, 245 Mass. 85, 89, 140 N.E. 418 (1923). It also applies where the settlor has included a spendthrift provision in the trust.[11] See Taylor v. Buttrick, 165 Mass. 547, 551, 43 N.E. 507 (1896); Jackson v. Von Zedlitz, 136 Mass. 342, 343 (1884); Pacific Nat'l Bank, 133 Mass. at 178-179; Tilcon Capaldi, Inc. v. Feldman, 249 F.3d 54, 60 (1st Cir. 2001).

Here, the defendant trustee relies on State St. Bank & Trust Co. v. Reiser, 7 Mass. App. Ct. 633, 638-639 (1979) (Reiser), for the proposition that a creditor may only reach and apply assets of a discretionary

trust after the settlor's death where the settlor reserved the power to amend or revoke the trust and direct the disposition of the trust's assets (i.e., where the trust was revocable). In Reiser, the plaintiff creditor sought to reach and apply trust assets of a revocable trust of a deceased settlor to satisfy a debt owed by the settlor's estate. Id. at 633, 389 N.E.2d 768. The settlor died before repaying the debt, and his estate had insufficient funds to pay it. Id. at 634, 389 N.E.2d 768. The Appeals Court held that the creditor could reach and apply the trust's assets to satisfy the debt. Id. at 638-639, 389 N.E.2d 768. On the facts, the holding of the court in Reiser is merely illustrative of one instance in which a creditor was allowed to reach the assets of a trust of a deceased settlor.[12] It does not define the limits of a creditor's ability to so reach.[13]

In another Appeals Court case, a creditor was allowed to reach the assets of an irrevocable spendthrift trust to satisfy a judgment in a personal injury action against the deceased beneficiary's estate because the trust was held to be self-settled. Calhoun v. Rawlins, 93 Mass. App. Ct. 458, 459, 464-465, 106 N.E.3d 684 (2018). The beneficiary allegedly caused an automobile collision that seriously injured the plaintiffs and resulted in the beneficiary's death. Id. at 461, 106 N.E.3d 684. In that case, the court focused on the trustees' "complete discretion to distribute" trust assets to the beneficiary or for his benefit. Id. at 460-461, 106 N.E.3d 684. Although the court did not address the effect of the beneficiary's death on the creditor's ability to reach the trust property, it necessarily assumed that the creditor was not prohibited from such reach, as the cause of action giving rise to the personal injury action in which the plaintiffs received judgment accrued simultaneously to the beneficiary's death. Id. at 461, 106 N.E.3d 684.

The facts here lean even more compellingly in favor of the creditor. Here, the cause of action giving rise to the judgment at issue accrued before Belanger's death. The De Prinses' deaths also are the direct result of Belanger's intentional act of murder, not the result of a negligently or recklessly caused automobile accident as in Calhoun. Further, as in Calhoun, this trust is self-settled. As noted above, it is well established in this Commonwealth that a settlor may not use a self-settled trust to protect his assets from creditors.

Although we have found no case law that directly discusses the distinction between the reachability of the assets of a self-settled trust during the settlor's lifetime versus after his death (if one exists), it would be incongruent for a self-settled trust not to protect a settlor's assets from creditors while the settlor is alive but to have it protect the settlor's beneficiaries from the settlor's creditors after the settlor's death when, absent the self-settled trust, they would not be so protected.[14] We therefore hold that a self-settled trust does not become protected from creditors on the settlor's death.

Although the plaintiff does not argue that the conveyance of Belanger's assets to the trust was fraudulent, the timing of the events could give rise to the inference that it was part of a single plan. The De Prinses brought and prevailed in a lawsuit against Belanger in 2007. Belanger's wife committed

suicide on October 4, 2008. Within six months of her suicide, Belanger created the trust, transferred substantially all of his assets to the trust, murdered the De Prinses, and then committed suicide.

The defendant argues that Belanger did not have an estate to live on but not one from which to pay his debts, because the defendant did not distribute any trust assets to Belanger prior to his death. According to the defendant's argument, now that Belanger is deceased, it would be impossible for the defendant to distribute any trust assets to Belanger or for Belanger's benefit,[15] so this is not a case where Belanger is able to "have his cake and eat it too." As the First Circuit correctly observed, however, the important point is what is within the trustee's power to do, not what he actually does. Tilcon Capaldi, Inc., supra at 60 ("Thus, even if the trustee chooses not to make any payments to the beneficiary, a creditor may still reach the maximum amount the trustee could pay"). In other words, although the defendant did not distribute any trust assets to Belanger during his lifetime, he could have under the express terms of the trust. Therefore, under the First Circuit's reasoning, the plaintiff should be able to reach the maximum amount the defendant could have distributed during Belanger's lifetime -- all the assets of the trust. See id.

Further, often one of our greatest goals in life is to leave our children the benefit of our property. To prevent the son of two murder victims from financially recovering for their wrongful deaths while protecting the murderer's assets for his beneficiary would contradict the well-established public policy of this Commonwealth and condone the actions of a settlor who, it can be inferred, thought he could use the protection of a trust to shield his assets from the consequences of his violence. The equities here simply do not allow Belanger to murder the plaintiff's parents and then leave the plaintiff with no recovery in the subsequent wrongful death action, despite Belanger's possessing substantial assets during his lifetime.

Conclusion. We answer the certified question as follows: On the undisputed facts of this record, we hold that a self-settled spendthrift irrevocable trust that is governed by Massachusetts law and that allowed unlimited distributions to the settlor during his lifetime does not protect assets in the irrevocable trust from a reach and apply action by the settlor's creditors after the settlor's death.

The Reporter of Decisions is directed to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States Court of Appeals for the First Circuit, as the answer to the question certified, and also will transmit a copy to each party.

FOOTNOTES

4. A spendthrift trust is one "that prohibits the beneficiary's interest from being assigned and also prevents a creditor from attaching that interest; a trust by the terms of which a valid restraint is imposed

on the voluntary or involuntary transfer of the beneficiary's interest." Black's Law Dictionary 1824 (11th ed. 2019).

5. The three elements required for an action for reach and apply are (1) a creditor who has secured judgment (2) who has "unsuccessfully sought to execute on judgment," and (3) "property which could not be taken on execution at law." Cavadi v. DeYeso, 458 Mass. 615, 631, 941 N.E.2d 23 (2011).

6. General Laws c. 190B, § 3-803 (a), (b), provides that a creditor of a deceased person must bring an action against the decedent's estate or trust within one year after the date of death of the deceased.

7. The comment explains how this section was altered from the Uniform Trust Code to provide that property is not considered distributable solely because the trustee may reimburse the settlor for taxes paid related to income earned by the trust. Report of the Ad Hoc Massachusetts Uniform Trust Committee 27 (rev. July 18, 2012).

8. General Laws c. 203E, § 105 (b) (3), provides: "The terms of a trust shall prevail over any provision of this chapter except: . the requirement that a trust has a purpose that is lawful and not contrary to public policy."General Laws c. 203E, § 404, provides: "A trust may be created only to the extent its purposes are lawful and not contrary to public policy."

9. General Laws c. 214, § 3 (8), provides this court and the Superior Court with equity jurisdiction to decide "[a]ctions to reach and apply in payment of a debt any property, right, title or interest, real or personal, of a debtor, liable to be attached or taken on execution in a civil action against him and fraudulently conveyed by him with intent to defeat, delay or defraud his creditors, or purchased, or directly or indirectly paid for, by him, the record or other title to which is retained in the vendor or is conveyed to a third person with intent to defeat, delay or defraud the creditors of the debtor."

10. This rule is derived from the Restatement of Trusts § 156 (Restatement), which provides: "Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit." Ware v. Gulda, 331 Mass. 68, 70, 117 N.E.2d 137 (1954), quoting Restatement, supra at § 156(2). This language from the Restatement was imported almost verbatim into the MUTC, G. L. c. 203E, § 505 (a) (2), further indicating that the Legislature merely intended to codify, rather than displace, the common law here.

11. This disregard for the spendthrift provision as a tool to protect one's trust assets from creditors also is found in the MUTC, G. L. c. 203E, § 505, which, as discussed above, addresses when a creditor can reach a trust's assets to satisfy a claim against the trust's settlor and applies regardless of whether a trust contains a spendthrift provision.

12. The Appeals Court held that "where a person places property in trust and reserves the right to amend and revoke, or to direct disposition of principal and income, the settlor's creditors may, following the death of the settlor, reach in satisfaction of the settlor's debts to them, to the extent not satisfied by the settlor's estate, those assets owned by the trust over which the settlor had such control at the time of his death as would have enabled the settlor to use the trust assets for his own benefit." State St. Bank & Trust Co. v. Reiser, 7 Mass. App. Ct. 633, 638 (1979) (Reiser ). This holding does not address whether the assets of an irrevocable trust are reachable after the settlor's death.

13. It should be noted that, even if the court in Reiser purported to demarcate the bounds of a creditor's ability to reach the trust assets of a deceased settlor, we would not be bound by the decision.

14. Without the trust, the beneficiaries would not be protected, because the settlor's assets would simply be probated as part of the estate and subject to the creditor's claims prior to those of heirs or beneficiaries under a will. See G. L. c. 190B, § 3-802. See especially G. L. c. 109B, § 3-805 (listing order in which estate's personal representative is to pay claims against estate in event that estate has insufficient assets to pay all claims in full).

15. As will be discussed below, allowing Belanger to gift his assets to his child could be considered a distribution for his benefit.

CYPHER, J.

490 Mass. 98
Supreme Judicial Court of Massachusetts, Hampshire.

Regan Stempniewicz BARBETTI & another [1]
v.
Edward STEMPNIEWICZ. [2]

SJC-13149
|
Argued January 5, 2022
|
Decided June 28, 2022

**Synopsis**

**Background:** Children of deceased mother brought action against uncle, seeking declaratory judgment that living trust created by uncle was invalid, that assets then held by trust belonged to mother's estate, and that uncle was holding mother's assets in constructive trust for children's benefit, among other claims. The Superior Court Department, Hampshire County, Richard J. Carey, J., 2019 WL 13163292, granted partial summary judgment in favor of plaintiffs, and Edward F. Donnelly, Jr., Justice, 2020 WL 13179437, entered final judgment and denied defendant's motion for reconsideration. Uncle appealed.

**Holdings:** Upon transfer from the Appeals Court, the Supreme Judicial Court, Cypher, J., held that:

[1] reasons for judge's order for entry of final judgment were sufficiently clear to warrant certification of final judgment for immediate appeal;

[2] claim for constructive trust was not an independent claim that properly could be subject to an entry of separate and final judgment eligible for immediate appeal;

[3] declaration of trust's invalidity was a final adjudication on a single claim;

[4] claim seeking declaration as to invalidity of trust depended on court's resolution of a pure question of law, such that claim could be considered separately;

[5] uncle, acting as settlor's attorney-in-fact under power of attorney, lacked authority to create trust, and trust was therefore void ab initio; and

[6] as a matter of first impression, where power to create trust is delegable, either pursuant to statute or judicial opinion, it is only so where there is express grant of power to create trust in power of attorney; and

[7] to whom assets were required to be returned upon declaration of trust as void ab initio was material fact issue precluding summary judgment on constructive trust claim.

Affirmed in part, reversed in part, and remanded.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (51)

[1] **Attorneys and Legal Services** Attorneys and Legal Services
**Attorneys and Legal Services** Privileges, duties, and liabilities of attorneys in general
**Principal and Agent** Letters or Powers of Attorney Under Seal

There are two categories of attorney, with widely differing rights, duties, obligations, and responsibilities: attorneys-in-fact and attorneys-at-law.

[2] **Attorneys and Legal Services** Practice of Law in General
**Attorneys and Legal Services** Power to Admit and License

The Supreme Judicial Court has a constitutional obligation to regulate the practice of law, and permission to practice law is within the exclusive cognizance of the judicial department.

[3] **Attorneys and Legal Services** Practitioners Not Admitted or Licensed; Unauthorized Practice of Law

  

Because only licensed attorneys-at-law may represent parties in court and give legal advice, no power of attorney or other written instrument may confer on a nonlawyer attorney-in-fact the authority to practice law.

[4] **Appeal and Error** Nature and Scope of Decision

Grant of partial summary judgment is normally a non-appealable interlocutory order.

[5] **Appeal and Error** Certificate as to grounds

Power to grant motion for separate and final judgment for immediate appeal is largely discretionary, to be exercised in light of judicial administrative interests as well as equities involved, and giving due weight to historic federal and state policy against piecemeal appeals. Mass. R. Civ. P. 54(b).

[6] **Courts** Decisions of United States Courts as Authority in State Courts

Federal decisions are sources of precedent with respect to issues under rule governing entry of final judgment because that rule was taken verbatim from the federal rule, so that in construing the Massachusetts rule the court may rely upon federal cases interpreting its federal cognate. Fed. R. Civ. P. 54(b); Mass. R. Civ. P. 54(b).

