CHAPTER 1

Drafting Under the Massachusetts Uniform Probate Code

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Scope Note

This chapter provides an introduction to the new language, provisions, and procedures for drafting under the Massachusetts Uniform Probate Code (MUPC). Intestacy, the execution of wills, the personal representative's role, trustees, and other topics pertaining to the MUPC are discussed.

§ 1.1 INTRODUCTION

The Massachusetts Uniform Probate Code (MUPC) has been enacted as G.L. c. 190B. The provisions concerning guardians and conservators became effective July 1, 2009. The rest of the MUPC is effective as of April 2012.

There are some differences between the MUPC and the Uniform Probate Code (UPC) found in other states. In some instances, existing Massachusetts laws were viewed more favorably than their UPC counterparts, and such laws have been retained. This chapter will review some of the changes in law that the MUPC brings and will also highlight some areas where existing Massachusetts law was preferred and incorporated into the MUPC. Sections of the code that are virtually identical to existing Massachusetts law are not discussed. Although this discussion focuses on changes in drafting wills and trusts under the code, some review of changes in probate procedure and administration is necessary so that the drafting changes can be better understood. References herein to sections of the MUPC are identical to sections of G.L. c. 190B.

§ 1.2 DEFINITIONS

Section 1-201 of the MUPC contains definitions of fifty-seven words and phrases. Most of these definitions are consistent with their common usage. Below, however, are four definitions of which the estate planning practitioner should be aware.

* Reviewed by Richard C. Barry, Jr., for the 2020 Edition.

§ 1.2.1 Devise

"'Devise', when used as a noun, means a testamentary disposition of real or *personal* property and, when used as a verb, means to dispose of real or *personal* property by will." MUPC § 1-201(10) (emphasis added). Likewise, Section 1-201(11) provides that "devisee" means a person designated in a will to receive a devise. The previous distinction between "bequeathing" personal property and "devising" real property has been eliminated. Under the code, the word "devise" should be used for all testamentary dispositions.

For example, a testamentary disposition of money prior to the code could be accomplished by the following: "I give and *bequeath* the sum of Ten Thousand ($10,000) Dollars to John Jones." Under the code, the equivalent language would be as follows:

> *I give and devise the sum of Ten Thousand ($10,000) Dollars to John Jones.*

Practice Note

The word "bequeath," whether in wills drafted before or after the adoption of the code, will undoubtedly be respected for its traditional meaning. The simple statement "I give" should also be satisfactory.

§ 1.2.2 Personal Representative

"'Personal representative' includes executor, administrator, successor personal representative, special administrator and persons who perform substantially the same function under the law governing their status." MUPC § 1-201(37). This means that "executor" and "executrix" should no longer be used in wills and should be replaced by the phrase "personal representative." In addition, it is no longer necessary to make reference to a potential "administrator with the will annexed."

§ 1.2.3 Trust

"'Trust' includes an express trust, private or charitable, with additions thereto, wherever and however created." MUPC § 1-201(54). This definition does not make a distinction between testamentary and inter vivos trusts.

§ 1.2.4 Descendant

"'Descendant' of an individual means all of such individual's descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this Chapter." MUPC § 1-201(9). Throughout Article II of the code, which addresses intestacy, wills, and donative transfers, the word "issue" is replaced by "descendants." Because inheritance rights in many instances extend to adopted children, the word "descendants" is deemed more appropriate than "issue."

§ 1.3 INTESTACY

If a person fails to dispose of all or a portion of their estate by a valid will or trust, then such property is distributed under the rules of intestacy.

§ 1.3.1 Intestate Share of Surviving Spouse

The intestate share of a decedent's surviving spouse changes significantly under MUPC § 2-102, with a greater amount going to the surviving spouse than under prior Massachusetts law.

The surviving spouse takes the entire intestate estate under the following circumstances:

- if there is no surviving descendant or parent of the decedent; or
- if there is a surviving descendant and all the decedent's surviving descendants are also descendants of the surviving spouse, and there is no other descendant of the surviving spouse who survives the decedent.

If there is no surviving descendant but a parent survives the decedent, then the spouse takes the first $200,000 and three-fourths of any balance of the intestate estate.

If there is a descendant of either the decedent or the surviving spouse who is not common to the decedent and the surviving spouse and who survives the decedent, then the spouse takes the first $100,000 and one-half of any balance of the intestate estate.

Examples

Decedent has an intestate estate of $500,000.

He has no children and his wife has no children. His parents have predeceased him. Under the MUPC, his wife takes the entire $500,000. Under prior law, his wife would have taken the first $200,000 and one-half of the remainder, for a total of $350,000.

He and his wife have two children together, and neither have any other children. Under the MUPC, his wife takes the entire $500,000. Under prior law, his wife would have taken one-half of the estate, or $250,000.

He has no children and his wife has no children. His mother is still alive and has survived him. Under the MUPC, his wife takes the first $200,000 and three-fourths of the remaining $300,000 (i.e., $225,000), for a total of $425,000. Under prior law, his wife would have taken the first $200,000 and one-half of the remainder, for a total of $350,000.

He and his wife have two children together, and his wife has a child from a prior marriage. Under the MUPC, his wife takes the first $100,000 and one-half of the remaining $400,000 (i.e., $200,000), for a total of $300,000. Under prior law, his wife would have taken one-half of the estate, or $250,000.

§ 1.3.2 Intestate Share of Heirs Other than the Surviving Spouse

The order by which the intestate estate not passing to the decedent's surviving spouse passes under the MUPC is set forth in MUPC § 2-103 as follows:

> (1) to the decedent's descendants per capita at each generation;
>
> (2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
>
> (3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation;
>
> (4) if there is no surviving descendant, parent, or descendant of a parent, then equally to the decedent's next of kin in equal degree; but if there are 2 or more descendants of deceased ancestors in equal degree claiming through different ancestors, those claiming through the nearest ancestor shall be preferred to those claiming through an ancestor more remote. Degrees of kindred shall be computed according to the rules of civil law.

Under G.L. c. 190, § 3, if all descendants who were entitled to a share of the estate were of the same generation, then the intestate estate was distributed per capita. However, if there was a deceased individual in the first generation with living descendants, then that individual's descendants took their share by right of representation. The MUPC changes the aforementioned rule found in G.L. c. 190, § 3 and adopts a system of representation called "per capita at each generation." Section 2-106(b) of the MUPC states as follows:

> (b) [Decedent's Descendants.] If, under section 2-103 (1), a decedent's intestate estate or a part thereof passes "per capita at each generation" to the to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent that contains 1 or more surviving descendants, and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants in the nearest generation and their surviving descendants had predeceased the decedent.

In order to illustrate the change from prior law, the decedent (D) has an intestate estate of $500,000. D does not have a surviving spouse and has three children: A, B, and C. A has three children, B has two children, and C has two children. A and B have both predeceased D.

Under G.L. c. 190, § 3, the estate divided into three equal shares. A's three children divided one-third equally (each receiving one-ninth, or $55,555). B's two children divided a one-third share equally (each receiving one-sixth, or $83,333). C takes one-third, or $166,667.

Under the MUPC, A's and B's shares are combined (i.e., two-thirds), which is then divided equally among their five children so that each receives two-fifteenths, or $66,667; C still takes one-third, which is equal to $166,667.

Under MUPC § 2-106(c), a similar rule applies to determining the shares of the descendants of the decedent's deceased parents pursuant to MUPC § 2-103(3).

