



Boston Bar
ASSOCIATION

FALL 2007

Trusts & Estates Section

FALL 2007 Newsletter

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Calendar of Section Events

Thursday, December 13, 2007

12:00 p.m. - 2:00 p.m.

Trust & Estates Mid-Year Review

The Co-chairs of the Trusts & Estates Section and the Estate Planning Committee invite you to the presentation of our annual Mid-Year Review. This year, we are privileged to welcome **Denis R. Delaney**, Hemenway & Barnes, **Peter Shapland**, Day Pitney LLP, and **Nick Gray**, Rubin & Rudman and **Nancy Dempze**, Hemenway & Barnes, as our presenters. They will discuss recent cases and rulings of importance to Trusts & Estates practitioners.

The program is the Section's annual Holiday celebration and lunch will be provided for all who attend. We hope you can join us for this festive event.

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ARTICLES WANTED

You are all invited and encouraged to contribute an article on any subject of interest, particularly if you find yourselves dealing with an unusual or undecided issue in Massachusetts. Please contact, Amiel Weinstock at amiel.weinstock@klgates.com or Christopher Perry at Christopher_D_Perry@notes.ntrs.com to pursue this further.

The Massachusetts Probate Code: Coming Changes

By Raymond H. Young

The MBA/BBA sponsored Massachusetts Probate Code is pending in the Joint Committee on the Judiciary as House Bill 1652 and Senate Bill 843. Much of this bill is a codification of present Massachusetts law and practice, making the law easier to find and apply. It is a re-working of the Uniform Probate Code to conform with what is best in prior Massachusetts practice and law. This specific tailoring makes it appropriate to call this bill the Massachusetts Probate Code.

There are also significant and helpful changes and improvements included in the MPC. This article reviews for the benefit of Massachusetts practitioners some of the more important of the coming changes.

Informal Probate. The greatest improvement is informal probate. 96% of all probate filings are uncontested, 2% are contested, and another 2% have enough assets or serious enough issues to warrant formal procedure in any event. The problem of our present practice in Massachusetts is that, apart from voluntary probate for small estates, all those uncontested probates or administrations have to endure the formal procedure with the result, depending on luck and counties, of a 3 to 5 months delay before formal appointment can be obtained. The estate must get a citation with a return date, arrange service and publication, and get action after the return date. Meanwhile, due to privacy laws, collecting the basic information is not possible until there is a certificate of appointment. The procedure causes friction between clients and lawyers, and creates problems for the Registries in dealing with complaints and inquiries from lawyers and petitioners. The Registries get blamed for delays, but it is not their fault. The problem is the antiquated law.

The solution can be corrected with the MPC informal probate. Application may be made seven days after a decedent's death and seven days after written notice to all interested parties. The initial filing will be reviewed by an Assistant Register or other person appointed by the Court, much as in the present initial review by an Assistant Register upon filing. The difference is that upon that initial review by the authorized Assistant Register the appointment can be effective immediately. The job is done. The appointed personal representative can proceed.

Where there is opposition the opportunity for contest is not lost. A request for formal procedure may be filed by any interested person with the request that the informal proceedings be terminated. Thereupon the informal appointment powers are at an end. This formal procedure request would be the equivalent of filing a contest. The Rule 16 provisions would thereafter apply. The opportunity to contest is not lost but is protected.

Testamentary trust liberation. Massachusetts lawyers largely avoid testamentary trusts because their clients wish to avoid the continuing formality and expense required with accounts, filing fees and guardians ad litem. "Avoiding probate" has been a great slogan for the trust mills which attack lawyers and courts as enemies, and promote their boilerplate "living trusts". The sensible approach here is to parallel the informal probate approach. Why force the formal procedure upon the 98% of the cases where it is not needed? The MPC follows just that approach, namely, there is no requirement for accounting to the Court for testamentary trusts, but rather a requirement to account to the beneficiaries. Any party who wishes court action for protection or to challenge what has been done is free to bring a probate proceeding wherever it is necessary, where everyone's rights can be determined and protected. But the unnecessary burden of filing and storing accounts where there is no question is avoided.