[7] **Appeal and Error** Certificate as to grounds

A certificate of final judgment for immediate appeal should not be entered routinely or as a courtesy or accommodation to counsel. Mass. R. Civ. P. 54(b).

[8] **Appeal and Error** Certificate as to grounds

A valid certification of final judgment for immediate appeal requires the confluence of four factors: (1) the action must involve multiple claims or multiple parties; (2) there must be a final adjudication as to at least one, but fewer than all, of the claims or parties; (3) there must be an express finding that there is no just reason for delaying the appeal until the remainder of the case is resolved; and (4) there must be an express direction of the entry of judgment. Mass. R. Civ. P. 54(b).

[9] **Appeal and Error** Certificate as to grounds

The Supreme Judicial Court expects strict compliance with the rule governing certification of final judgment for immediate appeal. Mass. R. Civ. P. 54(b).

[10] **Appeal and Error** Proceedings for review

While the judge should ordinarily make specific findings setting forth the reasons for the judge's order certifying a judgment as final for purposes of appeal, failure to do so is not always fatal, particularly where the reasons for the judge's ruling are clear. Mass. R. Civ. P. 54(b).

[11] **Declaratory Judgment** Appeal and Error

Final judgment on claims seeking declaration that living trust created by uncle was invalid, that assets then held by trust belonged to mother's estate, and that uncle was holding mother's assets in constructive trust for benefit of children, stated that there was no just reason to delay entry of final judgment for reasons set forth in children's motion for entry of final judgment and supporting documents, and expressly directed entry of judgment, indicating that judge adopted children's analysis as his own for purposes of granting motion, and thus reasons for judge's order for entry of final judgment were sufficiently clear to support valid certification of final judgment for immediate appeal, although separate findings would have been preferable. Mass. R. Civ. P. 54(b).

  

[12] **Appeal and Error** Finality, certification, and leave to appeal

Whether multiple claims exist and whether there has been a final adjudication as to any claim are questions of law upon which Supreme Judicial Court's review of judge's decision is de novo. Mass. R. Civ. P. 54(b).

[13] **Appeal and Error** Certificate as to grounds

To satisfy the requirements of rule governing entry of final judgment for immediate appeal, the claim finally adjudicated must be a claim for relief separable from and independent of the remaining claims in the case. Mass. R. Civ. P. 54(b).

[14] **Appeal and Error** Certificate as to grounds

In deciding whether one of several separately stated counts is a genuinely separate claim for purposes of certification of entry of final judgment for immediate appeal, a critical distinction has been drawn between separate claims for relief within the meaning of the rule and different theories of recovery arising out of the same cause of action. Mass. R. Civ. P. 54(b).

[15] **Appeal and Error** Certificate as to grounds

A party presents multiple claims for relief when the facts give rise to more than one legal right or cause of action, for purposes of certification of final judgment for immediate appeal; conversely, when a party asserts only one legal right, even if seeking multiple remedies, there is only a single claim. Mass. R. Civ. P. 54(b).

[16] **Appeal and Error** Certificate as to grounds

In determining whether requirements for certification of final judgment for immediate appeal are satisfied, there is only a single claim for relief where facts underlying adjudicated portion of a case are largely the same as or substantially overlap those forming basis for unadjudicated issues such that they are inextricably intertwined. Mass. R. Civ. P. 54(b).

[17] **Appeal and Error** Certificate as to grounds

Claim for constructive trust, asserting that uncle was in possession, custody, or control of assets, property, and funds which rightfully belong to mother's estate and/or mother's children, had substantial factual and legal overlap with conversion claim, and to the extent it did not separately assert a legal basis on which the court should conclude uncle was in possession, custody, or control of mother's assets, claim was not an independent claim that properly could be subject to an entry of separate and final judgment eligible for immediate appeal. Mass. R. Civ. P. 54(b).

[18] **Declaratory Judgment** Appeal and Error

Claim seeking declaration as to trust's invalidity raised a pure question of law as to whether power of attorney granted uncle authority to create a trust on behalf of settlor, and thus claim could be evaluated independently from other claims, such as for undue influence and breach of fiduciary duties, and thus grant of summary judgment declaring trust void ab initio was a final decision on a single claim that met bare minimum requirement that order dispose of at least a single substantive claim, as would support certification of final judgment for immediate appeal. Mass. R. Civ. P. 54(b).

[19] **Principal and Agent** Construction of letters or powers of attorney

**Principal and Agent** Construction of letters or powers of attorney

  

The determination of the legal effect of a written power of attorney is for the court.

[20] **Appeal and Error** 🔑 Certificate as to grounds

**Appeal and Error** 🔑 Grounds for Dismissal

Resolution of constructive trust claim depended, in part, on resolution of claim for trust's invalidity, such that no economy would have been achieved by a dismissal of appeal of final and separate judgment entered on claim for constructive trust, although constructive trust claim was not properly an independent claim on its own. Mass. R. Civ. P. 54(b).

[21] **Appeal and Error** 🔑 Certificate as to grounds

**Appeal and Error** 🔑 Finality, certification, and leave to appeal

Determination of presence or absence of just reason for delay for entry of final judgment subject to immediate appeal is left to sound discretion of trial judge and is subject to reversal only for abuse of discretion. Mass. R. Civ. P. 54(b).

[22] **Appeal and Error** 🔑 Substitution of reviewing court's discretion or judgment

Under abuse of discretion standard, Supreme Judicial Court does not disturb judge's ruling simply because it might have reached different result; standard of review is not substituted judgment.

[23] **Courts** 🔑 Abuse of discretion in general

"Abuse of discretion" occurs only where judge makes clear error of judgment in weighing factors relevant to decision such that decision falls outside range of reasonable alternatives.

[24] **Appeal and Error** 🔑 Certificate as to grounds

In determining whether there is no just reason for delay for entry of final judgment subject to immediate appeal, the facts of each case must be closely examined to ensure that allowing an appeal will not wrongly fragment the case. Mass. R. Civ. P. 54(b).

[25] **Appeal and Error** 🔑 Certificate as to grounds

In determining whether there is no just reason for delay, a court should examine whether certification of entry of final judgment for immediate appeal will advance the interests of judicial administration and public policy. Mass. R. Civ. P. 54(b).

[26] **Appeal and Error** 🔑 Certificate as to grounds

While a number of factors may be relevant to any given case, there is no mechanical test to be applied in determining whether a case presents no just reason for delay so as to warrant certification of final judgment for appeal; instead, the fact-specific analysis entails an assessment of the litigation as a whole, and a weighing of all factors relevant to the desirability of relaxing the usual prohibition against piecemeal appellate review in the particular circumstances. Mass. R. Civ. P. 54(b).

[27] **Appeal and Error** 🔑 Certificate as to grounds

Separate and final judgment eligible for immediate appeal may be appropriate where there is a showing of hardship or injustice, where an early appeal may simplify, shorten, or expedite the trial of any of the other claims still pending in the trial court, and where allowing an immediate appeal would be in the public interest. Mass. R. Civ. P. 54(b).

[28] **Appeal and Error** 🔑 Certificate as to grounds

  

Separate and final judgment eligible for immediate appeal may not be appropriate where there is a possibility that the need for review might be mooted by future developments in the trial court. Mass. R. Civ. P. 54(b).

[29] **Appeal and Error** Certificate as to grounds

The greater the degree of similarity or factual overlap between the claims on appeal and the claims remaining pending in the trial court, the less persuasive the case for certification of final judgment for immediate appeal. Mass. R. Civ. P. 54(b).

[30] **Appeal and Error** Certificate as to grounds

Where the action remains pending in the trial court as to all of the parties, such fact counsels against granting separate and final judgment that would be eligible for immediate appeal. Mass. R. Civ. P. 54(b).

[31] **Appeal and Error** Certificate as to grounds

Entry of final judgments eligible for immediate appeal must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. Mass. R. Civ. P. 54(b).

[32] **Declaratory Judgment** Appeal and Error

Claim seeking declaration as to invalidity of trust depended on court's resolution of a pure question of law, such that claim could be considered separately from numerous factual disputes still pending between children and uncle, as would support certification of entry of separate and final judgment for immediate appeal; validity of trust may have simplified, shortened, or expedited trial of other claims still pending in trial court. Mass. R. Civ. P. 54(b).

[33] **Declaratory Judgment** Scope and extent of review in general

Supreme Judicial Court would exercise its discretion to consider merits of appeal as to declaration that uncle was holding mother's assets in constructive trust for benefit of mother's children, even though constructive trust claim did not constitute a separate claim subject to final adjudication; dismissal on constructive trust claim alone would not have achieved any judicial economy which was a primary goal of rule governing entry of final judgment eligible for immediate appeal, and relevant issues had been fully briefed and argued. Mass. R. Civ. P. 54(b).

[34] **Appeal and Error** De novo review

**Appeal and Error** Summary Judgment

Supreme Judicial Court reviews the grant of a motion for summary judgment de novo, viewing the evidence in the light most favorable to the party opposing summary judgment. Mass. R. Civ. P. 56(c).

[35] **Judgment** Absence of issue of fact

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c).

[36] **Principal and Agent** Construction of letters or powers of attorney

**Trusts** Persons who may create trusts

Uncle, acting as settlor's attorney-in-fact under power of attorney, lacked authority to create trust, and trust was therefore void ab initio; power of attorney did not grant uncle near plenary authority over settlor's assets, and did not grant uncle authority to create trust as settlor's attorney-in-fact.

  

[37] **Trusts** 🔑 Nature and essentials of trusts

Instructions given by settlor at some time prior to creation of trust would void trust for lack of requisite contemporaneous manifestation of intent by the settlor. Mass. Gen. Laws Ann. ch. 203E, § 402.

[38] **Principal and Agent** 🔑 Construction of letters or powers of attorney

**Trusts** 🔑 Persons who may create trusts

**Trusts** 🔑 Modification

**Trusts** 🔑 Revocation

The power to create, modify, or revoke a trust is personal and non-delegable to an attorney-in-fact unless expressly granted in the power of attorney.

[39] **Trusts** 🔑 Persons who may create trusts

Where power to create trust is delegable, either pursuant to statute or judicial opinion, it is only so where there is express grant of power to create trust in power of attorney.

[40] **Contracts** 🔑 Subject, object, or purpose as affecting construction

**Contracts** 🔑 Language of contract

To ascertain and effectuate intent of parties as manifested by words used and object to be accomplished is the goal of all interpretations of written agreements.

[41] **Principal and Agent** 🔑 Construction of letters or powers of attorney

**Principal and Agent** 🔑 Construction of letters or powers of attorney

Power of attorney is subject to rule of strict construction.

[42] **Principal and Agent** 🔑 Construction of letters or powers of attorney

**Principal and Agent** 🔑 Construction of letters or powers of attorney

Rule of strict construction of power of attorney does not go to the extent of destroying purpose of power.

[43] **Principal and Agent** 🔑 Implied and Apparent Authority

Authority to conduct a transaction includes authority to do acts which are incidental to it, or are reasonably necessary to accomplish it.

[44] **Principal and Agent** 🔑 Implied and Apparent Authority

Authority to conduct incidental transactions only arises where authority has been granted in the first instance to conduct a primary transaction.

[45] **Trusts** 🔑 Effect of invalidity

When a trust is declared void ab initio, or void from the beginning, the courts act as though the trust never existed.

[46] **Trusts** 🔑 Effect of invalidity

Assets transferred into a trust that has been declared void ab initio are returned to the sources from which they came, as if the transfer of those assets to the trust never occurred in the first instance.

[47] **Judgment** 🔑 Weight and sufficiency

On motion for summary judgment, court does not resolve issues of material fact, assess credibility, or weigh evidence. Mass. R. Civ. P. 56(c).

[48] **Appeal and Error** 🔑 Summary Judgment

**Judgment** 🔑 Hearing and determination

When deciding a summary judgment motion, questions of credibility of affidavits do not

  

concern the trial court or the Supreme Judicial Court. Mass. R. Civ. P. 56(c).

[49] **Judgment** Presumptions and burden of proof

If the party moving for summary judgment establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment. Mass. R. Civ. P. 56(c).

[50] **Judgment** Presumptions and burden of proof

In reviewing the grant of a motion for summary judgment, courts view the evidence in the light most favorable to the party opposing summary judgment, drawing all reasonable inferences in the opponent's favor. Mass. R. Civ. P. 56(c).

[51] **Judgment** Trust cases

Genuine issue of material fact existed as to whom assets were required to be returned upon declaration of trust as void ab initio precluding summary judgment in favor of children on children's claim that assets which uncle conveyed to trust were part of mother's estate and should be held in constructive trust for the benefit of mother's estate.

**270 Trust, Creation, Constructive trust, Validity. Uniform Trust Code. Declaratory Relief. Practice, Civil, Declaratory proceeding, Summary judgment, Judgment.