§ 1.4 EXECUTION OF WILLS

§ 1.4.1 Formalities of Execution

As under prior Massachusetts law, a will must be signed either by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction. The will must also be signed by at least two other individuals (the witnesses), each of whom signed within a reasonable time after they witnessed either the signing of the will or the testator's acknowledgment of that signature or acknowledgment of the will. General Laws Chapter 191, § 1 required that the will must be attested and subscribed to in the testator's presence. Case law has interpreted G.L. c. 191, § 1 to permit a testator to sign a will not in the presence of witnesses provided that the testator later acknowledged their signature to the attesting witnesses. *In re Dunham*, 334 Mass. 282 (1956). Section 2-502 of the MUPC codifies this rule, thereby clearly establishing that a will may be validly executed in such fashion.

The UPC as adopted in other states generally allows holographic wills (i.e., wills handwritten and signed by the testator, but not witnessed). Massachusetts law prior to the MUPC did not permit holographic wills, and it was deemed preferable to retain this rule in Massachusetts. Therefore, the MUPC continues to prohibit holographic wills.

§ 1.4.2 Self-Proved Will

Section 2-504(a) of the MUPC provides for a self-proving will in the same manner as G.L. c. 192, § 2. The language suggested by MUPC § 2-504(a) is somewhat different, but in substance it is the same. Section 2-504(a) states that a will may be made self-proved in substantially the following form:

> *I, _____, the testator, sign my name to this instrument this _____ day of _____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.*

_____
Testator

We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument and [his/her] will and that [he/she] signs it willingly (or willingly directs another to sign for [him/her]), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Witness

_____
Witness

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn before me by _____ and _____, witness, this _____ day of _____.

_____
Notary Public
My commission expires:

Section 2-504(b) of the MUPC permits a properly witnessed will to become self-proved at any time after its execution, which is similar to G.L. c. 192, § 2, cl. (ii). In such a situation, MUPC § 2-504(b) provides that the will may be made self-proved by an acknowledgment attached to the will in substantially the following form:

COMMONWEALTH OF MASSACHUSETTS

COUNTY OF _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that [he/she] had signed willingly (or willingly directed another to sign for [him/her]), and that [he/she] executed it as [his/her] free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that

to the best of [his/her] knowledge the testator was at the time eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn before me by _____ and _____, witness, this _____ day of _____.

_____
Notary Public
My commission expires:

Section 2-504(c) of the MUPC states that "a signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution." MUPC § 2-504(c). Apparently, there have been situations that have arisen in other states where the testator or witnesses became confused and signed only on the self-proving affidavit. Courts have held that a signature only on the self-proving affidavit did not constitute a signature on the will, resulting in the invalidity of the will. Subsection (c) permits the signatures affixed to a self-proving affidavit attached to an unsigned will to be considered as signatures affixed to the will in order to establish its execution.

§ 1.4.3 Premarital Will

Under prior Massachusetts law, marriage revoked a will unless it was executed in contemplation of the marriage. G.L. c. 191, § 9. Pursuant to MUPC § 2-301, marriage does not revoke a will. Instead, the will remains in effect and the spouse is entitled to receive the share of the estate that the spouse would have received if the testator had died intestate, but only as to that portion of the estate that is not devised to a child of the testator who was born before the marriage and who is not a child of the surviving spouse, or to a descendant of such child. However, the surviving spouse will not be entitled to such intestate share if the will was made in contemplation of marriage or if the testator provided for the spouse by transfers outside the will and such transfers are intended to be in lieu of testamentary provisions.

Example 1

Decedent has children from a previous marriage and had executed a will leaving his estate to his children. He later remarries and does not execute a new will. Under prior law, the will is revoked by marriage and the decedent dies interstate. One-half of the estate passes to his new wife, and one-half passes to his children. Under the MUPC, the will is not revoked

and the entire estate still passes to the decedent's children. The new wife does not receive any part of the estate.

Example 2
Decedent has an estate of $500,000. He has no children. He had executed a will leaving his entire estate to his siblings. He later marries and fails to execute a new will. He has one parent living who survives him. Under prior law, the will is revoked by marriage and the decedent dies intestate. His wife takes the first $200,000 and one-half of the remainder (i.e., $150,000), for a total of $350,000. The decedent's parent takes the remaining $150,000. Under the MUPC, the will is not revoked but the decedent's wife takes an intestate share of the estate. Since the decedent's parent is alive, the wife's share is the first $200,000 and three-fourths of the remainder (i.e., $225,000), for a total of $425,000. The remaining $75,000 passes to the decedent's siblings pursuant to the will.

§ 1.4.4 Revocation of Probate and Nonprobate Transfers by Divorce

General Laws Chapter 191, § 9 provided that a divorce or annulment revoked testamentary dispositions to the former spouse, any provision conferring a power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian. In *Clymer v. Mayo*, 393 Mass. 754 (1985), based on the particular facts of the case, the court held that G.L. c. 191, § 9 applied to revoke the provisions for the settlor's former spouse contained in an unfunded revocable trust executed concurrently with the settlor's will. An open question was whether the holding in *Clymer* would apply to a funded revocable trust or to one not executed concurrently with the will. Section 2-804 of the MUPC retains the provisions of G.L. c. 191, § 9 and expands the effect of divorce and annulment to nonprobate transfers. Divorce or annulment revokes any revocable disposition to the former spouse. This includes

- a revocable inter vivos trust, regardless of whether it is funded and whether it is executed concurrently with the settlor's will;
- life insurance beneficiary designations; and
- retirement plan beneficiary designations.

However, it appears that the Employee Retirement Income Security Act (ERISA) regulations prevent divorce from having any effect on the beneficiary designation relative to a 401(k). In addition, property held by a husband and wife as joint tenants with the right of survivorship is severed, transforming the interests of the former spouses into tenancies in common. The aforementioned rules are subordinate to the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made before or after the marriage, divorce, or annulment.

§ 1.4.5 Beneficiary as a Witness

Prior Massachusetts law allowed a beneficiary of a will to be a witness to the will without invalidating it. However, any devise or legacy to a witness or to the husband or wife of such witness was void unless there are two other witnesses who are not similarly benefited. Section 2-505 of the MUPC sets forth the same general rule, but with a significant exception. If the interested witness establishes that the devise was included and that the will was signed voluntarily and not as a result of fraud or un-due influence by the witness, then the devise to the witness is not void.

§ 1.5 PERSONAL REPRESENTATIVES (FORMERLY KNOWN AS EXECUTORS AND ADMINISTRATORS)

As described above in § 1.2.2 under the MUPC, the phrase "personal representative" replaces "executor," "administrator," and "administrator with the will annexed."

> *I appoint my wife, Ruth Johnson, to be the Personal Representative of my estate.*

Persons with the highest priority for appointment as personal representative include not only the nominee but also a person nominated by a power conferred in a will. MUPC § 3-203.

> *I appoint my wife, Ruth Johnson, to be the Personal Representative of my estate, and if she shall decline to serve, I give her the power to nominate another person to serve as Personal Representative in her place.*

§ 1.5.1 Informal Probate Proceedings, Formal Probate Proceedings, and Supervised Administration

In order to understand the changes in law pertaining to executors and administrators (i.e., personal representatives), a summary of the probate proceedings for the administration of estates in accordance with the MUPC is necessary. Under previous Massachusetts law, judicial approval was often required before executors and administrators could perform relatively routine tasks. Even the appointment of an executor named in a will could take six weeks or more, necessitating the appointment of a temporary executor in the interim. In contrast, the MUPC generally treats the court's role in the administration of estates as passive. The court's intervention is usually appropriate only if requested by an interested person.