Guardianship and conservatorship. Guardianship is the area where the MPC improvements are on the side of more protection rather than less. These provisions were carefully worked out after intensive review with a committee of probate judges. Incapacitated persons are particularly vulnerable. They may not have family members or known beneficiaries who can protect them. Necessary safeguards are required to prevent railroad-ing of elderly and incapacitated persons without adequate protection. Reforms are badly needed, have been agreed upon by all concerned for a long time, but have not as yet been adopted. They are at last provided in the MPC guardianship and conservatorship provisions.

POD accounts. Presently in Massachusetts joint bank accounts are used as "poor man's wills". But we have all seen that the most disruptive, emotionally searing and expensive litigation can occur over whether the ac-

count was intended to transfer ownership at death or whether it was merely a convenience account to permit payment of bills, with no intent to transfer ownership. The unnecessary disruption and litigation is avoided by the MPC providing for the establishment of pay-on-death accounts making it clear that the intent is to transfer ownership where that is in fact the case.

Spousal elective share. There has been contention for years about determination of the share which a surviving spouse takes on election against the will of the deceased spouse. Because of that contention the pending MPC does not contain any provisions for an elective share. Present Massachusetts law is continued until there is agreement. The MBA, the BBA and the Women's Bar Association all agree that consideration of the MPC should not be delayed pending a resolution of spousal elective share. The good news is that there may in time be an agreement on the elective share. There is an interbar committee, including representatives of the MBA, the BBA and the WBA, which has been considering the question for close to 2 years. That committee is now starting an intensive analysis of resolution of this question in Massachusetts. That committee's estimate is that it will take two more years to explore all questions and gain insights from the practical application of enactments in other states. All the bar associations agree that the consideration of the MPC should not be delayed to await this result.

Intestacy: surviving spouse. The surviving spouse under present Massachusetts law, where there is no will and no issue, takes the first \$200,000 plus one-half of the balance. The MPC increases the surviving spouse's intestate share in most cases to all of the intestate estate. This is consistent with the experience lawyers have in drawing wills. In most cases the intention is that the entire estate goes to the surviving spouse where there is no issue.

MPC applies the same rule where all issue is issue of the marriage. This is distinguished from the present Massachusetts provision that where there is issue the surviving spouse takes one-half and the issue take the other half. There is a practical reason for the MPC change, where the children are young the most reasonable provision is to provide everything for the surviving parent, whose interest is in taking care of those children as well as of himself or herself. This is particularly important in modest size estates. It accords guardianship for minor children with the attendant extra expense and delay. This is the provision which most clients choose to write into their wills. It therefore is also the disposition which should be effected by the intestacy laws.

If either spouse has issue from a prior marriage, the rule is different. Then there is a 50-50 allocation between the surviving spouse and the issue. This protects against what could otherwise be a conflict of interest on the part of the surviving spouse.

Intestacy: issue of different generations. Lawyers learn about "per stirpes" distribution in law school and tend to believe that is the proper form of distribution. But this is a question for clients to decide. Lawyers should talk with their clients about this question before drawing the will. They may be surprised by their clients' choice. The question can be asked in terms of the client's own family patterns of children and grandchildren. In simplified form, suppose the client has three children, child A has three children, child B has one child, and child C has two children. Suppose two of your three children, A and B, die before you but your other child C survives you. Presumably you want C, the surviving child, to take one third. Now comes the significant question. How should the property go among your four grandchildren who are descendants or your two deceased children? One-ninth each to the three surviving children of deceased child A and one-third to the child of deceased child B? Or one-sixth to each of the four grandchildren? Over 75% of clients questioned in a survey of ACTEC members chose the equal sharing, "equally near, equally dear", rather than the per stirpetal approach of per capita at each generation. One ACTEC Fellow reported

"[my clients] unanimously selected [per capita at each generation]. In my estate planning practice over the years all of my plans have been drawn to have a [per stirpes at the first generation] distribution . . . I have reluctantly come to the conclusion that I have been inadvertently influencing the decision, as my personal very strong preference is for [per stirpes at the first generation]"

The MPC follows the wishes of most clients, as is the appropriate rule for intestacy. In the meantime, before the MPC becomes effective, lawyers should discuss this question with their clients to find out what it is they want to do, the object of drafting.