CIVIL ACTION commenced in the Superior Court Department on March 30, 2018.

The case was heard by Richard J. Carey, J., on motions for summary judgment; separate and final judgment was entered by Edward F. Donnelly, Jr., J., and a motion for reconsideration was considered by him.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

**Attorneys and Law Firms**

Mark A. Tanner, Northampton, for the defendant.

Angelina P. Stafford, for the plaintiffs.

Patrick G. Curley, Wakefield, Clarence D. Richardson, Jr., & C. Alex Hahn, for Massachusetts Chapter of the National Academy of Elder Law Attorneys, amicus curiae, submitted a brief.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

**Opinion**

CYPHER, J.

*99 This case arises out of a familial dispute over assets left by Lubov Stempniewicz, who was the mother and grandmother to the parties to this action. Regan Stempniewicz Barbetti and Ryan Stempniewicz initiated this action against their uncle, Edward Stempniewicz, and Edward's two children, Nikita Stempniewicz and Stanislav Stempniewicz, to determine the validity of the Living Trust of Lubov Stempniewicz (Lubov Trust).[3] Nikita and Stanislav did not participate in the litigation, resulting in the entry of a default order against them. The plaintiffs moved for partial summary judgment, arguing that Edward acted without authority in creating the Lubov Trust, and therefore the trust is void ab initio. A Superior Court judge (first motion judge) agreed, granting partial summary **271 judgment, and separate and final judgment entered for the plaintiffs. Edward filed a motion for reconsideration or amendment of the judgment, which was denied. Edward then appealed from the grant of partial summary judgment, the entry of separate and final judgment, and the denial of his motion for reconsideration.[4] For the reasons discussed infra, we affirm in part and reverse in part.

[1] [2] [3] Background. We recite the undisputed material facts, reserving certain facts for later discussion. On March 27, 2013, when Lubov was ninety-one years old, she executed a power of attorney, titled "Durable Power of Attorney for Financial Management," which appointed Edward as Lubov's attorney-in-fact.[5] Lubov also executed a will (2013 will) to replace a prior will *100 executed in 1999 (1999 will).[6]

  

Lubov was not represented by an attorney with respect to the drafting, review, or execution of the power of attorney or the will.

On February 22, 2017, Edward created and signed the Lubov Trust in three capacities: (1) as attorney-in-fact under the power of attorney, as Lubov is the named grantor of the Lubov Trust; (2) as attorney-in-fact under the power of attorney, as Lubov is named as the first cotrustee of the Lubov Trust; and (3) in his personal capacity, as Edward is named as the second cotrustee of the Lubov Trust. Lubov was not represented by an attorney with respect to the creation or execution of the Lubov Trust.

The Lubov Trust provides that the purpose of the trust was "to receive and manage assets for the benefit of [Lubov] during [Lubov's] lifetime, and to further manage and distribute the assets of the [t]rust upon the death of [Lubov]." Consistent with this purpose, during Lubov's lifetime, all income and "such sums from the principal as [Lubov] may request" were to be paid "to or for the benefit of [Lubov]." The Lubov Trust further provided that, on Lubov's death, the trust assets would be distributed as follows: $25,000 would be distributed to each of Lubov's four grandchildren, plaintiffs Regan and Ryan and defendants Nikita and Stanislav; all tangible personal property would be distributed to Edward, or Edward's children if Edward predeceased Lubov; and all remaining assets would **272 continue to be held in trust by Edward for the benefit of his two children, Nikita and Stanislav.

After executing the trust document, Edward executed two deeds, signed under power of attorney for Lubov, conveying from *101 Lubov to the Lubov Trust two parcels of real property. Edward also opened six bank accounts in the name of the Lubov Trust. According to Edward, Edward funded the trust accounts with assets owned by Lubov individually, assets owned by Edward individually, and those owned by Lubov and Edward jointly.

On Lubov's death in 2018, the plaintiffs in this action filed a petition in the Probate and Family Court Department seeking probate of the 1999 will. After Edward appeared and objected to the petition, that action evolved into a will contest as to the validity of the 1999 and 2013 wills. That action remains pending. The plaintiffs also brought this action in the Superior Court challenging the validity of the Lubov Trust. The two cases have not been consolidated, but they have been assigned to a single judge pursuant to a joint request for interdepartmental assignment. The plaintiffs brought fourteen counts in this action, relating to the creation and funding of the trust and to Edward's alleged breach of fiduciary duties, as follows:

1. conversion, related to Edward's transfer of Lubov's assets to himself or to the Lubov Trust;

2. conversion, related to Edward's transfer of Lubov's assets to himself and to his own living trust;

3. breach of fiduciary duties owed to Lubov when acting as Lubov's attorney-in-fact and as trustee of the Lubov Trust and breach of fiduciary duties owed to the plaintiffs when acting as trustee of the Lubov Trust;

4. breach of fiduciary duties owed to Lubov based on Edward's and Lubov's close personal relationship, in transferring Lubov's assets to Edward's own living trust;

5. demand for accounting;

6. demand for trust accounting;

7. declaratory judgment that the Lubov Trust is invalid and the trust assets belong to Lubov's probate estate;

8. constructive trust;

9. undue influence;

10. rescission of deed;

11. intentional interference with inheritance;

*102 12. removal of trustee;

13. injunctive relief to prevent Edward from transferring or spending any contested assets; and

14. trustee process, seeking payment from Edward's and the Lubov Trust's account assets held by Florence Bank.

Relevant to this appeal, the plaintiffs moved for summary judgment on count 7 of their amended complaint, seeking a declaration that the Lubov Trust is invalid and that the assets then held by the Lubov Trust belong to Lubov's estate, and count 8, seeking a declaration that Edward is holding Lubov's assets in constructive trust for the benefit of the plaintiffs. The first motion judge granted partial summary judgment in favor of the plaintiffs on both counts.[7] The plaintiffs then moved for entry of separate and final judgment on counts 7 and 8 pursuant to Mass. R. Civ. P. 54 (b), 365

Mass. 820 (1974). A different judge (second motion judge) granted the **273 motion, "having found and determined that there is no just reason for delay ... for the reasons set forth in the [p]laintiffs' motion and supporting documents." The second motion judge denied Edward's subsequent motion for reconsideration, and this appeal followed. We transferred the case from the Appeals Court on our own motion.

[4] Discussion. 1. Separate and final judgment. As a threshold matter, we must determine whether the second motion judge properly entered separate and final judgment pursuant to Mass. R. Civ. P. 54 (b) as to the two counts of the plaintiffs' complaint on which partial summary judgment was granted, as the grant of partial summary judgment is "normally a non-appealable interlocutory order." Long v. Wickett, 50 Mass. App. Ct. 380, 385 n.6, 737 N.E.2d 885 (2000).

[5] [6] [7] When an action involves multiple claims or multiple parties, rule 54 (b) allows the entry of separate and final judgment "as to one or more but fewer than all of the claims or parties upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[8] Mass. R. Civ. P. 54 (b). The power to grant a motion for separate and final *103 judgment "is largely discretionary, to be exercised in light of judicial administrative interests as well as the equities involved, and giving due weight to the historic [F]ederal [and State] policy against piecemeal appeals"[9] (quotations and citations omitted). Reiter v. Cooper, 507 U.S. 258, 265, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993). As such, "[a rule 54 (b)] certificate should not be entered 'routinely or as a courtesy or accommodation to counsel.' " Acme Eng'g & Mfg. Corp. v. Airadyne Co., 9 Mass. App. Ct. 762, 764, 404 N.E.2d 693 (1980), quoting Panichella v. Pennsylvania R.R. Co., 252 F.2d 452, 455 (3d Cir. 1958).

[8] [9] [10] "[A] valid rule 54(b) certification requires the confluence of four factors: (1) the action must involve multiple claims or multiple parties; (2) there must be a final adjudication as to at least one, but fewer than all, of the claims or parties; (3) there must be an express finding that there is no just reason for delaying the appeal until the remainder of the case is resolved; and (4) there must be an express direction of the entry of judgment" (footnote omitted). Long, 50 Mass. App. Ct. at 385-386, 737 N.E.2d 885, citing J.W. Smith & H.B. Zobel, Rules Practice § 54.4, at 307 (1977 & Supp. 2000). "We ... expect strict compliance with this rule." Appleton v. Hudson, 397 Mass. 812, 813 n.3, 494 N.E.2d 10 (1986). While the judge "should ordinarily make specific findings setting forth the reasons for [the judge's] order" (citation omitted), Long, supra at 402, 737 N.E.2d 885, a failure to do so is not always fatal, particularly where the reasons for the judge's ruling are clear, see **274 Dattoli v. Hale Hosp., 400 Mass. 175, 176, 508 N.E.2d 100 (1987); O. Ahlborg & Sons, Inc. v. Massachusetts Heavy Indus., Inc., 65 Mass. App. Ct. 385, 392-393, 840 N.E.2d 977 (2006); Quinn v. Boston, 325 F.3d 18, 26 (1st Cir. 2003).

[11] Here, the final judgment on counts 7 and 8 of the plaintiffs' complaint stated that "there is no just reason to delay in entry of final judgment for the reasons set forth in the [p]laintiffs' motion and supporting documents," and expressly directed the entry of judgment. Although separate findings would have been preferable, the second motion judge's reference to the plaintiffs' motion *104 and supporting documents indicated that he adopted the plaintiffs' analysis as his own for the purposes of granting the plaintiffs' motion, and thus the reasons for the judge's order are sufficiently clear.

[12] [13] [14] [15] [16] a. Multiple claims and finality. "Whether multiple claims exist and whether there has been a final adjudication as to any claim are questions of law upon which our review of the judge's decision is de novo." O. Ahlborg & Sons, Inc., 65 Mass. App. Ct. at 392, 840 N.E.2d 977, citing Long, 50 Mass. App. Ct. at 386, 737 N.E.2d 885. "To satisfy the requirements of Rule 54(b) ... the claim [finally] adjudicated must be a 'claim for relief' separable from and independent of the remaining claims in the case." Long, supra at 391, 737 N.E.2d 885, quoting Brunswick Corp. v. Sheridan, 582 F.2d 175, 182 (2d Cir. 1978). "In deciding whether one of several separately stated counts [is a] genuinely separate claim[ ], ... [a] critical[ ] distinction has been drawn between separate claim[s] for relief within the meaning of the rule ... [and] different theories of recovery arising out of the same cause of action" (quotations omitted). Long, supra at 391, 737 N.E.2d 885, quoting Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 10, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980), and Lubanes v. George, 386 Mass. 320, 323 n.5, 435 N.E.2d 1031 (1982). "A [party] presents multiple claims for relief ... when the facts give rise to more than one legal right or cause of action.... Conversely, when a party asserts only one legal right, even if seeking multiple remedies, there is only a single claim for relief for rule 54(b) purposes" (citations omitted). Long, supra at 392, 737 N.E.2d

885. "Finally, there is only a single claim for relief ... where the facts underlying the adjudicated portion of the case are largely the same as or substantially overlap those forming the basis for the unadjudicated issues" such that they are "inextricably intertwined." Id., quoting Spiegel v. Trustees of Tufts College, 843 F.2d 38, 45 (1st Cir. 1988).

[17] Here, the plaintiffs assert fourteen separate counts in their complaint. There do not, however, appear to be fourteen separate claims or causes of action. Critically here, count 8, "constructive trust," asserts that Edward is "in possession, custody, or control of assets, property and funds which rightfully belong to [Lubov's] estate and/or the [p]laintiffs." This count has substantial factual and legal overlap with the conversion claim asserted in counts 1 and 2, and to the extent it does not separately assert a legal basis on which the court should conclude Edward is in possession, custody, or control of Lubov's assets, it does not constitute an independent claim that properly may be subject to an entry of separate and final judgment.

*105 [18] [19] [20] However, count 7 is on different footing. Although there is some potential for mootness if the power of attorney pursuant to which Edward was acting is adjudicated to be void, the claim for the trust's invalidity raised in count 7 may be evaluated independently from the plaintiffs' other claims, such as that for undue **275 influence and breach of fiduciary duties, because count 7 raises a pure question of law as to whether the power of attorney granted Edward the authority to create a trust on behalf of a settlor. [10] Thus, the grant of summary judgment on count 7, declaring the Lubov Trust void ab initio, constituted a final decision on a single claim. Additionally, although not properly an independent claim on its own, the resolution of count 8 depends, in part, on the resolution of count 7 such that "no economy will be achieved by a dismissal" of the final and separate judgment entered on count 8 (citation omitted). See Tiffany v. Sturbridge Camping Club, Inc., 32 Mass. App. Ct. 173, 179, 587 N.E.2d 238 (1992) (deciding not to dismiss appeal from separate judgment because, after full briefing and oral argument, "no economy will be achieved by a dismissal"). Thus, where entry of summary judgment on count 7 constitutes a final adjudication on a single claim, the judge's grant of final and separate judgment meets the "bare minimum" requirement that it "dispose[ ] ... 'of at least a single substantive claim.' " Spiegel, 843 F.2d at 43, quoting Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978).