(a) *Voluntary Administration*

In order for a voluntary administration to be applicable, the following conditions must be present:

- thirty days must have passed since date of death;

- the decedent cannot own real estate at the time of their death;
- the decedent's personal property (excluding a car) must be $25,000 or less; and
- the decedent is a resident ("inhabitant") of Massachusetts.

(b) *Informal Probate Proceedings*

The appointment of a personal representative and the allowance of a will in estates that are relatively routine and involve no controversy will generally be accomplished through informal probate. Informal probate may be sought in both testate and intestate estates. A detailed discussion of the probate proceedings is beyond the scope of this chapter. In general, a person seeking informal probate and appointment as a personal representative must give notice to the heirs and devisees at least seven days prior to filing a petition with the Probate and Family Court. If the petition is satisfactory, then the informal probate and appointment will be granted. After the appointment of the personal representative, provided that no interested party requests intercession by the court, the personal representative will administer the estate virtually free of court supervision. Closing the estate can be accomplished by simply filing a sworn statement with the court that debts, expenses, and taxes have been paid and distributions have been made to the persons entitled to them.

(c) *Formal Probate Proceedings*

"A formal testacy proceeding is litigation to determine whether a decedent left a valid will." MUPC § 3-401. A formal testacy proceeding may be brought within three years of death, even if informal probate has been granted. Therefore, in some situations it may be prudent to petition initially for formal probate in order to establish the validity of the will and foreclose a later challenge. A formal proceeding concerning the appointment of a personal representative is a proceeding to determine the priority or qualification of an individual who has applied to act as personal representative or who has previously been appointed personal representative in informal proceedings. A personal representative appointed in an informal proceeding may continue to act as personal representative after the commencement of a formal proceeding, subject to certain restrictions. Formal proceedings involve notice to all persons interested in the estate and the opportunity for the filing of objections and a hearing.

(d) *Supervised Administration*

In supervised administration, the personal representative may not make any distribution of the estate without a court order. In addition, the court may impose other restrictions on the personal representative. A petition for supervised administration may be joined with a petition in a testacy or appointment proceeding or may be filed by an interested person or personal representative at a later time. The court will order supervised administration in the following situations:

- if the will directs supervised administration;

- on a finding that it is necessary for the protection of persons interested in the estate, even if the will directs unsupervised administration; or
- in other cases if the court finds that supervised administration is necessary under the circumstances.

Supervised administration is described in UPC § 3-501 as a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court. It involves the adjudication of testacy or intestacy at the beginning and the distribution of the estate by court decree at its conclusion.

Supervised administration should not be confused with a formal proceeding. A formal proceeding is the judicial determination of the validity of a will or the appointment of an appropriate personal representative, but after the court has made such a decision, the estate administration is unsupervised.

If the testator desires supervised administration, such a direction should be included in the will.

> *I direct that the administration of my estate be supervised by the court.*

If the testator prefers to avoid supervised administration, the opposite direction should be made in the will.

> *I direct that the administration of my estate be unsupervised by the court.*

§ 1.5.2 Bonds

Pursuant to prior Massachusetts law, a testator had to state in the will that they wished the executor to be excused from giving surety on the bond. An administrator could be excused from giving a bond with surety if all interested persons consent. Otherwise, the executor or administrator was required to give a bond with surety. G.L. c. 205, § 4.

Section 3-603(a) of the MUPC states as follows:

> Sureties shall be required on the bond of a personal representative unless: (i) the will directs that there be no bond or waives the requirements of surety thereon; (ii) all of the heirs, if no will has been probated, or all of the devises named in a will file a written waiver of sureties; (iii) the personal representative is a bank or trust company qualified to do trust business or exercise trust powers in this state; or (iv) the court concludes that sureties are not in the best interest of the estate. In any formal proceeding the court, on its own motion, may require sureties or additional sureties.

Thus, the MUPC requirement for sureties and exemption therefrom is essentially the same as prior law, except that under the MUPC the court itself may conclude that sureties are not in the best interest of the estate. This would seem to present an opportunity to petition the court to waive sureties in situations where all of the written waivers could not be obtained.

The UPC as adopted in other states requires bonds to have sureties, but permits waiver of the bond. In Massachusetts bonds are always required, but sureties may be waived. For clarity, in case a will is offered for probate in another state, the will should include:

> *I direct that the Personal Representative be exempt from furnishing a bond or from giving surety on any bond required by law.*

§ 1.5.3 Amount of Bond

Section 3-604 of the MUPC provides that if sureties are required, then the provisions of the will or order may specify the amount. This provides a planning opportunity that up to this time did not exist in Massachusetts, as the will may specify the amount of the sureties. Previously, the amount of the sureties was entirely at the discretion of the court. Of course, under the code, the court may still exercise its discretion and require that the sureties suggested in the will be increased, reduced, or eliminated, depending on the circumstances. However, the court presumably will only override the testator's wishes concerning the sureties if there are reasons in a particular case for the court to do so.

A testator may recognize a need for sureties in connection with their estate, but not for the full amount of that estate. For example, a testator has two adult children and is leaving the estate to them in equal shares. One child has been named the personal representative. Because the child who will serve as personal representative will receive one-half of the estate, the testator may determine that sureties equal to only one-half of the personal estate are needed to protect the share of the other child. If the other child is named successor personal representative, then sureties for one-half of the personal estate from this child may also be appropriate. If neither child survives the testator, then sureties for the full amount of the personal estate may be desirable.

> *I appoint my son, Craig Johnson, to be the Personal Representative of my estate. If he fails or ceases to serve as Personal Representative, then I appoint my daughter, Donna Johnson, to be the successor Personal Representative of my estate. If Craig Johnson or Donna Johnson is the Personal Representative, then I direct that he or she give surety for his or her bond in an amount equal to one-half of the estimated value of my personal estate. If the Personal Representative of my estate is someone other than Craig Johnson or Donna Johnson, then I direct that he or she give surety for his or her bond in an amount equal to the estimated value of my personal estate.*

Additionally, a testator who directs that the personal representative should be exempt from giving sureties may still find it prudent to specify the amount of sureties in the event that the court determines that they should be given.

> *I appoint my son, Craig Johnson, to be the Personal Representative of my estate, to serve without any surety on his bond. I direct that no Personal Representative of my estate shall be required to give surety on any bond. Notwithstanding my direction that no surety be given, if the court orders that Craig Johnson give surety for his bond, then I direct that he give a surety in an amount equal to one-half of the estimated value of my personal estate.*

§ 1.5.4 Temporary Executors and Administrators

The UPC eliminates temporary executors and administrators, and the MUPC makes no provision for a temporary personal representative. Because a personal representative can be appointed almost immediately in an informal proceeding, a temporary personal representative is therefore not necessary. If a formal proceeding later commences, the personal representative appointed informally can continue to serve subject to certain restrictions while the formal proceeding is pending. If a personal representative has not been appointed informally prior to formal proceedings, MUPC § 3-614 provides for the appointment of a special personal representative in order to preserve the estate. The court will determine who should act as special personal representative. In accordance with G.L. c. 192, § 13, a will usually included a request that the executor also be appointed temporary executor on application to the Probate and Family Court. Under the code, this request should no longer be included in wills.