Premarital will. We all know that marriage revokes a prior will unless the will was executed in contemplation of marriage. Generally speaking, this has the beneficial effect of allowing the spouse to receive an intestate share. But that result is overbroad in some instances. A superior court malpractice action charged a lawyer should have found out his client had gotten married, and should have advised the client of the need for a new will. The factual situation was instructive. The marriage,

kept private, occurred while the new wife was terminally ill. The husband had a prior will providing a substantial trust for one of his nephews with special needs. That careful provision was obliterated by the overbroad application of invalidity. The MPC to the contrary provides a more carefully tailored provision. It does not invalidate the prior will, but in the event of a subsequent marriage the surviving spouse takes an intestate share of so much of the estate as is not devised to a child of the testator by a prior marriage.

Effect of divorce. By Massachusetts statute divorce revokes a prior will provision for the divorced spouse. This is a rule which is not broad enough. Much of wealth currently passes outside the probate estate, by insurance beneficiary designation, by retirement plan beneficiary designation, and by funded revocable trusts. The Massachusetts statutory provision does not apply to those assets. The case of *Clymer v. Mayo*, 393 Mass. 754 (1985), allowed the revocation to extend to an unfunded revocable trust but on the limited ground that it was part of the testamentary plan. The MPC provision extends the sensible rule to all non-testamentary transfers, retirement plans, insurance, and funded trusts.

Omitted children. Under present Massachusetts law the pretermitted child takes an intestate share unless the omission was intentional. The more narrowly tailored MPC provision is that the omitted child takes the intestate share if there is no issue living at the time of the will. If there is issue living at the time of the will then the omitted child, unless the omission is shown to be intentional, takes a proportionate share of the part devised to children. This more narrowly tailored approach prevents unnecessary disruption of the overall testamentary plan.

Memorandum. The precatory memorandum many lawyers use in connection with tangibles is given binding effect, provided the writing is signed, and describes the donees and the items with reasonable certainty. The writing may be referred to as one to be in existence at the time of death and may be prepared before or after the execution of the will.

Anti-lapse. The benefits of the anti-lapse provision, that on the death of a relative a legacy or devise to that relative if no other provision is made in the will, passes to the surviving issue of the relative. But, that beneficial provision does not extend to trusts, to retirement plans, to insurance, or other non-probate transfers. The MPC extends the anti-lapse rule to all these non-probate transfers.

Conclusion. The pending Massachusetts Probate Code will bring many benefits. It is well that we all keep in mind the coming changes and benefits provided by the pending Massachusetts Probate Code. We also want to speed up enactment of the MPC. The members of the legislature do not feel the urgency that we do about the need for this legislation. You can help by contacting your state representative and state senator to let them know that this is legislation about which you feel strongly. Please convey to them your sense of urgency so that we will all get the benefit of this legislation sooner rather than later.

The Constitutional Limits of the Massachusetts Estate Tax

By Andrew D. Rothstein

It has been nearly five years since Massachusetts enacted its current version of the estate tax. During that time Massachusetts trusts and estates lawyers have become more familiar with the law and how it works. The experience developed during that time has led to the discovery that, in at least one respect, the Massachusetts estate tax may reach beyond the constitutional limits on the commonwealth's jurisdiction to tax. Those limits only permit Massachusetts to impose its estate tax on real and tangible personal property located within the commonwealth. See, *Frick v. Pennsylvania*, 268 U.S. 473, 498 (1925). However, in certain circumstances Massachusetts imposes its estate tax on real or tangible personal property that is located outside of Massachusetts.

Under the current Massachusetts estate tax, the amount of the tax payable by the estate of a resident decedent is equal to the amount of the credit for state death taxes that would have been allowable by the resident decedent's estate computed under Internal Revenue Code §2011, as in effect on Dec. 31, 2000. M.G.L. ch. 65C, §2A(a).

The starting point for the calculation of the credit for state death taxes is the federal gross estate. See, Form M-706 Massachusetts Resident Estate Tax Return Instructions. This includes all property, real and personal, whether the property is located within Massachusetts or outside of Massachusetts.