[21] [22] [23] b. No just reason for delay. "The determination of the presence or absence of a just reason for delay ... is left to the sound discretion of the trial judge and is subject to reversal only for an abuse of ... discretion." Long, 50 Mass. App. Ct. at 386, 737 N.E.2d 885. Under the abuse of discretion standard, we "do not disturb the judge's ruling 'simply because [we] might have reached a different result; the standard of review is not substituted judgment' " (citation omitted). Laramie v. Philip Morris USA Inc., 488 Mass. 399, 414, 173 N.E.3d 731 (2021). "An abuse of discretion occurs only where the judge makes a clear error of judgment in weighing the factors relevant to the decision ... such that the decision falls outside the range of reasonable alternatives" (quotations and citations omitted). District Attorney for the N. Dist. v. Superior Court Dep't, 482 Mass. 336, 342, 122 N.E.3d 1051 (2019).

[24] [25] [26] In determining whether there is no just reason for delay, "the *106 facts of each case [must] be closely examined to ensure that allowing an appeal will not wrongly fragment the case.... A court should also examine whether [certification] will advance the interests of judicial administration and public policy." Long, 50 Mass. App. Ct. at 395, 737 N.E.2d 885, quoting Consolidated Rail Corp. v. Fore River Ry. Co., 861 F.2d 322, 325 (1st Cir. 1988). While a number of factors may be relevant to any given case, we note that there is no mechanical test to be applied in determining whether a case presents no just reason for delay. Instead, the fact-specific analysis "entails an assessment of the litigation as a whole, and a weighing of all factors relevant to the desirability of relaxing the usual prohibition against piecemeal appellate review in the particular circumstances." Spiegel, 843 F.2d at 43.

[27] [28] [29] [30] [31] Separate and final judgment may be appropriate where there is a showing of "hardship or injustice," where an early appeal may "simplify, shorten or expedite the trial of any of the other claims still pending in the [trial court]," Harrison v. Roncone, 447 Mass. 1001, 1002 n.3, 849 N.E.2d 181 (2006), and where allowing an immediate appeal would be in the public interest, Quinn, 325 F.3d at 27. Conversely, separate and final judgment may not be appropriate where there is a "possibility **276 that the need for [rule 54 (b)] review might ... be mooted by future developments in the [trial] court." Long, 50 Mass. App. Ct. at 398, 737 N.E.2d 885, quoting Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975). Additionally, "[t]he greater the degree of similarity or

factual overlap [between the claims on appeal and the claims remaining pending in the trial court], the less persuasive the case for certification." Long, supra at 399, 737 N.E.2d 885. Where "the action remains pending [in the trial court] as to all of the parties," such fact also counsels against granting separate and final judgment. Spiegel, 843 F.2d at 44. "Judgments under [rule 54 (b)] must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." Id. at 42.

**[32]** Here, because the validity of the Lubov Trust depends on our resolution of a pure question of law, this claim, as articulated in count 7 of the plaintiffs' complaint, may be considered separately from the numerous factual disputes still pending between the plaintiffs and defendant. As the second motion judge concluded, the resolution of the validity of the Lubov Trust also may "simplify, shorten or expedite the trial of ... the other claims still ***107** pending in the [trial court]," Harrison, 447 Mass. at 1002, 849 N.E.2d 181, as, for example, the resolution of the plaintiffs' claim that Edward committed a breach of his fiduciary duties as trustee of the Lubov Trust inherently depends on whether there is a trust in the first instance or whether the purported trust is void ab initio, cf. Massachusetts Mun. Wholesale Elec. Co. v. Danvers, 411 Mass. 39, 54, 577 N.E.2d 283 (1991) (contract that is void ab initio may not be enforced, and "no breach of contract is possible"). Thus, the judge did not abuse his discretion in granting separate and final judgment on count 7. See Clair v. Clair, 464 Mass. 205, 214, 982 N.E.2d 32 (2013) (appellate court may affirm correct result based on reasons different from those articulated by judge below).

**[33]** We already have observed that count 8 does not constitute a separate claim subject to final adjudication and, thus, it is not properly before this court. However, we have also noted that, where the relevant issues have been fully briefed and argued, dismissal on that count alone would not achieve any judicial economy, a primary goal of rule 54 (b). Tiffany, 32 Mass. App. Ct. at 179, 587 N.E.2d 238. See Long, 50 Mass. App. Ct. at 396 n.12, 737 N.E.2d 885. Thus, we exercise our discretion to consider the merits of the defendant's appeal as to both counts.

**[34]** **[35]** 2. Summary judgment. We review the grant of a motion for summary judgment de novo, "view[ing] the evidence in the light most favorable to the part[y] opposing summary judgment" (citation omitted). Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680, 46 N.E.3d 24 (2016). "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Conservation Comm'n of Norton v. Pesa, 488 Mass. 325, 330, 173 N.E.3d 333 (2021); Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002).

**[36]** **[37]** a. Validity of the trust. We first address whether Edward had the authority, acting as Lubov's attorney-in-fact under the power of attorney, to create the Lubov Trust.[11] We hold that he did not and ****277** that the Lubov Trust is therefore void ab initio.

***108** This court never has determined whether the power of a settlor to create a trust is delegable, either at common law or under the Massachusetts Uniform Trust Code (MUTC), G. L. c. 203E, §§ 101 et seq. The MUTC was enacted in 2012, after an ad hoc Massachusetts Uniform Trust Code committee (ad hoc committee) completed a thorough review of and made revisions to the Uniform Trust Code drafted by the Uniform Law Commission. See St. 2012, c. 140, § 56; Report of the Ad Hoc Massachusetts Uniform Trust Code Committee 1-2 (rev. July 18, 2012) (Report). Although the MUTC was passed, in part, to "hav[e] all trust law in one place," the MUTC was "not intended to replace the common law of trusts in Massachusetts except where the [MUTC] modifies it." Report, supra at 2, 7. See G. L. c. 203E, § 106 (§ 106) ("The common law of trusts and principles of equity shall supplement this chapter, except to the extent modified by this chapter or any other general or special law"). Thus, pursuant to § 106, the common law continues to apply where it has not been modified by the MUTC.

Two sections of the MUTC address trust creation. Section 401 provides three methods for trust creation.[12] None of the enumerated methods involves creation by an agent acting pursuant to a ***109** power of attorney. G. L. c. 203E, § 401 (§ 401). The absence of language relating to creation by an agent is not dispositive, however, particularly where the ad hoc committee's comment to § 401 provides that "[§ 401] states familiar ways of creating a trust, but is not an exclusive list of methods." Report, supra at 17. Section 402 provides requirements to create a trust, regardless of the method used. G. L. c. 203E, § 402. A trust may be created only if, among other things, "the settlor has capacity to create a trust" and

"the settlor indicates an intention **278 to create the trust." G. L. c. 203E, § 402 (a) (1)-(2).

Section 303 of the MUTC codifies certain common-law principles related to agency, such as that "an agent having authority to act with respect to the particular question or dispute may represent and bind the principal." G. L. c. 203E, § 303 (3). Section 602 is the only section of the MUTC that specifically addresses the delegation of a settlor's power to an agent acting under a power of attorney. G. L. c. 203E, § 602. That section provides that "[a] settlor's powers with respect to revocation, amendment or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust and the power" (emphasis added). G. L. c. 203E, § 602 (e). Notably, § 602 of the Uniform Trust Code (UTC) allows an agent acting under a power of attorney to exercise authority related to revocation, amendment, or distribution of trust property where either the power of attorney or the trust document expressly authorizes such exercise. Uniform Trust Code § 602(e) (2000). The ad hoc committee intentionally revised UTC § 602 such that, in the MUTC, such authorization must expressly appear both in the trust document and the power of attorney. Report, supra at 29-30. Thus, the ad hoc committee, and by extension the Legislature in adopting the MUTC, chose to limit to a greater extent than under the UTC the ability of a settlor to delegate the power to amend or revoke a trust to an agent acting under a power of attorney.

However, § 602 facially addresses revocation and amendment of a trust, but not trust creation. Although the ad hoc committee's revisions to § 602 may indicate a general hesitancy to allow delegation of a settlor's powers, such evidence is far from conclusive of legislative intent as to trust creation where the MUTC is silent on the ability of a settlor to delegate trust-creation power *110 and where § 401, which deals with methods of creating a trust, provides only a nonexhaustive list. G. L. c. 203E, § 401. See Report, supra at 17. Thus, no section of the MUTC addresses the ability of a settlor to delegate the power to create a trust. [13] However, an examination of the law in other jurisdictions is instructive.

Several States have adopted the Uniform Power of Attorney Act (UPAA) or otherwise provided by statute that the power to create a trust may be delegated to an agent or attorney-in-fact acting under a valid power of attorney. See, e.g., Cal. Prob. Code § 4264 ("An attorney-in-fact under a power of attorney may perform any of the following acts on behalf of the principal or with the property of the principal only if the power of attorney expressly grants that authority to the attorney-in-fact: [a] Create, modify, revoke, or terminate a trust, in whole or in part"); Colo. Rev. Stat. § 15-14-724(1) ("An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject: [a] Create, amend, revoke, or terminate an inter vivos trust"); Neb. Rev. Stat. § 30-4024(1) (same); **279 Tex. Est. Code Ann. § 751.031(b) ("An agent may take the following actions on the principal's behalf or with respect to the principal's property only if the durable power of attorney designating the agent expressly grants the agent the authority and the exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject: [1] create, amend, revoke, or terminate an inter vivos trust").

Additionally, where other States that have adopted the UTC wished to allow the delegation of the power to create a trust, they included in their versions of § 401 or § 402 express language to that effect. See, e.g., Ark. Code Ann. § 28-73-401 ("A trust may be created by: ... [4] an agent under a power of attorney that *111 expressly grants the agent the authority to create a trust"); Conn. Gen. Stat. § 45a-499w(d) ("The settlor's power to create or contribute to a trust may be exercised by [1] an agent under a power of attorney only to the extent expressly authorized to create or contribute property to a trust ..."); Miss. Code Ann. § 91-8-401 ("A trust may be created ... [5] [b]y an agent or attorney-in-fact under a power of attorney" in certain circumstances). Regardless of whether trust-making power may be delegated under a State's version of the UPAA or the UTC, the statutes reviewed by this court provide that such power may only be delegated where the specific power to create a trust is expressly granted to the attorney-in-fact in the power of attorney.

Prior to Texas's adoption of a statute permitting an agent acting under a power of attorney to create a trust on behalf of a settlor, the Texas Court of Appeals held that the power to create a trust was nondelegable because "[a]n agent acting under a power of attorney cannot have the requisite intent to create a trust." Ritter v. Till, 230 S.W. 3d 197, 203 (Tex. App. 2006), superseded by Tex. Est. Code Ann. § 751.031, inserted by 2017 Tex. Gen. Laws c. 834, § 3. Conversely, prior to Vermont's adoption of a statute providing for trust creation by an agent, the Vermont Supreme Court concluded

that an agent acting pursuant to a power of attorney may create a trust where "the express language of the power of attorney authorized the attorney-in-fact to create [the] trust." In re Estate of Kurrelmeyer, 179 Vt. 359, 363, 895 A.2d 207 (2006). See Vt. Stat. Ann. tit. 14A, §§ 401(5)(A), 402(b), inserted by 2009 Vt. Acts & Resolves no. 20, § 1.

**[38]** **[39]** "The general weight of authority suggests that the power to create, modify, or revoke a trust is personal and non-delegable to an attorney-in-fact unless expressly granted in the [power of attorney]," and "several state courts have held that, in the absence of an express grant of authority, an attorney-in-fact does not have the power to create a trust on behalf of [his or] her principal." Stafford v. Crane, 382 F.3d 1175, 1183-1184 (10th Cir. 2004). Thus, although jurisdictions vary in their conclusions as to whether the power to create a trust is ever delegable, our review of the statutes and case law of other States reveals an underlying principle: where the power to create a trust is delegable, either pursuant to a statute or judicial opinion, it is only so where there is an express grant of the power to create a trust in the power of attorney.