§ 1.5.5 Powers of Personal Representatives

General Laws Chapter 195, § 5A contained a relatively short list of powers of executors and administrators. As a result, a well-drafted will has usually included a comprehensive list of powers in an effort to enable the executor to engage in almost every type of transaction imaginable without having to seek court authority. The Code expands the statutory powers and gives personal representatives many of the powers found enumerated in wills. Section 3-715(a) of the MUPC states that a personal representative other than a special administrator, except as restricted or otherwise provided by the will or by an order in a formal proceeding, may properly do the following:

- retain assets owned by the decedent pending distribution or liquidation, including those in which the representative is personally interested or that are otherwise improper for trust investment;
- receive assets from fiduciaries or other sources;
- perform, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as they may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may do the following:

  - execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or
  - deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;
- satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if, in the judgment of the personal representative, the decedent would have wanted the pledges completed under the circumstances;
- if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments that would be reasonable for use by trustees generally;
- acquire or dispose of tangible and intangible personal property for cash or on credit, at public or private sale, and manage, develop, improve, exchange, change the character of, or abandon an estate asset;
- make repairs or alterations in buildings or other structures, demolish any structures, raze existing, or erect new party walls or buildings;
- subdivide, develop, or dedicate land to public use, adjust boundaries or adjust differences in valuation by giving or receiving considerations, or dedicate easements to public use without consideration;
- enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;
- enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;
- abandon property when, in the opinion of the personal representative, it is valueless or is so encumbered or is in such condition that it is of no benefit to the estate;
- vote stocks or other securities in person or by general or limited proxy;
- pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;
- hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the security so held;
- insure the assets of the estate against damage, loss, and liability and the personal representative against liability as to third persons;

- borrow money with or without security to be repaid from the estate assets or otherwise and advance money for the protection of the estate;
- effect a fair and reasonable compromise with any debtor or obligor, or extend, renew, or in any manner modify the terms of any obligation owing to the estate (if the personal representative holds a mortgage, pledge, or other lien on the property of another person, the personal representative may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien);
- pay taxes, assessments, compensation of a personal representative other than a special representative, and other expenses incident to the administration of the estate;
- sell or exercise stock subscription or conversion rights or consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- allocate items of income or expense to either estate income or principal, as permitted or provided by law;
- employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties, act without independent investigation on their recommendations and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;
- defend and, except for special representatives, prosecute claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of duties;
- sell or lease any personal property of the estate or any interest therein for cash, credit, or for part cash and part credit and with or without security for unpaid balances;
- continue any unincorporated business or venture in which the decedent was engaged at the time of death
  - in the same business form for a period of not more than four months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business, including good will,
  - in the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties, or
  - throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

- incorporate any business or venture in which the decedent was engaged at the time of death;
- provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate; and
- satisfy and settle claims and distribute the estate as provided in the code.

MUPC § 3-715(a).

Although MUPC § 3-715(a) consolidates and lists most powers in one place, there are some powers found elsewhere in the code. Section 3-813 of the MUPC gives the personal representative the ability to compromise claims against the estate. The personal representative may distribute assets in kind pursuant to MUPC § 3-906. Section 3-707 of the MUPC authorizes the personal representative to employ appraisers to ascertain the fair market value of estate assets, and MUPC § 3-720 allows a personal representative to incur expenses, including reasonable attorney fees, in defending or prosecuting estate litigation.

The powers conferred on personal representatives by the code apply in both testate and intestate estates. These powers are consistent with the intent of the code to facilitate the administration of estates without court intervention. A significant exception, however, is any transaction involving real estate. The UPC, as adopted in most other states, empowers the personal representative to engage in real estate transactions without any special authority from the court. The MUPC does not include such authority, and G.L. c. 202, which requires a license to sell or mortgage real estate, remains in force. Therefore, if the testator wishes the personal representative to deal with real estate without a court proceeding, a specific direction providing such power must be included in the will, as was the previous practice.

In most modest estates, the powers provided by the code will be sufficient, eliminating the need to include a list of powers in simple wills. In fact, because a personal representative's powers are fairly comprehensive under the code, if a list of powers is to be included in a will, the drafter should be careful that they do not inadvertently restrict the power of a personal representative with language that is not as broad as that found in the code.

The code includes all the powers described in G.L. c. 184B, § 2 (Statutory Optional Fiduciary Powers), as well as powers not found in that statute.

Practice Note

Under the MUPC, the drafter is presented with several choices with respect to the "powers" of the personal representative. Determining which approach to use depends on the client and the nature of the client's estate.

If the will says nothing on the subject of powers, the personal representative will nevertheless have all the powers contained in the code. The advantage of this approach is that the document will be that much shorter and easier to read. One drawback is that, once death occurs, the personal representative (and those the personal representative has to

deal with, such as bankers and transfer agents) may need to refer to a law book to find out whether the personal representative does or does not have a particular power.

A second drawback is that the powers granted under the code may not be broad enough to permit everything the personal representative would want or need to do.

Another drafting approach is to incorporate the statute's powers by reference in the will. This approach basically has the same pros and cons as the approach described above, but it may be slightly preferable because it at least provides direction toward the statute to identify the extent of the powers of the personal representative. This approach may be best used for a client who dislikes (or has difficulty with) lengthy documents and whose estate is expected to be relatively easy to administer.

The third approach is to list all the personal representative's powers in the will, modifying (or expanding or limiting) the statutory list of powers as the drafting attorney deems advisable for the best administration of the estate. The major drawback of this approach, obviously, is that the will remains a long document full of legal "boilerplate" despite the changes brought about by the MUPC. The advantage is that the personal representative and all those the personal representative needs to deal with can instantly determine the personal representative's powers simply by reading the will. This advantage can be significant if the personal representative is not a Massachusetts lawyer or needs to transact business with others who are not familiar with the provisions of the MUPC.

§ 1.5.6 Power to Make Funeral Arrangements

A personal representative nominated in a will may, even prior to appointment, carry out written instructions regarding the decedent's body, funeral, and burial arrangements. MUPC § 3-701. Absent written instructions, Massachusetts law gives the spouse, or if none, the next of kin, the authority to direct the funeral arrangements.

§ 1.6 APPOINTMENT OF GUARDIANS AND CONSERVATORS

§ 1.6.1 New Distinction Between Guardians and Conservators

Under prior Massachusetts law, a guardian may be appointed to have custody of both the person and property of the ward. However, the code makes a clear distinction between guardians and conservators. A guardian only has custody of the person of the ward; only a conservator may have possession of the property of the ward. Consequently, a testator must now appoint both a guardian and conservator for their minor children.

> *I appoint my sister, Mary Johnson, as guardian of the person and as conservator of the property of my minor children.*

A testator who believes that one person is better suited to raising their children, while another is more capable of managing the money, could appoint the former as the guardian of the person and the latter as conservator of the property. A guardian of a minor, however, does have some limited powers concerning the property of the ward. Section 5-209 of the MUPC gives the guardian the powers to do the following:

- apply available money of the ward to the ward's current needs for support, care, and education;
- conserve any excess money of the ward for the ward's future needs, and to pay such excess money quarterly to the conservator; and
- receive money payable to the ward's parent, guardian, or custodian for the support of the ward.

§ 1.6.2 Appointment of a Guardian of a Minor

If there is no surviving parent who has parental rights, then the parent of a minor may name a guardian of a minor in their will or other writing signed by the parent and attested by two witnesses. Such an appointment automatically becomes effective when the guardian files their acceptance in court. MUPC § 5-202. However, a minor who is fourteen or more years of age may object to such an appointment.