For example, a Massachusetts resident decedent who owned Massachusetts real estate valued at \$5,000,000 and Florida real estate valued at \$5,000,000, calculates his estate tax starting with a gross estate of \$10,000,000. Assuming no deductions, the Massachusetts estate tax is calculated as follows:

Taxable Estate	\$ 10,000,000
Less: \$60,000 per IRC § 2011(b)(3)	<u>(60,000)</u>
Adjusted Taxable Estate	\$ 9,940,000
Times: Effective Tax Rate	<u>10.74%</u>
Total Massachusetts Estate Tax	<u>\$ 1,067,600</u>

Part 2 of the M-706 provides a further computation for a resident decedent with property located in another state. Under the Massachusetts approach, the estate is given credit for tax actually paid in the other jurisdiction. However, as a result of decoupling, there is no Florida estate tax payable by the decedent in the example above, and therefore no credit will be given on the Massachusetts return. As a result, the decedent's estate will pay a Massachusetts estate tax attributable to the real property located in Florida.

While the Massachusetts credit for tax paid in another jurisdiction appears to prevent multiple state death taxes from being imposed on the property of a Massachusetts resident decedent, it does not prevent Massachusetts from effectively taxing a resident decedent's property located outside of Massachusetts.

Massachusetts taxes a nonresident decedent's estate differently than a resident decedent's estate. If the decedent in the example above was a Florida resident instead of a Massachusetts resident, the credit for state death taxes (as figured above) would still be the starting point. The credit for state death taxes would then be apportioned based on the ratio of Massachusetts property to the total estate. M.G.L. ch. 65C, §2A(b). Thus, the nonresident decedent's estate would only be subject to Massachusetts estate tax on property located in the commonwealth. The statute makes no distinction as to whether the nonresident lives in a state that imposes a death tax or not. In this example, the nonresident decedent's estate would owe only \$533,800 – one-half the amount it would owe if the decedent was a Massachusetts resident.

There is legal authority that indicates that the disparity in the Massachusetts estate taxation of a resident decedent and a nonresident decedent may be problematic from a constitutional law perspective.

In *Frick v. Pennsylvania*, 268 U.S. 473, 498 (1925) the United States Supreme Court held that a Pennsylvania estate tax statute, "in so far as it attempts to tax the transfer of tangible personalty having an actual situs in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid." In its deci-

sion the Supreme Court noted “[i]ndeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state, much less where such action has been defended in any court.” *Id.* at 490 quoting Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).

The United States Supreme Court reached a similar result in Treichler v. Wisconsin, 338 U.S. 251 (1949). There the Court held a Wisconsin estate tax statute “invalid insofar as it is measured by tangible personal property outside of Wisconsin.” *Id.* at 257. In that case, the Wisconsin tax was measured by portions of the federal death tax credit that were attributable to tangible personal property located outside of Wisconsin.

Because the Massachusetts estate tax for a resident decedent is determined in part based on the value of real property located outside of Massachusetts, it is possible that the statute results in the application of the Massachusetts estate tax beyond the constitution’s jurisdictional limits that allow the tax to be imposed only on real and tangible personal property located within the commonwealth.

The California Supreme Court dealt with a similar issue in Cory v. Fasken, 563 P.2d 832, 842 (1977). In that case the California Supreme Court found that constitutional limits on the state’s jurisdiction to impose its estate tax prevented California from “picking-up” any part of the federal credit for state death taxes that was not apportioned to property within the state. In reaching its decision, the Court reasoned that California’s entitlement to a portion of the credit

“...should not depend on how one or more of the other states with a right to levy inheritance or pick-up taxes proceed to do so. Should, for instance, a sister state with some portion of estate property located within its borders elect not to assert its claim for a share of the federal credit, California’s entitlement should not thereby be enlarged or otherwise affected as any increased apportionment in California’s favor would extend its jurisdictional reach to the sister state’s property.”

Based on the cited authorities, it is possible that the Massachusetts estate tax, to the extent that it applies to a resident decedent’s property with a situs outside of the commonwealth, may be subject to a constitutional challenge.