**[40]** **[41]** **[42]** **[43]** **[44]** This principle is consistent with our rules of construction related to powers of attorney. Certainly, "[t]o ascertain and effectuate ***112** the intent of the parties as manifested by the words used and the object to be accomplished is the goal of all interpretations of written agreements." MacDonald v. Gough, 326 Mass. 93, 96, 93 N.E.2d 260 (1950), quoting Marcelle, Inc. v. S. Marcus Co., 274 Mass. 469, 473, 175 N.E. 83 (1931). A power of attorney, however, ****280** is also subject to a rule of strict construction. McQuade v. Springfield Safe Deposit & Trust Co., 333 Mass. 229, 233, 129 N.E.2d 923 (1955). This rule "does not go to the extent of destroying the purpose of the power." Id., citing Malaguti v. Rosen, 262 Mass. 555, 561, 160 N.E. 532 (1928). "Authority to conduct a transaction includes authority to do acts which are incidental to it, or are reasonably necessary to accomplish it." McQuade, supra. However, authority to conduct incidental transactions only arises where authority has been granted in the first instance to conduct a primary transaction. Thus, where a power of attorney contains a general grant of authority, we have declined to interpret such grant to provide more authority than absolutely necessary to effectuate the purpose of the power, absent some additional express authorization. See Williams v. Dugan, 217 Mass. 526, 529-530, 105 N.E. 615 (1914) (general power of attorney "couched in comprehensive terms" without specific authority to borrow money "fall[s] short of conferring the right to borrow money on the principal's account"); Wood v. Goodridge, 6 Cush. 117, 123, 60 Mass. 117 (1850) (power of attorney "must be ... interpreted ... as not to extend the authority given to [the attorney-in-fact] beyond that which is given in terms, or which is necessary and proper for carrying the authority expressly given into full effect").

We now review de novo the legal effect of the terms of the power of attorney that Edward claims provided him the authority to create the Lubov Trust. See McQuade, 333 Mass. at 233, 129 N.E.2d 923. We assume for this analysis that the power of attorney is valid, but we do not decide the matter, as it is not properly before us.

Part 1 of the power of attorney provides, "I, Lubov Stempniewicz, appoint the person named below [Edward] as my attorney-in-fact to act for me in any lawful way with respect to the powers delegated in [p]art 4, below." Part 4 of the power of attorney, which "grant[s Lubov's] attorney-in-fact power to act on [her] behalf in the following matters," includes two matters relating to trust transactions: number 7, "Estate, trust, and other beneficiary transactions," and number 8, "Living trust transactions." The powers enumerated in part 4 are further defined in part 12.

Part 12 of the power of attorney, titled "Definition of Powers Granted to Attorney-in-Fact," provides, "[t]he powers granted in ***113** [p]art 4, above, authorize my attorney-in-fact to do the following." Thus, contrary to Edward's assertion, the powers granted in part 4 of the power of attorney do not grant Edward "near plenary authority over Lubov's assets." Instead, part 4 defines the matters or subject areas in which Edward has authority to act as attorney-in-fact on Lubov's behalf, while part 12 defines the scope of Edward's authority to act in such matters. Such an interpretation of the power of attorney is consistent with the rule of strict construction to which we must adhere.

Section 7 of part 12, titled "Estate, trust and other beneficiary transactions," provides in relevant part: "My attorney-in-fact may act for me in all matters that affect a trust ... from which I am, may become or claim to be entitled, as a beneficiary, to a share or payment. My attorney-in-fact's authority includes the power to disclaim, release or renounce any assets which I am, may become or claim to be entitled, as a beneficiary, to a share or payment." This section addresses only trust transactions where Lubov is a beneficiary of a trust, not a

  

settlor. It discusses no authority to create a trust, and trust creation is not an authority necessary for Edward to act on behalf of Lubov in situations where she is or may become entitled to trust assets as a ****281** beneficiary of a trust. Thus, this section confers on Edward no authority to create a trust on Lubov's behalf.

Section 8 of Part 12, titled "Living trust transactions," provides: "My attorney-in-fact may transfer ownership of any property over which he or she has authority under this document to the trustee of a revocable trust I have created as settlor. Such property may include real property, stocks, bonds, accounts with financial institutions, insurance policies or other property." Where this section speaks of trusts "[Lubov] ha[s] created as settlor," and not of any trusts that may be created in the future or trusts that may be created by another on Lubov's behalf, it would be pure speculation for this court to read into this section an authority in Edward to create a trust on Lubov's behalf. Such an interpretation is also unnecessary to effectuate the purpose of the section to allow Edward to transfer Lubov's property to a preexisting trust created by Lubov. Thus, it is an impermissible interpretation pursuant to the rule of strict construction.

Because the power of attorney did not grant Edward the authority to create the Lubov Trust as Lubov's attorney-in-fact, any trust he purported to create as Lubov's attorney-in-fact, including the Lubov Trust, is void ab initio. We therefore affirm the grant of ***114** summary judgment in favor of the plaintiffs on count 7 of the complaint. In so doing, we do not decide whether, as a matter of law, a settlor may ever delegate the authority to create a trust pursuant to a power of attorney. If this court were to so conclude, it would raise questions related to how the trust creation requirements set forth in G. L. c. 203E, § 402, may be observed when a trust is created on behalf of a settlor by an attorney-in-fact.

For example, § 402 (a) provides that "[a] trust shall be created only if[, among other things]: (1) the settlor has capacity to create a trust; [and] (2) the settlor indicates an intention to create the trust" (emphasis added). G. L. c. 203E, § 402 (a) (1)-(2). As discussed, see note 11, supra, the requisite manifestation of intent must occur contemporaneously to the creation of the trust. See UBS Fin. Servs., Inc., 483 Mass. at 407, 133 N.E.3d 277; Freedman, 445 Mass. at 1010, 834 N.E.2d 251. Additionally, the power of attorney at issue here purported to provide the defendant with "broad legal powers" that "will continue to exist even if [the principal] become[s] disabled or incapacitated." See G. L. c. 190B, § 5-502 (attorney-in-fact acting pursuant to durable power of attorney may bind principal during period of disability or incapacity of principal); Johnson v. Kindred Healthcare, Inc., 466 Mass. 779, 785, 2 N.E.3d 849 (2014). Thus, where an agent creates a trust pursuant to a power of attorney, such action may conflict with the requirement of § 402 that the settlor -- the principal in the principal-agent relationship -- have capacity to create a trust.[14] G. L. c. 203E, § 402 (a) (1).

Additionally, while we acknowledge the critical importance of powers of attorney in the area of elder life planning, we likewise acknowledge that, given the broad powers they may confer on an agent, they may be used as tools of abuse against the very people they are intended to assist. See Bautz, Modernizing Financial Legislation to Protect Older Americans from Financial Abuse, 25 U. Miami Bus. L. Rev. 89, 96-99 (2017); Black, ****282** The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population, 82 St. John's L. Rev. 289, 291 (2008). This risk is compounded in the trust context, where trusts are often used as a means of avoiding the probate process and resultant review by a court of the disbursement of a decedent's assets. See Sacks v. Dissinger, 488 Mass. 780, 780-781, 788 & n.10, 178 N.E.3d 388 (2021) (plaintiffs sued aunts and grandmother's ***115** estate, alleging undue influence caused them to be excluded from grandfather's trust); Matter of the Colecchia Family Irrevocable Trust, 100 Mass. App. Ct. 504, 509-511, 180 N.E.3d 988 (2021) (petitioner asserted that sister exerted undue influence on parents in creation of trust, resulting in his partial disinheritance).

In sum, there is significant opportunity for powers of attorney and trusts to be used as tools of abuse against vulnerable individuals. The Legislature has enacted comprehensive legislation related to trusts that must be considered when determining the scope of an agent's ability to create a trust on behalf of a principal-settlor. The Legislature is currently considering whether to adopt the Uniform Power of Attorney Act, which would permit an agent acting under a power of attorney to "create, amend, revoke, or terminate an inter vivos trust" on behalf of a settlor "only if the power of attorney expressly grants the agent the authority." House Bill No. 1598, at 20 (Jan. 22, 2021). Therefore, we conclude that, at this time, the more prudent path is to allow the Legislature the opportunity to decide whether and how to allow delegation of the power to create a trust.

  

b. Constructive trust. Count 8 of the plaintiffs' complaint asserted that Edward and the other defendants are "in possession, custody, or control of assets, property and funds which rightfully belong to the Decedent's estate and/or the Plaintiffs" and sought a declaration that they are holding such assets in constructive trust for the plaintiffs' benefit. In granting summary judgment on this count, the motion judge concluded that the assets Edward conveyed to the Lubov Trust were part of Lubov's estate, and as a result, those assets should be held in constructive trust for the benefit of Lubov's estate. This was error.

**[45]** **[46]** When a trust is declared void ab initio, or void from the beginning, the courts act as though the trust never existed. See Massachusetts Mun. Wholesale Elec. Co., 411 Mass. at 55, 577 N.E.2d 283 (when contract is void ab initio, "courts treat the contract as if it had never been made"). Assets transferred into the trust are therefore returned to the sources from which they came, as if the transfer of those assets to the trust never occurred in the first instance. See Stafford v. Crane, 241 F. Supp. 2d 1239, 1247 (D. Kan. 2002), aff'd, 382 F.3d 1175 (10th Cir. 2004); Jasser v. Saadeh, 97 So. 3d 241, 247 (Fla. Dist. Ct. App. 2012). Cf. Service Employees Int'l Union, Local 509 v. Department of Mental Health, 476 Mass. 51, 58, 63 N.E.3d 1097 (2016) (where privatization contracts were void ab initio, renewal contracts based thereon also were void ab initio); ***116** Brown v. Coggeshall, 14 Gray 134, 134, 80 Mass. 134 (1859) (where proceedings in insolvency were adjudged void ab initio, "all proceedings under them became, as far as then practicable, void and of no effect").

**[47]** **[48]** **[49]** **[50]** The plaintiffs contend that the undisputed facts establish that the Lubov Trust was funded exclusively with Lubov's assets and that Edward's "disingenuous, conclusory" assertion to the contrary is insufficient to defeat their motion for summary judgment. This argument ignores the rule that, on a motion for summary judgment, "a court does not resolve issues of material fact, assess credibility, or weigh evidence" (emphasis added). ****283** Bulwer, 473 Mass. at 689, 46 N.E.3d 24. Specifically, "[q]uestions of credibility of affidavits ... do not concern the trial court" or this court. Norwood Morris Plan Co. v. McCarthy, 295 Mass. 597, 603, 4 N.E.2d 450 (1936). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment." Pederson v. Time, Inc., 404 Mass. 14, 17, 532 N.E.2d 1211 (1989). Further, in reviewing the grant of a motion for summary judgment, we "view the evidence in the light most favorable to the part[y] opposing summary judgment ..., drawing all reasonable inferences in [the opponent's] favor" (citations omitted) Bulwer, supra at 680, 46 N.E.3d 24.

**[51]** In response to the plaintiffs' motion for summary judgment, Edward asserted by affidavit that he funded the trust with "assets owned by [Lubov], individually; by [Edward], individually; and by [Edward] and [Lubov], jointly." It is not for this court to assess whether this allegation is "disingenuous" or "conclusory." Where the affidavit specifically alleges that the Lubov Trust was funded, in part, with Edward's assets, it is sufficient to establish the existence of a genuine issue of material fact regarding to whom at least some of the assets must be returned now that the Lubov Trust has been declared void ab initio.

The plaintiffs further argue that, even taking the assertions in Edward's affidavit as true, any transfers he made to the Lubov Trust constituted completed gifts. This argument is unavailing. Where the Lubov Trust is void ab initio, any transfers of assets into the Lubov Trust are likewise void ab initio, and the status of such assets after transfer into the Lubov Trust is irrelevant. The only relevant inquiry is to whom those assets belonged prior to their void transfer into the Lubov Trust. If Edward proves at trial that his own assets were transferred into the Lubov Trust, then he is entitled to the return of those assets. See ***117** Stafford, 241 F. Supp. 2d at 1247; Jasser, 97 So. 3d at 247. Cf. Service Employees Int'l Union, Local 509, 476 Mass. at 58, 63 N.E.3d 1097; Brown, 14 Gray at 134. We therefore reverse the grant of summary judgment in favor of the plaintiffs on count 8 of the complaint.

3. Motion for reconsideration. After the first motion judge had granted summary judgment in favor of the plaintiffs on counts 7 and 8, the second motion judge entered final and separate judgment on those counts. Edward moved for reconsideration, making largely the same argument raised in his opposition to the plaintiffs' motion for summary judgment and on appeal, namely that the evidence establishes that the Lubov Trust was partly funded with assets owned by Edward.

First, we already have reviewed the underlying decision on the plaintiffs' motion for summary judgment on which

Edward sought reconsideration. Second, the motion for reconsideration raised no additional arguments beyond those this court already has considered. Third, our review of the underlying grant of summary judgment has led to a reversal of the grant of summary judgment on count 8, which is the result sought in the motion for reconsideration. Fourth, our review of the underlying grant of summary judgment was de novo, which was less deferential than the abuse of discretion standard under which we would review the motion for reconsideration. Blake v. Hometown Am. Communities, Inc., 486 Mass. 268, 278, 158 N.E.3d 18 (2020). Thus, because our earlier discussion addressed Edward's arguments raised in his motion for reconsideration and granted the relief sought therein, the motion **284 for reconsideration has been rendered moot and we do not consider it. See Guardianship of D.C., 479 Mass. 516, 520, 143 N.E.3d 370 (2018) (judge's subsequent allowance of hospital's guardianship petition rendered moot appeal from dismissal of earlier petition).