The parental appointment of a guardian can become effective only if both parents are dead or incapacitated or the surviving parent has no parental rights. A parent should consider appointing a guardian in a separate writing in addition to the will to cover a situation in which the parent has become incapacitated.

Appointment of Guardian of a Minor

I, Charles Johnson of 1 Commonwealth Avenue, Boston, Suffolk County, Massachusetts make this appointment of a guardian of the person of my minor children, revoking all other appointments of persons to act as such guardian previously made by me.

If any of my children are minors at the time of my death or in the event that I am incapacitated, and my wife, Ruth Johnson, is deceased or incapacitated, I appoint my sister, Mary Johnson, as guardian of the person of my minor children.

This appointment is intended to constitute a parental appointment of a guardian for minors pursuant to MUPC § 5-202.

IN WITNESS WHEREOF, I, the undersigned Charles Johnson, declare that I willingly execute this instrument in the presence of the two witnesses who sign below, as my free and voluntary act for the purposes herein expressed in _____, Massachusetts, on the _____ day of _____, 20__.

_____

Charles Johnson

We, the undersigned, have witnessed the signing of this Appointment of Guardian of a Minor by Charles Johnson and state that to the best of our knowledge he is at least eighteen years of age, of sound mind and under no constraint or undue influence.

Date: _____, 20__ *Signature* _____
Name _____
(Print)
Address _____
_____

Date: _____, 20__ *Signature* _____
Name _____
(Print)
Address _____
_____

§ 1.6.3 Appointment of a Guardian of an Incapacitated Person

Section 5-301 of the MUPC provides a much-needed opportunity that was not previously available in Massachusetts to plan for the care of an incapacitated person. The parent of an unmarried incapacitated person or the spouse of a married incapacitated person may nominate a guardian for the incapacitated person. The nomination may be made in a will or other writing signed by the parent or the spouse and attested by two witnesses.

The court will give priority to such person nominated to be guardian. MUPC § 5-305(c).

If at the time of my death my son, Joseph Johnson, should be under a disability other than minority so that he needs a guardian, and my wife, Ruth Johnson, is deceased or incapacitated, I appoint my sister, Mary Johnson, as guardian of the person of my son, Joseph Johnson, as long as such disability shall exist.

It would be prudent for the parents of an incapacitated person to appoint a guardian not only in their wills but also in separate instruments in the event that the parents themselves become incapacitated. Likewise, the spouse of an incapacitated person should make such an appointment in both a will and a separate instrument.

Parental Appointment of Guardian
of an Incapacitated Person

I, Charles Johnson, of 1 Commonwealth Avenue, Boston, Suffolk County, Massachusetts make this appointment of a guardian of the person of my son, Joseph Johnson, revoking all other such appointments previously made by me.

If, at the time of my death or in the event that I am incapacitated, my son, Joseph Johnson, should be under a disability other than

minority so that he needs a guardian, and my wife, Ruth Johnson, is deceased or incapacitated, I appoint my sister, Mary Johnson, as guardian of the person of my son, Joseph Johnson, as long as such disability shall exist.

This appointment is intended to constitute a parental appointment of a guardian for an incapacitated person pursuant to the MUPC § 5-301.

IN WITNESS WHEREOF, I, the undersigned Charles Johnson, declare that I willingly execute this instrument in the presence of the two witnesses who sign below, as my free and voluntary act for the purposes herein expressed in _____, Massachusetts, on the _____ day of _____, 20__.

_____
Charles Johnson

We, the undersigned, have witnessed the signing of this Appointment of Guardian of an Incapacitated Person by Charles Johnson and state that to the best of our knowledge he is at least eighteen years of age, of sound mind and under no constraint or undue influence.

Date: _____, 20__ *Signature* _____
Name _____
(Print)
Address _____
_____

Date: _____, 20__ Signature _____
Name _____
(Print)
Address _____
_____

§ 1.6.4 Delegation of Powers by Parent or Guardians

A parent of a minor or guardian of a minor or incapacitated person, by a properly written instrument attested to by two witnesses, may delegate to a temporary agent, for a period not exceeding sixty days, any power regarding care, custody, or property of the minor child or ward, except the power to consent to the marriage or adoption of a minor ward. MUPC § 5-103. This essentially replaces G.L. c. 201, §§ 2A to 2H. It can be useful if a parent or guardian will be unavailable for an extended period of time and wishes to designate another to care for the minor or incapacitated person, especially in the event of emergencies.

Appointment of Temporary Agent for Care of a Minor

I, Charles Johnson, of 1 Commonwealth Avenue, Boston, Suffolk County, Massachusetts appoint Paul Friend of 1 Massachusetts Avenue, Boston, Suffolk County, Massachusetts temporary agent to have custody of and to care for my minor child, Junior Johnson, and I delegate to Paul Friend the powers which I possess as the parent of Junior Johnson.

The powers delegated to Paul Friend include, but are not limited to, the authority to make health care decisions for Junior Johnson, including decisions about life-sustaining treatment.

This power of attorney shall terminate sixty (60) days from this date, and it is intended to constitute an Appointment of Temporary Agent for Care of Minor pursuant to MUPC § 5-10.

IN WITNESS WHEREOF, I have set my hand and seal this _____ day of _____, 20__.

_____
Charles Johnson

We, the undersigned, have witnessed the signing of this Appointment of Temporary Agent for Care of a Minor by Charles Johnson and state that to the best of our knowledge he is at least eighteen years of age, of sound mind and under no constraint or undue influence.

Date: _____, 20__ *Signature* _____
Name _____
(Print)
Address _____
_____

Date: _____, 20__ Signature _____
Name _____
(Print)
Address _____
_____

§ 1.6.5 Appointment of a Conservator

It should be noted that the code refers to the ward of a conservator as a "protected person." To be appointed conservator, a person must petition the court and give notice, and a hearing must be conducted in which the court finds that the appointment is appropriate. Section 5-409 of the MUPC, however, does establish the priority of persons to be appointed conservator. They are as follows:

1. a person nominated in a durable power of attorney;

2. a conservator appointed in another jurisdiction;
3. an individual or corporation nominated by a protected person who is at least fourteen years of age and of sufficient mental capacity;
4. an agent appointed by the protected person under a durable power of attorney;
5. a parent of the protected person, or any parental nominee; and
6. any person deemed appropriate by the court.

The court does have the discretion, if it is in the best interest of the protected person, to pass over a person with priority and appoint a person with lower or no priority. The list of priorities changes previous Massachusetts law, which did not include such priorities.

§ 1.6.6 Bonds of Guardians and Conservators

The guardian of a minor is required to file a bond. The guardian of an incapacitated person shall be required to file a bond with surety unless the court determines that it is in the best interest of the incapacitated person to waive surety. A request for waiver may be made in a health-care proxy or durable power of attorney.

A conservator is also required to give a bond with sureties in an amount set by the court, except the court may waive the requirement of sureties for good cause shown by the conservator. However, sureties must be waived if the conservator is nominated in a durable power of attorney which waives the requirement. MUPC §§ 5-410(b), 5-503(b). A power of attorney could include a clause such as follows:

> *If it is deemed necessary to seek appointment by a probate court of a conservator, I hereby nominate my said attorney-in-fact, _____, or in his or her absence my alternate attorney-in-fact, _____, for appointment by such court to serve as such fiduciary, and I request that my nominees be exempt from furnishing bond or any surety on any required bond as conservator.*

§ 1.7 UNIFORM TOD SECURITY REGISTRATION ACT

Part 3 of Article VI is called the Uniform TOD Security Registration Act (TOD is an acronym for transfer-on-death) and replaces G.L. c. 201D, which was enacted in 1998. It enables the owner of a security to provide for the direct transfer of the security at death without using the potentially troublesome joint tenancy. Section 6-305 of the MUPC provides that a security with the abbreviation "POD" will be given the same effect as TOD.

Generally, a designated beneficiary must survive the owner of the security. However, MUPC § 6-310(a) permits substituting a named beneficiary's descendants to take the place of the named beneficiary in the event of the beneficiary's death. Such substitution may be designated by placing the letters "LDPS" (i.e., lineal descendants per stirpes) after the beneficiary's name, though this does not mean that the beneficiary's

descendants will take per stirpes. Instead, the beneficiary's descendants are determined in accordance with the intestate law of the beneficiary's domicile. If there are joint owners of a security, then a TOD beneficiary will not take the security until the death of the last surviving joint owner.

Section 6-310(b) of the MUPC gives the following illustrations of registrations in beneficiary form:

- Sole owner–sole beneficiary: John S. Brown TOD (or POD) John S. Brown, Jr.
- Multiple owners–sole beneficiary: John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr.
- Multiple owners–primary and secondary (substituted) beneficiaries:
  - (example 1) John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr. SUB BENE Peter Q. Brown
  - (example 2) John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr., LDPS.

§ 1.8 TRUSTS

§ 1.8.1 Scope of the Massachusetts Uniform Trust Code

The Massachusetts Uniform Trust Code (MUTC) has been enacted as G.L. c. 203E. It became effective on July 8, 2012, and Article VII of the MUPC was simultaneously repealed. However, many of the provisions that were set forth in Article VII of the MUPC can be found in the MUTC.

Just as Article VII of the MUPC applied to all trusts, both inter vivos and testamentary, so does the MUTC. All trusts shall be subject to the jurisdiction of the Probate and Family Court in the county where its principal place of administration is located, (G.L. c. 203E, § 204). Section 201(b) of the MUTC provides that trusts shall not be subject to continuing judicial supervision unless ordered by the court. Thus, testamentary trusts are free of court supervision, including accountings to the court. However, the appointment of the trustee of a testamentary trust still requires the involvement of the Probate and Family Court.

The MUTC applies to all trusts, including those created before July 8, 2012. However, certain provisions that are found in trusts executed prior to July 8, 2012, will remain effective. Section 502(a) of the MUTC provides that, to be effective, a spendthrift clause must prohibit both voluntary and involuntary transfer. Under prior Massachusetts law, a spendthrift clause could validly prohibit involuntary transfers while permitting voluntary ones, and such clauses found in trusts executed prior to July 8, 2012, shall remain in force. Section 602(a) states that, unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This reverses prior Massachusetts law, which set forth that, if a trust was silent in regard to revocability, it was irrevocable; this rule shall continue to apply to trusts established before July 8, 2012. Section 703(a) of the MUTC provides that cotrustees

who are unable to reach a unanimous decision may act by a majority decision. Previously, it was presumed that trustees must act unanimously unless otherwise provided in the trust, and this presumption is still in effect in regard to trusts executed prior to July 8, 2012.

Section 105(b) of the MUTC provided that the terms of a trust shall prevail over any provision of the MUTC except

- the requirements for creating a trust;
- 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;
- the requirement that a trust have a purpose that is lawful and not contrary to public policy;
- the power of the court to modify or terminate a trust under Sections 410 to 416, inclusive;
- the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust, as provided in Article 5;
- the power of the court under Section 702 to require, dispense with, or modify or terminate a bond;
- 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;
- the effect of an exculpatory term under Section 1008;
- the rights under Sections 1010 to 1013, inclusive, of a person other than a trustee or a beneficiary; and
- the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

§ 1.8.2 Bond of a Testamentary Trustee

Section 702 of the MUTC states:

> 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.

The terms and conditions of the bond of a testamentary trustee are essentially the same as those specified for the bond of a personal representative. Thus, a testamentary trust should generally include a waiver from the requirement of a bond or surety on a bond.

§ 1.8.3 Powers of a Trustee

Section 816 of the MUTC sets forth a lengthy list of specific powers of a trustee. Unless otherwise limited by the trust documents, a trustee has all of these powers. If a list of powers is to be included in a trust, care should be taken that the powers listed are as broad as those found in Section 816.

§ 1.8.4 Trustee's Duty to Inform and Report

Section 813 of the MUTC addresses the duty of the trustee to inform and report. A trustee is obligated to keep the qualified beneficiaries reasonably informed about the administration of the trust. A qualified beneficiary is defined in Section 103 of the MUTC as a person who, on such date, is a distributee or a permissible distributee of trust income or principal or would be a distributee or a permissible distributee of trust income or principal if the trust terminated on that date. Section 813(b) provides that "[w]ithin 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." Section 813(c) states: "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."

It appears that a trust document may modify the requirements to inform and report. Section 105(b) of the MUTC, discussed above, does not list the duty to inform and report as one of the provisions that the terms of a trust cannot effect. Of course, common law has always imposed a duty to account to the beneficiaries, so it is not likely that a trustee can be relieved of all responsibility to inform and report. However, it may be reasonable to specify to whom the trustee must report. For example, in the case of a trust for the benefit of a surviving spouse and descendants, accountings could be limited to the surviving spouse during their lifetime.

§ 1.8.5 Modification of an Irrevocable Trust

The MUTC expands the ability to modify the terms of an irrevocable trust. Previously under Massachusetts law, a trust could be reformed if it could be proven that, as a result of error, the terms of the trust were not consistent with the settlor's intent. This required a proceeding in the Probate and Family Court.

Section 411 of the MUTC provides that the court may modify or terminate an irrevocable trust if the settlor and all of the beneficiaries consent to the modification or termination. An irrevocable trust can be modified or terminated with the consent of all of the beneficiaries if the court concludes that such modification is not consistent with a material purpose of the trust. If all of the beneficiaries do not consent, the court may still approve a modification or termination if it is satisfied that the interests of a beneficiary who does not consent will be adequately protected.

Section 412 of the MUTC authorizes the court to modify or terminate a trust if, because of circumstances not anticipated by the settlor, modification or termination will

further the purposes of the trust. Section 415 essentially codifies prior Massachusetts law by providing that the court may reform a trust to conform to the settlor's intention if it is proved that the terms of the trust were affected by a mistake of fact or law.

The MUTC also creates the opportunity to modify an irrevocable trust without court interaction. Section 111 permits interested persons to enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust to the extent that it does not violate a material purpose of the trust and includes terms and conditions that could otherwise be approved by the court.

§ 1.9 MISCELLANEOUS

§ 1.9.1 Testamentary Addition to Trusts

Section 2-511(a) of the MUPC provides that a will may validly devise property to a trust to be established at the testator's death by the testator's devise to the trustee, if the trust is set forth in a written instrument that was executed before, concurrently with, or after the execution of the testator's will. Although G.L. c. 203, § 3B stated that a pour-over trust must be executed before or concurrently with the execution of the will and implied that the trust corpus can be nonexistent, the procedure generally followed was to state in the will that the trust was executed prior to the will and to fund the trust with at least a nominal amount. Section 2-511(a) of the MUPC makes it clear that a pour-over trust need not be funded at creation to be valid, but can be funded solely by the pour-over devise from the will. In addition, the devise to the trust is valid even if the trust document is executed after the will.