Conclusion. We reverse the judgment with respect to count 8 of the plaintiffs' complaint. In all other respects, we affirm the judgment. The case is remanded for further proceedings consistent with this opinion.

So ordered.

**All Citations**

490 Mass. 98, 189 N.E.3d 264

## Footnotes

1 Ryan Stempniewicz, individually and as special personal representative of the estate of Lubov Stempniewicz.

2 Individually, as trustee of the Living Trust of Lubov Stempniewicz, and as trustee of the Edward Stempniewicz Revocable Living Trust.

3 Because many of the parties share a last name, we use their first names for ease of reference.

4 We acknowledge the amicus brief submitted by the Massachusetts Chapter of the National Academy of Elder Law Attorneys.

5 There are two categories of "attorney," with widely differing "rights, duties, obligations, and responsibilities": attorneys-in-fact and attorneys-at-law. Federal Nat'l Mtge. Ass'n v. Rego, 474 Mass. 329, 334-335 & n.7, 50 N.E.3d 419 (2016). An attorney-in-fact is "one who is designated to transact business for another; a legal agent." Black's Law Dictionary 159 (11th ed. 2019). An attorney-in-fact is empowered to act as an agent of another "by an instrument in writing, called a 'letter of attorney,' or more commonly a 'power of attorney.' " Federal Nat'l Mtge. Ass'n, supra at 335, 50 N.E.3d 419, quoting Black's Law Dictionary 105 (1891). An attorney-at-law, or, more colloquially, "attorney" or "lawyer," is "[s]omeone who practices law." Black's Law Dictionary 159 (11th ed. 2019). This court has a "constitutional obligation to regulate the practice of law," and "[p]ermission to practi[c]e law is within the exclusive cognizance of the judicial department" (citation omitted). Rental Prop. Mgt. Servs. v. Hatcher, 479 Mass. 542, 550, 97 N.E.3d 319 (2018). Because "[o]nly [licensed] attorneys[-at-law] may represent parties in court and give legal advice," Matter of Hrones, 457 Mass. 844, 849, 933 N.E.2d 622 (2010), no power of attorney or other written instrument may confer on a nonlawyer attorney-in-fact the authority to practice law.

6 The validity of both the power of attorney and 2013 will are disputed. For the purpose of the questions currently before us, we assume without deciding that the power of attorney is valid.

7 The plaintiffs also sought summary judgment on count 3, breach of fiduciary duties. The judge denied summary judgment on that count.

8 Rule 54 (b) of the Massachusetts Rules of Civil Procedure, 365 Mass. 820 (1974), provides in relevant part:

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

9 "We note that Federal decisions are sources of precedent with respect to issues under our rule 54(b) because that rule was taken verbatim from Fed.R.Civ.P. 54(b), so that in construing our rule we may rely upon Federal Cases interpreting its Federal cognate" (quotation and citation omitted). Long v. Wickett, 50 Mass. App. Ct. 380, 385 n.6, 737 N.E.2d 885 (2000).

10 "The determination of the legal effect of [a] written power [of attorney] is for the court." McQuade v. Springfield Safe Deposit & Trust Co., 333 Mass. 229, 233, 129 N.E.2d 923 (1955).

11 On appeal, Edward argues that, regardless of whether he had authority as Lubov's attorney-in-fact under the power of attorney to create the Lubov Trust, he validly created the trust pursuant to express actual authority orally granted to him by Lubov. Edward signed the Lubov Trust as "Edward Stempniewicz under power of attorney for Lubov Stempniewicz, Grantor," "Edward Stempniewicz under power of attorney for Lubov Stempniewicz, Co-Trustee 1," and "Edward Stempniewicz, Co-Trustee 2." Thus, in creating the Lubov Trust, Edward did not appear to assert any authority separate from that provided to him under the power of attorney. Additionally, a trust may be created only where the settlor manifests, at the time the trust is created, an intention to create a trust. See G. L. c. 203E, § 402 (trust may be created only if settlor indicates intention to create trust); UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 407, 133 N.E.3d 277 (2019) (settlor's expressed intent to create trust is prerequisite to trust creation); Freedman v. Freedman, 445 Mass. 1009, 1010, 834 N.E.2d 251 (2005) (reformation of trust to conform to settlor's intent requires proof of settlor's intent at time he or she created trust); Restatement (Third) of Trusts § 13 comment a (2003) (creation of inter vivos trust "requires that the intention be to create the trust at that time.... [A]n intention to create a trust at some time in the future ordinarily does not create an express trust"). Thus, if Edward purported to create the Lubov Trust based not on his authority under the power of attorney but on instructions given by Lubov at some time prior to Edward's creation of the trust, the trust would be void for lack of the requisite contemporaneous manifestation of intent by the settlor.

12 General Laws c. 203E, § 401, entitled "Methods of creating trust," provides in relevant part:

> "A trust may be created by:
>
> "(1) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
>
> "(2) declaration by the owner of property that the owner holds identifiable property as trustee; or
>
> "(3) exercise of a power of appointment in favor of a trustee."

13 The Massachusetts Uniform Trust Code (MUTC) provides for the continuing application of the common law in circumstances not addressed by the MUTC. G. L. c. 203E, § 106. The common law of Massachusetts, however, is no more instructive on the question before us than the MUTC, as the ability of a settlor to delegate

the power to create a trust to an agent acting pursuant to a power of attorney appears to be a question of first impression in the Commonwealth.

14 We note that the common law of trusts is superseded by any conflicting provision of the MUTC. G. L. c. 203E, § 106.

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*Docket:* **22-233-BLS1**
*Date:* **April 1, 2024**
*Parties:* **ELIZABETH A. SHERRY Plaintiff vs. PAUL E. CAPASSO,[1] & others[2] Defendants**
*Judge:* **/s/Peter B. Krupp**

MEMORANDUM AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT
Plaintiff Elizabeth Sherry ("plaintiff" or "Elizabeth") and defendants Paul Capasso ("Paul") and Jerrod Capasso ("Jerry") are siblings and equal co-owners of a real estate business (the "Business") that was established by their father, Donato D. Capasso. Plaintiff alleges that in various respects Paul and Jerry (together, "defendants") have operated the Business without regard to her rights as an equal co-owner. The case is before me on defendants' motion for

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[1]Individually and in his capacity as Trustee of The Capasso Family Irrevocable Trust, The Donato D. Capasso 1994 Trust, The Margaret L. Capasso 1994 Trust, and the Florence Street Realty Trust.
[2]Jerrod C. Capasso, individually and in his capacity as Trustee of The Capasso Family Irrevocable Trust, The Donato D. Capasso 1994 Trust, and The Margaret L. Capasso 1994 Trust. Plaintiff has named the following entities as necessary party defendants: Capasso Associates Series II, LLC, 1172 Beacon Street Series; Cold Spring Series; Concord Street Series; Westbrook Apartment Series; Capasso Associates Series III - Waltham, LLC; 880 Main Street Series; The Rumford Ave., LLC; Packard Cove Associates LLP; Capasso Associates Limited Partnership; JCC Associates, Inc.; Capasso Realty Corporation; the Lexington Street Apartments Trust; the Second Lexington Street Apartments Trust; the Third Lexington Street Apartments Trust; the Fifth Lexington Street Apartments Trust; P.J.E., LLC, and P.J.E., LLC, as Trustee of the 1172 Beacon Street Trust, the Cold Spring Realty Trust, the Concord Street Trust, the Westbrook Apartments Realty Trust, the Rumford Avenue Trust, and the 880 Main Street Realty Trust.

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partial summary judgment. Defendants contend that some or all of plaintiff's claims are time- barred. For the following reasons, I agree.
BACKGROUND
The summary judgment record reflects the following relevant facts:[3]
A. F actual Background
The Business owns and manages real estate through a network of 27 entities in which Elizabeth, Paul and Jerry (together, "the siblings") each hold equal one-third ownership or beneficial interests. Capasso Realty Corporation ("CRC") manages the day-to-day operations of the Business. Paul is the President and Chief Executive Officer of CRC. Jerry is CRC's Treasurer and the Senior Operations Officer. Plaintiff is CRC's secretary and part-time bookkeeper.
CRC is run as a "break-even" operation. Each of the Business' entities pays an annual management fee to CRC. Any money left over after the payment of the fee is potentially available to be distributed as profits to the siblings. Paul determines how much each entity distributes as profits to the siblings.
1. Profit Distributions
Before 2012, the siblings received equal profit distributions. In 2012,

Paul told plaintiff that he and Jerry were going to receive 20% more in distributions because they did more work for the Business than she did. From 2012 until 2016, plaintiff received less in distributions than

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[3]Defendants served plaintiff with a motion to strike certain of plaintiff's responses in the Consolidated Statement of Material Facts (Docket #47) and her Statement of Additional Material Facts, see Defendants' Notice of Motion to Strike; Reply to Plaintiff's Opposition to Defendants' Motion for Partial Summary Judgment (Docket #49) at 7-10, but did not file it with the court. At the hearing, plaintiff conceded that she had failed to comply with the rule at least with respect to her Statement of Additional Material Facts and agreed to withdraw the statement. In ruling on the motion, I rely only on the evidence in the Joint Appendix and plaintiff's admissions to defendants' statements of material fact.



defendants. During the entirety of this four-year period, plaintiff was aware of the unequal distributions. In 2016, after she complained about the arrangement, Paul agreed to resume equal payments. Since 2017, the payments have been equal.

2. C RC Salaries

In 2016, the siblings hired Charles Schultz of CFS Consulting, Inc. to perform a market compensation study for selected employees within the Business, including the three siblings. On May 5, 2016, Schultz issued a report, which concluded that Paul and plaintiff's annual salaries were below market value and that Jerry's salary was above market value. Plaintiff did not object to the report's conclusion.

3. Capasso Hospitality Project

In March 2016, defendants informed plaintiff that they planned to buy property in Waltham to develop a boutique hotel (the "Capasso Hospitality Project"). They offered plaintiff the opportunity to participate in buying the property on terms plaintiff alleges were unfair. After initially contributing funds for the project, plaintiff asked for and, on or about July 30, 2016, received a refund of her investment. Later in 2016, defendants purchased property in Waltham without plaintiff's involvement through a newly created entity called Capasso Hospitality, LLC, which is owned equally by Paul and Jerry. The hotel has yet to be developed.

4. Company Vehicles

For years, the Business has purchased or leased vehicles for Paul and Jerry. On October 30, 2010, the Business leased a 2011 Porsche 911 for Jerry to use. On November 4, 2014, the Business paid off the lease on the Porsche. The Business still owns the Porsche. On September 5, 2014, the Business purchased a used 2013 Bentley for Paul to use. The Bentley replaced a company-owned Maserati that Paul used, and which was traded in toward the purchase of the Bentley. The Business still owns the Bentley. On April 4, 2015, the Business leased a 2016 Audi



A7 for Jerry to use. Plaintiff was aware of these automobile leases and purchases when they were made and was unhappy about the cost of the vehicles.

B. Procedural History

On February 27, 2020, plaintiff filed this case in Middlesex Superior

Court. In early 2022, the case was transferred to the Business Litigation Session and assigned a new docket number. The operative pleading is plaintiff's Amended Complaint ("AC") (Docket #14), which asserts claims for accounting (Count I), breach of fiduciary duty (Count II), waste (Count III), breach of contract (Count IV), breach of the covenant of good faith and fair dealing (Count V), unjust enrichment (Count VI), and conversion (Count VII), and which seeks removal of trustees (Counts VIII, IX, and X). Most of plaintiff's counts are based on her allegations that defendants failed to pay her an equal share of the Business' profit distributions from 2012-2016, usurped several business opportunities, paid themselves unreasonably high salaries, and abused the Business' automobile fringe benefit by causing the Business to purchase luxury vehicles.

In moving for summary judgment, defendants argue that Count IV for breach of contract and Counts VIII and IX, which seek to remove Paul and Jerry as the trustees, are wholly time- barred, and Counts II, III, V, VI, and VII are partially time-barred. [4] As explained below, I agree with defendants.

DISCUSSION

I. Standard of Review

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Mass. R. Civ. P. 56(c). See Cassesso v.

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[4]Because defendants have not clearly addressed the claims for accounting (Count I) and for removal against P.J.E., LLC as the trustee of certain trusts (Counts X), I do not address those counts.



Commissioner of Corr., 390 Mass. 419, 422 (1983). The moving party has the burden to show the absence of any triable fact. Flesner v. Technical Comm'n Corp., 410 Mass. 805, 808-809 (1991). If the moving party meets its burden, the burden shifts to the non-moving party to show specific facts that establish a genuine dispute. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991). The court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in its favor. Jupin v. Kask, 447 Mass. 141, 143 (2006).

II. Statute of Limitations

A. B reach of Fiduciary Duty, Waste, and Conversion

Plaintiff's claims for breach of fiduciary duty (Count II) and waste (Count III) are based on her allegations that defendants paid themselves excessive compensation, abused the automobile fringe benefit, and usurped business opportunities, including the Capasso Hospitality Project. AC ¶¶ 175, 176, 180. Plaintiff's conversion claim (Count VII) is based on these allegations as well as her allegations that defendants failed to provide equal profit distributions between 2012 and 2016, and used the Business' funds to maintain their own properties. AC ¶ 196. The parties agree that these claims sound in tort. See, e.g., Tocci v. Tocci, 490 Mass. 1, 12 (2022) (breach of fiduciary and conversion); Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 517 (1997) ("shareholder derivative action for breach of fiduciary duty through diversion of corporate opportunities and self-dealing").

"Actions of tort" must be commenced within three years after the cause of action accrues. G.L. c. 260, § 2A. "A cause of action in tort accrues on the date the plaintiff suffers injury or loss." Nortek, Inc. v. Liberty Mut. Ins. Co., 65 Mass. App. Ct. 764, 770 (2006). In the case of a breach

of fiduciary duty claim, the statute of limitations begins to run when "the trustee repudiates the trust and the beneficiary has actual knowledge of that repudiation." Demoulas, 424 Mass. at 518 (emphasis in original). Having filed the case on February 27, 2020, plaintiff's

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claims for breach of fiduciary duty, waste, and conversion are barred to the extent they accrued before February 27, 2017.

In her papers, plaintiff has not offered any argument opposing defendants' contention that these claims are barred to the extent they concern excessive compensation or abuses of the automobile fringe benefit before February 27, 2017. Plaintiff's claims are therefore waived to the extent they concern such conduct. Even if these claims were not waived, they are untimely. Plaintiff knew of defendants' compensation by May 2016. The automobiles in question - the Maserati, Bentley, Porsche, and Audi - were procured for defendants' use between 2010 and 2015. Plaintiff admits she was aware of these acquisitions when they occurred.

Insofar as these claims are based on the Capasso Hospitality Project, the claims are time- barred because plaintiff knew defendants acquired the property for the project in 2016. In opposing the motion, plaintiff somewhat confusingly argues that her breach of fiduciary duty claim based on the Capasso Hospital Project survives because defendants "continu[ed] to use their unlawful acquisition of the Capasso Hospitality properties as a means to keep Elizabeth" from participating in another business opportunity. See Opposition of Plaintiff Elizabeth Sherry to Defendants' Motion for Partial Summary Judgment (Docket #46) at 18-19. I disagree that such conduct altered the accrual date. Defendants' actions after their purchase of the project property does not change the fact that plaintiff understood in 2016 that she was not participating in the project.

To the extent the conversion claim is based on the unequal profit distributions in 2012- 2016, the claim is untimely because plaintiff admitted in her deposition testimony that Paul told her in 2012 that defendants were going to receive a greater share of the profit distributions from 2012 onward and therefore her claims accrued in that year.

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B. Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, and Unjust Enrichment

Plaintiff's breach of contract claim (Count IV) alleges that defendants breached the various articles of incorporation, operating agreements, partnership agreements, and trust documents governing the business entities that hold the Business' properties ("Entity Agreements") by failing to make equal profit distributions between 2012 and 2016. AC ¶ 184. Plaintiff's claims for breach of the implied covenant of good faith and fair dealing (Count V) and unjust enrichment (Count VI) are based on this allegation and her allegations concerning excessive compensation, abuse of the automobile fringe benefit, and usurpation of business opportunities. AC ¶¶ 190, 193.

"Actions of contract," such as plaintiff alleges here, must be brought within six years, G.L. c. 260, § 2, and "accrue[ ] at the time of the breach . . . even though a specific amount of damages is unascertainable at the time of the breach or even if damages may not be sustained until a later time." Nortek, 65 Mass. App. Ct. at 768, quoting International Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc., 29 Mass. App. Ct. 215, 221 (1990).

Claims for breach of the implied covenant of good faith and fair dealing

and for unjust enrichment normally sound in contract and are subject to the six-year limitations period for contract actions. See Nortek, 65 Mass. App. Ct. at 768-769 (breach of implied covenant claim subject to six year statute of limitation); Sacks v. Dissinger, 488 Mass. 780, 791 n.14 (2021), quoting SiOnyx, LLC v. Hamamatsu Photonics K.K., 332 F. Supp. 3d 446, 466 (D. Mass. 2018) ("[w]here an unjust-enrichment claim is contractual in nature, the limitations period for that claim is . . . six years"); Suffolk Const. Co. v. Benchmark Mech. Sys., Inc., 475 Mass. 150, 156 (2016) ("quasicontractual [claims] . . . are subject to the six-year statute of limitations applicable to contracts").

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I agree with defendants, however, that to the extent plaintiff's breach of the implied covenant and unjust enrichment claims are based on the allegations of excessive compensation, abuse of the automobile fringe benefit, and the Capasso Hospitality Project, the "gist" of the claims allege breaches of fiduciary duty and therefore sound in tort. See Bridgwood v. A.J. Wood Constr., Inc., 480 Mass. 349, 364 (2018) (Gants, C.J., dissenting) ("where a plaintiff frames what is essentially a common-law claim sounding in tort as a contract claim in an attempt to obtain the benefit of the six-year statute of limitations . . . we look to the gist of the action and apply the three-year statute of limitations applicable to torts") (internal quotes omitted). My conclusions above regarding the breach of fiduciary duty claim apply to these claims.[5] See,
supra, at 5-6.
The portions of the breach of the implied covenant and unjust enrichment claims based on the unequal distribution of profits sound in contract, as does the breach of contract claim, which is entirely based on these unequal distributions. Although defendants argue the "gist" of these claims is an alleged breach of fiduciary duty, the complaint makes clear that these claims are based on the Entity Agreements and the provisions therein concerning the distribution of profits. AC ¶¶ 75, 86, 87. Even applying the six-year limitations period, however, they are time- barred. It is undisputed that in 2012, Paul informed plaintiff that defendants were going to take a greater share of the profits for themselves. The claims accrued in 2012, more than six years before plaintiff filed this action.
In opposing summary judgment, plaintiff argues that her breach of contract claim is not time-barred because each time defendants paid themselves a greater share of the profits created a

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[5]Insofar as plaintiff's claims are based on excessive compensation and abuse of the automobile fringe benefit, the claims are waived because plaintiff failed to address them in her papers. Plaintiff concedes in her papers that her claims based on the Capasso Hospitality Project sound in tort.

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new starting point from which the statute of limitations ran.[6] I disagree. "When the statute of limitations for a breach of contract begins to run depends on whether the contract is entire or divisible." See Flannery v. Flannery, 429 Mass. 55, 58 (1999). The Supreme Judicial Court has described the characteristics of a divisible contract as follows:

> A contract may be entire in the sense that there is but one agreement covering all the terms and yet it may be that the performance under the contract will be divided into different groups, each set embracing performances which are the agreed exchange for each other, the result being that the contract is entire but divisible.

Bianchi Bros., Inc. v. Gendron, 292 Mass. 438, 445 (1935). The parties' performance over time is "a reliable indication" that a contract is divisible. Price Chopper, Inc. v. Consol. Beverages, LLC, No. CIV. 09-10617-FDS, 2011 WL 901817 at * 7 (D. Mass. Mar. 11, 2011) (Saylor, J.), quoting Allan R. Hackel Org., Inc. v. American Radio Systems Corporations, 2000 WL 281689 at * 2 (Mass. Super. Jan. 12, 2000) (Fahey, J.).

When a contract is divisible, "each alleged violation of the continuing [periodic] payment obligation [is] a new claim for statute of limitation purposes." Chambers v. Lemuel Shattuck Hosp., 41 Mass. App. Ct. 211, 213 (1996). See Flannery, 429 Mass. at 58 ("Where an obligation is payable in instalments, the general rule is that the applicable statute of limitations begins to run against the recovery of each instalment from the time it becomes due."). However, "[t]here is an exception . . . to . . . [this] rolling statute of limitations When there is a clear and unequivocal repudiation of a party's contractual obligation, the statute of limitations begins to run from the date of the repudiation." Callender v. Suffolk Cnty., 57 Mass. App. Ct. 361, 364 (2003).

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[6]After the hearing on the motion, I permitted plaintiff to provide additional support for this argument. See Letter from Michael A. Burkett (Mar. 21, 2024) (Docket #50).



Assuming the Entity Agreements at issue are divisible, there was a clear and unequivocal repudiation of those agreements when Paul put plaintiff on notice in 2012 that she was going to receive distributions that were smaller than defendants' distributions. See Callender, 57 Mass. App. Ct. at 365 (letter that plaintiff's benefits were terminated and would not be reinstated "sufficiently conveyed to its reader the notion that any contractual obligation to pay [ ] benefits was being repudiated"). Plaintiff's breach of contract claim accrued in 2012 and is now untimely.[7]

C. Removal Claims

Plaintiff seeks to remove defendants as trustees of certain trusts, including the Capasso Family Irrevocable Trust of which plaintiff is a co-trustee and a co-beneficiary (Counts VIII and IX). Although not referenced in the complaint, plaintiff has clarified that, insofar as these counts are related to the Capasso Family Irrevocable Trust, she seeks removal under G.L. c. 203E, § 706, based on a serious breach of trust.[8] Plaintiff argues that defendants' unequal distributions in 2014-2016 from the Capasso Family Irrevocable Trust constituted a serious breach of trust, and that the court may consider these actions to determine whether defendants should be removed as trustees of that trust. Under the Massachusetts Uniform Trust Code ("MUTC"), which was adopted in 2012, "[t]he settlor, a co-trustee or a beneficiary may request the court to remove a trustee," G.L. c.

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[7]In support of her position, plaintiff relies on Starr v. Wexler, 101

Mass. App. Ct. 1114, 2022 WL 3093117 at * 6 (Aug. 4, 2022) (Rule 23:0 decision), which did not involve the accrual of a contract statute of limitations. In that case, the defendant was found liable on a claim of breach of fiduciary duty and the court did not find a clear repudiation of a trustee's duties. The facts in this case are different.
[8]Plaintiff does not address defendants' argument as to the other trusts and therefore her claims based on those trusts are waived.

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203E, § 706(a), and "[t]he court may remove a trustee if: (1) the trustee has committed a serious breach of trust." G.L. c. 203E, § 706(b). Defendants argue that its claims in Counts VIII and IX are barred by the applicable statute of limitations. Neither § 706, nor any section in Article 7 of the MUTC, sets a limitations period for claims to remove a trustee based on a "serious breach of trust." However, G.L. c. 203E, § 1005, entitled "Limitation of action against trustee," sets forth different limitation periods for breach of trust claims. As is relevant here, § 1005 provides that "a beneficiary may not commence a proceeding against a trustee for breach of trust more than 3 years after the date the beneficiary . . . knew or reasonably should have known of the existence of a potential claim for breach of trust." G.L. c. 203E, § 1005(b).9 Notably, G.L. c. 203E, § 1001, defines a breach of trust as "[a] violation by a trustee of a duty the trustee owes to a beneficiary," id. § 1001(a), and lists removal of the trustee as one of the remedies for such a breach. Id. § 1001(b)(7). Reading MUTC sections 706, 1001, and 1005 together, I conclude that plaintiff's request for removal under § 706 is subject to the three-year limitation period set forth in § 1005(b).
In arguing that an action for removal under § 706 is not subject to any limitation period, plaintiff cites B.W. v. J.W., 67 Mass. App. Ct. 295 (2006), in which the Appeals Court stated that "[a]ll conduct . . . not merely behavior limited to the trusts at issue, is relevant to resolve an action to remove a trustee." 67 Mass. App. Ct. at 298. The case in apposite. It was not decided under the MUTC and does not concern the timeliness of a removal claim.
Even if § 1005(b) did not apply, the result would be the same. Under the MUTC, "[t]he common law of trusts and principles of equity shall supplement this chapter, except to the extent modified by this chapter or any other general or special law." G.L. c. 203E, § 106. See De Prins

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9The limitation periods listed in G.L. c. 203E, § 1005(a) and (c) do not apply to plaintiff's claims for removal in this case.