A devise to a trust executed concurrently with the will could be made as follows:

> *I give the remainder of my property to the trustees of the Charles Johnson Trust—2015 executed on the date of the execution of this will, and as it may be amended from time to time.*

Despite the ability to execute a trust some time after the will, this is not recommended for obvious reasons. If the trust is never executed or if the testator dies before it can be executed, the devise will fail, resulting in intestacy unless an alternate devise is made. Also, referring to the date of the trust clearly identifies the trust that is to receive the gift.

§ 1.9.2 Anti-lapse Statute

General Laws Chapter 191, § 22 states that, if a devise or legacy is made to a child or other relation of the testator who dies before the testator, then the issue of such child or relation shall take the devise or legacy, unless the will provides otherwise. This is known as the anti-lapse statute. Thus, a legacy left to a relative must specify that the relative must survive the testator as a condition of receiving the legacy if the testator does not want the legacy to pass to the relative's issue when the relative predeceases the testator.

The code's version of the anti-lapse statute is found in MUPC § 2-603. It is applicable only to legacies to the grandparents, the descendants of the grandparents, and the stepchildren of either the testator or the donor of a power of appointment exercised by the testator's will. The descendants of the deceased devisee take per capita, under the intestacy rules described in § 1.3, Intestacy, above. The UPC as adopted in other states provides that words of survivorship are not, in the absence of additional evidence, sufficient to prevent the application of the anti-lapse rule. The Massachusetts UPC attributes to words of survivorship their plain meaning; such language is sufficient to avoid the anti-lapse statute.

§ 1.9.3 Omitted Children

General Laws Chapter 191, § 20 provided that if a testator failed to provide in their will for any of their children, whether born before or after the testator's death, or for the issue of a deceased child, whether born before or after the testator's death, the omitted descendant(s) shall take an intestate share of the estate unless they have been provided for by the testator in their lifetime or unless it appears that the omission was intentional. Section 2-302 of the MUPC reduces the protection given children omitted in wills. Only children born or adopted after the execution of the will are protected by the code; the descendants of a deceased child have no right to a share of the estate.

If the testator had no child living when the will was executed, then an omitted after-born or after-adopted child receives an intestate share of the estate unless the will devises all or substantially all of the estate to the other parent of the omitted child. If the testator devises property to one or more children, then the omitted after-born or after-adopted child is entitled to an equal share of the total devises to such children. A child who is not included in a will solely because the testator believes the child to be dead is entitled to a share in the estate as if the child were an omitted after-born or after-adopted child.

§ 1.9.4 Guardian Ad Litem

General Laws Chapter 206, § 24 permitted a testator to direct in their will that the appointment of a guardian ad litem to represent the interests of persons unborn or unascertained be dispensed with in connection with the allowance of the executor's accounts. No similar provision in the code exists. Section 1-404 of the MUPC provides that in formal proceedings, the court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown if the court determines that representation of the interest otherwise would be inadequate. Thus, under the code, a will need not include a direction that a guardian ad litem be dispensed with because it will have no meaning.

§ 1.9.5 Creation of Trust by Conservator of a Minor

Previously, the guardian or conservator of the estate of a ward, other than the guardian of a minor, could create trusts on behalf of the ward pursuant to G.L. c. 201, § 38.

Occasionally, a minor will receive a large sum of money by inheritance or a recovery for personal injuries. A guardian will be appointed to manage the minor's estate, but the guardianship will terminate when the minor reaches age eighteen. Eighteen-year-old persons are generally not mature enough to handle significant wealth. Ideally, a trust should be established to hold the money beyond age eighteen in such a situation, but G.L. c. 201, § 38 precluded the creation of a trust by the guardian of a minor.

Section 5-407 of the MUPC permits the conservator of a minor to create a trust of the property of a minor that will extend beyond age eighteen. To create such a trust, the court must determine that it is in the best interest of the minor to extend the management and protection of the minor's money and property beyond age eighteen. Only the minor and their descendants can be beneficiaries of the trust, and on termination of such a trust, the property must be distributed to the minor. If the minor dies before termination of the trust, the minor must have a testamentary general power of appointment over the trust property, which, of course, may be exercised only after the minor reaches age eighteen. If the minor fails to exercise the power of appointment, then the trust can provide for the distribution of the property to relatives who would be likely recipients of legacies from the minor. (Compare G.L. c. 201, § 38 with the foregoing UPC provisions.)

§ 1.9.6 Disposition of Tangible Personal Property by Memorandum

A testator often wishes to leave a variety of items of tangible personal property to certain individuals. However, it is usually cumbersome and not practical to list all of these bequests in a will. In addition, if they are set forth in a will, then every change to the list of tangible items requires a codicil or new will.

Under prior Massachusetts laws, a memorandum describing the disposition of tangible personal property was given binding effect if it was in existence when the will was executed and it was referred to in the will. Any change required a codicil or new will.

The common practice in Massachusetts was to create a nonbinding memorandum. It was often executed after the will and could be changed from time to time. It provided guidance and was useful in harmonious family situations.

Section 2-513 of the MUPC provides as follows:

> A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it

> may be a writing that has no significance apart from its effect on the dispositions made by the will.

Section 2-513 gives binding effect to memorandums that previously would have been nonbinding. If the testator wants to have the option to direct the disposition of their tangible personal property, a clause similar to the following sample supplied in the comment to MUPC § 2-513 should be included in the will:

> *I might leave a written statement or list disposing of items of tangible personal property. If I do and if my written statement or list is found and is identified as such by my Personal Representative no later than 30 days after the probate of this will, then my written statement or list is to be given effect to the extent authorized by law and is to take precedence over any contrary devise or devises of the same item or items of property in this will.*

§ 1.9.7 Estate Tax Apportionment

Section 3-916 of the MUPC provides that estate taxes shall be apportioned among all persons interested in the estate in proportion to the value received by the respective parties. Formerly, the probate residue carried the burden of taxes on the probate property. Property for which a deduction is available is not subject to apportionment. If a will directs another method of apportionment, that method controls.

MCLE

Drafting Simple Wills and Trusts

Shani Rea Collymore, Esq.
Cody, Cody & McCarthy, LLC

The Last Will and Testament

- In preparing the Last Will and Testament, I am assuming you have already met with your client and determined what assets they have and who they want to leave their property to.
- Ideally, you should have your client complete a questionnaire outlining their legal names and address, their children's names and addresses, and all of their asset information.
- Testator/Testatrix – individual making the Will
- Personal Representative – More commonly known as the Executor
- Beneficiary – person or persons inheriting property under the Will
- Refer to MUPC Chapter 190B.

Revoking Prior Wills

- The opening line of your Will (Publishing Clause) should revoke any prior Wills or Codicils. For example:
  - *I, [Testator's Name], a resident of x County, Massachusetts, revoke any prior wills and codicils made by me and declare this to be may Last Will and Testament.*

Will in Contemplation of Marriage

- If getting married, it's a good idea to reference that the Will is being made in contemplation of marriage to x person.
- Prior to the MUPC a will was considered revoked if a person got married after the execution of their will. This is no longer the rule.
- Surviving spouse will now get an intestate share in this circumstance unless: the will was made in contemplation of marriage, the will expresses the intention for it to be effective notwithstanding the future marriage, or the testator provided for the surviving spouse outside of the will.

Article One
Family Information

- Article One should list whether they are married or unmarried. How many children they have and their names.

  I am unmarried.

  I have the following two children. They are:

  John Smith, born January 1, 1900; and

  Jane Smith, born February 1, 1903.

  All references to my children in my Will are to these children.

  References to my descendants are to my children and their descendants, including descendants of any deceased children.

- This is where you would also reference any children that are being purposefully left out of the Will. For Example:

All references in my Will to my children are to Jane Smith. I am specifically disinheriting John Smith. Therefore, for the purposes of my Will, John Smith and his descendants will be considered to have predeceased me.

Article Two
Disposition of Tangible Personal Property

- If your client chooses to prepare a Personal Property Memorandum. This is where the language should appear in the Will referring to the Personal Property Memorandum.
- To the extent any property is not distributed under the memorandum then it should flow into the Residuary Clause.
- If any expenses for shipping the personal property or storing it is covered, you should address that here as well as whether it counts against their ultimate share under the Will.
- If making any specific or general bequests, they should also appear in this Article.

Article Three
Residuary Clause

- Residuary estate includes all property not disposed of in the prior articles. It can include real or personal property. For example:

  Definition of My Residuary Estate

  All the remainder of my estate, including property referred to above that is not effectively disposed of, will be referred to in my Will as my "residuary estate."

  Disposition of My Residuary Estate

  I give my residuary estate to my descendants, per stirpes.

Article Four
Remote Contingent Distribution

- This article outlines who gets the property under the Will if all the named beneficiaries have predeceased the Testator.
- Typically, it will say it passes under the intestacy laws of the Commonwealth of Massachusetts.

Article Five
Personal Representative

- This is where you designate who will serve as your Personal Representative. This can be two people serving jointly or the survivor or individually and then the next named person.

Article Six
General Administrative Provisions

- This is where you outline general provisions and rules that apply to the probate estate. For example:
- Bond – you want to address whether the Personal Representative can serve with or without sureties on their bond.
- Informal and Unsupervised Proceedings –typically you want your Personal Representative to serve with as little court supervision as possible to keep estate administration costs low.
- Fiduciary Compensation – Can the Personal Representative be compensated for their service?
- Other things to address: Self-Dealing, Employment of Professionals, Principal and Income Act, Address Underage Beneficiaries or Disabled, & Rule Against Perpetuities (if any Trusts created).

Article Seven
Powers of My Fiduciaries

- Outline the powers you wish your Personal Representative to have. Be sure to include all fiduciaries that may be appointed under the Will, like a Special Personal Representative or Trustee .
- The powers listed should be in addition to any statutory powers conferred by law.
- Power to sell real property especially important to be listed here. No statutory power of sale.
- Standard provisions include invest powers, powers to sell real estate, mortgage, and lease. Powers to hire professionals and include access digital assets.
- Power to pay distributions in cash or in kind.

Article Eight
Payment of Debts, Expenses and Taxes

- You'll want to provide for payment of all legally enforceable debts. These debts can be paid from the residuary estate or could be apportioned amongst the beneficiaries under the Will.
- It is common for this to be paid from the residuary without apportionment.
- Should address how estate taxes are paid from assets passing outside the Will like Retirement Accounts.

Article Nine
Definitions and General Provisions

- You'll want to define terms used throughout the Will. For example:
  - Adopted and Afterborn persons
  - Descendants
  - Per Stirpes
  - Per Capita
  - Good Faith
  - Legal Representative
  - Shall and May
- Contest clause
- Survivorship provisions
- Virtual Representation and GAL
- Singular and plural, gender, headings, Governing Law
- Guardian of minor children.

Who Can Make a Will?

- Any individual 18 or older who is of sound mind.
- Signing Requirements for a Will:
  - Signed by Testator
  - Witnessed and signed by 2 other individuals
- Self-Proved Will (MUPC Section 2-504):
  - See statute for recommended language. Must be notarized.

Capacity to Make a Will

- What is “sound mind”?

1. Does the person comprehend the nature and the extent of his or her assets?
2. Can the person identify the natural objects of his or her bounty?
3. Did the person understand the purpose or effect of the will or trust that he or she was signing?

- This is all determined at time of signing the Will. Testator can have a “moment of lucidity”.

Revocable Trusts

- MUTC Chapter 203E governs trusts.
- A basic revocable trust will be for the benefit of the Grantor, they will be the initial Trustee and beneficiary.
- Will generally provide that the trust assets are for the sole benefit of the Grantor while they are alive, then upon their death to named beneficiaries.

Benefits of the Revocable Trust

- Can act as a super power of attorney in the sense that it can hold most of the Grantor's assets and will provide for a successor Trustee in the event the Grantor no longer has capacity.
- Avoids probate.
- Can provide for the easy distribution of assets upon the death of the Grantor.
- Assets can go outright to beneficiaries or can remain in trust at Grantor's preference.

Format of Making a Trust

INDENTURE OF TRUST, made this ___ day of ____ 20__, by _____ (the "donor") and _____ (the "trustees").

The donor proposes to transfer property to the trustees for administration under this indenture. The trustees agree with the donor that they will hold all property now or later transferred by any person to them as trustees in accordance with the terms and provisions of this indenture.

This trust shall be known as the _____ Trust.

[insert dispositive and administrative provisions]

IN WITNESS WHEREOF, the parties have set their hands on the day, month and year set out above.

Donor

Trustee

Trustee

[Notary Block]

Notarization

- Notarization of the trust is not required for it to be valid. However, it is a good idea to have it notarized especially if it might hold real estate.

Methods of Creating a Trust
MUTC § 401

- A trust may be created by:
  - A 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.
  - Declaration by the owner of property that the owner holds identifiable property as trustee; or
  - Exercise of a power of appointment in favor of a trustee.

Requirements for Creation
MUTC § 402

- A trust shall be created only if:
  - The settlor has capacity to create a trust;
  - The settlor indicates an intention to create the trust;
  - The trust has a definite beneficiary or is:
    - A Charitable Trust;
    - A trust for the care of an animal, as provided in section 408; or
    - A trust for a non-charitable purpose, as provided in section 409;
  - The trustee has duties to perform; and
  - The same person is not the sole trustee and sole beneficiary.

Trust Purpose

- A trust may be created only to the extent its purposes are lawful and not contrary to public policy. MUTC § 404

Trustee Selection

- When selecting a successor trustee clients should consider whether they want an individual to serve such as a child or other family member or whether they want a professional trustee such as a CPA or attorney. Can go a step further and select a financial institution or bank.
- The person selected should be honest, financially responsible, can get along with the beneficiaries of the trust, and good at record keeping.

Incapacity of Grantor

- The successor Trustee will generally take over when the Grantor (and initial trustee) is deceased, incapacitated or voluntarily steps down.
- The Trust document should define incapacity and how that is determined.
- Trust will continue to be for Grantor's benefit during incapacity. Additional beneficiaries may include Grantor's spouse or children.
- Disability Panel?

Funding the Trust

- Proper funding of the Trust is the single most important task.
- Decide whether it should be funded now with transfer of assets or funded at death of Grantor/Donor through beneficiary designation forms.

Rule Against Perpetuities

- 21 years after the death of a life in being at the creation of the trust OR 90-year term.

Trustee Powers

- There are statutory powers, but your document should list out specific powers granted to your trustee. Like the power of sale.
- Ultimate Disposition
- Choice of Governing Law
- Payments of Debts, Taxes and Expenses
- Spendthrift clauses

Thank you!