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v. Michaeles, 486 Mass. 41, 45 (2020) ("It is clear … that the common law continues to apply where the MUTC does not address the situation at issue, and that the court may apply 'principles of equity' to such cases."). Prior to the passage of the MUTC, removal was seen as an equitable remedy. See, e.g., Gorman v. Stein, 1 Mass. App. Ct. 244, 248 (1973) ("Power is lodged in a court of general equity jurisdiction to remove trustees under appropriate circumstances."); Harp v. Swartz, 83 Mass. App. Ct. 1139, 2013 WL 3283732 at * 2 (July 1, 2013) (Rule 1:28 decision) ("Trustee removal is a matter of equity . . . and courts are vested with broad discretion in determining whether removal is appropriate.") (internal citation omitted). Equitable claims are subject

to the same statute of limitations for the analogous claims at law. Lanier v. President & Fellows of Harvard Coll., 490 Mass. 37, 54 (2022) ("Where an equitable claim such as restitution is not explicitly covered in the statutes of limitations, we look to the analogous claim at law to determine the applicable statute of limitations."); Desmond v. Moffie, 375 F.2d 742, 743 (1st Cir. 1967) ("In Massachusetts the statutes of limitation applicable to law actions based on contract and tort are also applicable to suits in equity."). Thus, if § 1005(b) does not apply, plaintiff's removal claims would be barred because they are clearly based on the analogous breach of contract claim. To the extent the claims for removal accrued in 2012 when plaintiff was informed that she was no longer going to receive equal distributions, they are untimely.

ORDER

Defendants' Motion for Partial Summary Judgment (Docket #44) is ALLOWED as set forth herein.

/s/Peter B. Krupp
Justice of the Superior Court

2024 WL 3512705 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Plymouth County

Lucy H. NESBEDA,

v.

STEPHEN H. CLARK AND HANNAH TUCKER CLARK MOORE [1] & others [2].

No. 2283CV00588.
June 13, 2024.

1 Successor Co-Trustees and Individually

2 Mary H. Clark January 9, 1987 Trust as restated plus amendments, Stephen H. Clark, Hannah Tucker Clark Moore, Caroline C. Kressly, Helen Tupper, and William Van Alan Clark, III, qualified beneficiaries; and JoAnn Watson, descendant beneficiary

**Memorandum of Decision and Order on Plaintiff's Motions to Strike and Defendants' Motion to Dismiss**

Sharon E. Donatelle, Judge.

***1** Plaintiff Lucy Nesbeda ("Nesbeda") filed this action alleging breach of fiduciary duty with respect to a family trust and seeking an accounting and declaratory relief. For the reasons discussed below, Plaintiffs Motion to Strike Defendants' Joinder Motion and Plaintiffs Motion to Strike Defendants' Post-Rule 9A Court Filings are **DENIED**, and Defendants' Motion to Dismiss is **ALLOWED**.

## BACKGROUND

The Clark family's wealth originated from William Van Alan Clark, Jr., who was an heir to the Avon cosmetics fortune. When William died in July of 1983, he left a gross estate of $40 million, which went to his wife Mary's marital trust. Mary sold her stock in Avon and diversified her holdings over time. She purchased 1 Ram Island in Marion, Massachusetts in 1956, raised her family there, and resided there until she relocated to Englewood, Florida in 1987.

On January 9, 1987, Mary established the Mary H. Clark 1987 Trust ("the Trust"). The beneficiaries of the Trust are Mary's children, Nesbeda, Hannah Tucker Clark Moore ("Moore"), Stephen Clark ("Clark"), Caroline Kressly, Helen Tupper, and William V.A. Clark, III, and a family friend, JoAnn Watson. The original trustees were Mary, Clark, and Nesbeda's former spouse, Peter. The Trust initially reserved Mary's right as settlor to revoke or amend it and stated that it "shall be construed, governed and administered in accordance with Massachusetts law."

Mary moved to Florida in 1987 and purchased a primary residence at 10591 Pittman Road in Sarasota, Florida on January 30, 1995. She invested heavily in Florida Gulf Coast real estate.

On December 19, 2011, Peter resigned as trustee of the Trust and Moore accepted the appointment as successor co-trustee of the Trust.

On April 19, 2016, Mary amended and restated the Trust in its entirety. Paragraph 14.9 of the Trust as amended states: "All matters involving the validity and interpretation of this Trust are to be governed by Florida law. Subject to the provisions of this Trust, all matters involving the administration of a trust are to be governed by the laws of the jurisdiction in which the Trust has its principal place of administration." Mary also executed her will on April 19, 2016. That will never was probated. On June 9, 2020, Mary amended the Trust for the last time. Mary died on May 10, 2021 at 100 years old. Her death terminated the Trust, and the trustees distributed the residue of the Trust assets equally to the beneficiaries.

Moore and Clark are the successor trustees of the Trust. Moore resides in Marion, Massachusetts and Clark resides in Warren, Rhode Island. Nesbeda filed this action on August 1, 2023, alleging that Moore and Clark failed to provide the required sixty days' notice of acceptance of the Trust upon Mary's death as required by Florida law. Nesbeda alleges that fifteen acres of land and a residence sold for $2,200,000 should have been part of the Trust assets distributed to the beneficiaries. She further alleges that in December of 2022 and January of 2023, Moore and Clark refused her demands for information concerning the Trust and represented that Mary left only two houses and a trust account valued at $4.4 million, despite her years of accumulated wealth. Nesbeda contends that she has never received an adequate accounting of the Trust estate.

*2 Count I of Nesbeda's Amended Verified Complaint alleges breach of fiduciary duty by Moore and Clark and Count II seeks declaratory and equitable relief under Florida law, including an accounting. Nesbeda seeks the following relief: restoration of the Trust's real property and other assets; an accounting to her that complies with Florida law; an order that the trustees provide her with copies of trust documents and relevant information about the assets and liabilities of the Trust; an order that the trustees distribute her proper share of the Trust assets; injunctive relief enjoining the trustees from committing a breach of trust; an order of mediation in accordance with the terms of the Trust; an order removing and suspending the trustees; and the court appointment of new trustees.

Moore avers that the Trust's principal place of administration has been in Florida since Mary established the Trust on January 9, 1987. She avers that all Trust expenses were paid from Florida and meetings concerning the Trust took place in Florida. In addition, Florida real estate made up a substantial portion of the Trust assets, which were managed by Parsons Capital Management in either Florida or Rhode Island.

Moore further avers that Mary lived in Florida for more than thirty years prior to her death, had minimal ties to Massachusetts, and did not visit Massachusetts for thirty years prior to her death. All of Mary's estate planning occurred in Florida. Upon Mary's death, Moore filed a Notice of Trust in the Circuit Court for Sarasota, Florida in accordance with Florida law. Moore avers that Nesbeda was estranged from and had no contact with Mary for the last nineteen years of Mary's life. Nesbeda also is estranged from Moore and her other siblings.

Nesbeda and Moore live in Massachusetts, as do some of their children. Nesbeda avers that Mary had close ties to Massachusetts and the Trust was administered in Massachusetts. Mary stayed involved with her children's activities, her grandchildren, her friends, the local community, and various philanthropies. Nesbeda avers that Mary's financial advisors were Acquitas Investment Advisors in Hingham, Fidelity Investments in Boston, Baldwin Brothers in Marion, and Parsons Capital Management in Rhode Island.

Nesbeda avers that she visited Mary when she relocated to Englewood and then Sarasota, Florida. Nesbeda's relationship with her siblings admittedly is complicated. Nesbeda and two of her siblings found it necessary to create some distance from Mary.

**Motions to Strike**

Moore filed a motion to dismiss the Amended Verified Complaint on February 9, 2024. Thereafter, defendants Clark, Kressly, Tupper, Clark, III, and Watson filed "Defendants' Joinder in Hannah Tucker Clark Moore's Motion to Dismiss." Nesbeda then filed a "Motion to Strike Defendants' Joinder Motion," protesting that the defendants' filing "does not set out rules, laws, or statements of fact as to why the particular Defendant beneficiaries captioned above should be permitted to join Defendant

Hannah Tucker Clark Moore's 12(b)(1) motion to dismiss." The defendants' joinder motion incorporates by reference Moore's recitation of the facts and legal argument and is clearly based on a lack of subject matter jurisdiction. Accordingly, the Court, in its discretion, will deny Plaintiffs' Motion To Strike as well as Plaintiffs Motion to Strike Defendants' Post-Rule 9A Court Filings. See *Malden Police Patrolman's Ass'n v. Malden*, 92 Mass. App. Ct. 53, 56 (2017) (court has discretion to forgive failure to comply with procedural rule if that failure does not prejudice opposing party).

## DISCUSSION

The defendants move to dismiss the Amended Verified Complaint for lack of subject matter jurisdiction pursuant to Mass. R. Civ. P. 12(b)(1). In deciding such a motion, the court may consider affidavits and materials extrinsic to the complaint. *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 322 (1998); *Pishev v. Somerville*, 95 Mass. App. Ct. 678, 682, rev. den., 483 Mass. 1106 (2019). The plaintiff bears the burden of proving sufficient jurisdictional facts. *Hiles v. Episcopal Diocese of Mass.*, 437 Mass. 505, 516 (2002); *Pishev v. Somerville*, 95 Mass. App. Ct. at 681. The court gives no weight to the jurisdictional averments in the complaint and must resolve any factual disputes raised by the parties. *Hiles v. Episcopal Diocese of Mass.*, 437 Mass. at 516; *Pishev v. Somerville*, 95 Mass. App. Ct. at 682.

***3** The Uniform Trust Code provides that the court may "intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law." G.L. c. 203E, § 201(a). [3] However, the Code also states:

3 A judicial proceeding involving a trust "may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights." G.L. c. 203 E, § 201 (c).

> The court shall not over the objection of a party, entertain proceedings under section 201 involving a trust registered or having a principal place of administration in another state, unless (1) all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration; or (2) the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of a party to submit to the jurisdiction of the state in which the trust is registered or has its principal place of administration or the court may grant a continuance or enter any other appropriate order. G.L. c. 203E, § 203.

The court of a State in which the settlor intends the trust to be administered may exercise jurisdiction over the trust. *Walton v. Harris*, 38 Mass. App. Ct. 252, 254, rev. den., 420 Mass. 1102 (1995). If the trust does not expressly designate a place of administration, the court must discern the settlor's intent, which may appear from the language of the trust interpreted in light of the circumstances. *Id.* Relevant factors include the settlor's domicile at the time the trust was created, the situs of the trust property at that time, the place the trust was executed, and the purpose of the trust. *Id.* at 255-256 (concluding that although trust res was moved to Florida, settlor intended Massachusetts to be place of administration where settlor was Mass. resident, executed trust in Mass. and appointed Mass. residents as original and successor trustees, stock of Mass. company constituted bulk of trust's assets, trust referred to Mass. law, one trustee was Mass. bank which would not be expected to change its domicile, and trust gave Mass. law firm responsibility for appointing successor trustees).

Nesbeda's Amended Verified Complaint implicates the administration of the Trust. See *Walton v. Harris*, 38 Mass. App. Ct. at 255-256 (action for breach of fiduciary duty, accounting, and removal of trustees was matter of trust administration). Cf. *Curran v. Berkshire Hills Bancorp*, 2018 WL 3431892 at *1 (Mass. Super. Ct.) (Salinger, J.) (action seeking damages for trustees' past breach of fiduciary duty and Chapter 93A violation would not involve Massachusetts in ongoing administration of trust and did not implicate Chapter 203E).

Nesbeda has not demonstrated that the Trust has a principal place of administration in Massachusetts, making it appropriate for the court to entertain proceedings with respect to the Trust's administration. See G.L. c. 203E, § 203. Mary established the Trust in Florida and was domiciled in Florida for thirty years prior to her death, the Trust assets consisted largely of Florida real estate,

and Trust meetings were held in Florida. Mary was a trustee until her death, residing in Florida, with the other trustees residing in Rhode Island and Massachusetts. Although the Trust initially stated that it was governed by Massachusetts law, Mary amended it in 2016 to provide that it is governed by Florida law, and the amended Trust requires that accountings to beneficiaries comply with specific sections of the Florida Statutes. In addition, the Trust references sections of the Florida Statutes with respect to the trustees' authority to make investments, allocations to income and principal, and certifications of fact.

***4** Thus, the trust language and all the relevant circumstances demonstrate that Mary intended Florida to be the principal place of administration of the Trust. See *Walton v. Harris*, 38 Mass. App. Ct. at 255-256. Because the Trust has a principal place of administration in another state, this Court cannot entertain this action. See G.L. c. 203E, § 203. [4]

4 Nesbeda has not demonstrated that all parties cannot be bound by litigation in Florida or that the interests of justice seriously would be impaired by litigation there. See G.L. c. 203E, § 203.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that Plaintiffs Motion to Strike Defendants' Joinder Motion and Plaintiffs Motion to Strike Defendants' Post-Rule 9A Court Filings be **DENIED** and Defendants' Motion to Dismiss be **ALLOWED**.

<<signature>>

Sharon E. Donatelle

Justice of the Superior Court

**DATED:** June 13, 2024

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