Andrew Rothstein is an associate in the Private Client & Trust group at Goulston & Storrs. He focuses his practice on estate and tax planning and trust and estate administration. Andy can be reached at arothstein@goulstonstorrs.com.

The information contained in this article should not be construed as legal advice or legal opinion on any specific facts or circumstances. The information is intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.

Recent Probate Case of Interest

Dawson v. Shoffner

Lawyers Weekly No. 15-004-06 (Plymouth Probate Court 2006)
Validity of Realty Trusts

The following case summary was included in the presentation materials for the 2006-2007 Boston Bar Association Year in Review, New Developments in Massachusetts Case Law, and is published here with thanks and credit to Michelle M. Porter and Nancy E. Dempze.

Facts

Jane Dawson and Luke Dawson, the children of Nick Dawson from his first marriage, filed a Complaint in Equity against parties including their stepmother, Freya Shoffner, seeking clarification of ownership of two properties held in separate nominee trusts created by Nick.

In 1981 and 1987, Nick established the two nominee trusts, called the Boat House Realty Trust (“BHRT”) and the Happy House Realty Trust (“HHRT”), into which he conveyed property located in Marshfield. The BHRT and the HHRT state that they are nominee trusts and that their original beneficiaries are listed on Schedules of Beneficiaries executed concurrently with the trusts, although no original Schedules of Beneficiaries were ever located.

Over the years, a number of transactions occurred with both trusts. In 2001, Schedules of Beneficiaries were created by the Trustees for both the BHRT and the HHRT; both schedules named the Dawson/Shoffner Family 2001 Revocable Trust (“Family Trust”) as the beneficiary. The Family Trust provided for Freya during her lifetime, and then split into six shares: one for each of Luke, Jane, Max Zayas (Freya’s son), Darius Zayas (Freya’s son), and two for Wolfgang Dawson (son of both Nick and Freya).

Jane and Luke believed that the property held by the BHRT was supposed to be held in trust for them only, while the property held by the HHRT would be held for the benefit of all five children.

Procedure

Jane and Luke initiated these proceedings seeking information regarding the original schedules of beneficiaries.

Issue

Were schedules of beneficiaries created for the HHRT and BHRT at the time of their creation?

Discussion and Decision

The Court found that Nick did not create schedules of beneficiaries for the HHRT and BHRT at the time of their creation and held that, as a result, the transfers to the trusts failed due to the invalidity of the trusts. The Court’s analysis relied on *Arlington Trust Co. v. Caimi*, 414 Mass. 839 (1993), where the Supreme Judicial Court held that, although the names of beneficiaries do not have to be listed in a trust, a trust will fail if no beneficiaries are designated. Here, the first schedules of beneficiaries were not created until 2001 when the Family Trust was given 100% beneficial interest. Thus, the BHRT and HHRT were not valid trusts when properties were conveyed to them, and thus all conveyances fail. As such, Nick remained the owner of the properties at his death, and his Will poured the properties into the Family Trust.

Comment

This case underscores the importance of observing formalities in creating trusts and in diligently maintaining trust records. If the parties cannot produce an executed Schedule of Beneficial Interests for the nominee realty trust, they may not have a valid realty trust.

Deathbed Gifts Can Save Massachusetts Estate Taxes

By Robert C. Pomeroy & Susan L. Abbott

The Economic Growth and Tax Relief Reconciliation of 2001 ("EGTRRA") phased out the former federal estate tax credit for death taxes paid to any state. As a result, like many states Massachusetts "decoupled" its state estate tax from the amount of the state death tax credit. Its estate tax continues to be based on the pre-EGTRRA state death tax credit. This provides an opportunity for a terminally ill client to achieve significant state tax savings by making a taxable gift a short time before death.

The gross amount of the state death tax credit was based only upon the size of the federal taxable estate, which does not include the amount of adjusted taxable gifts made prior to death. (The federal estate tax is based on the combined amount of the taxable estate and adjusted taxable gifts.) Thus, a taxable gift made just before death removes the value of the gift from the calculation of the Massachusetts estate tax. In a fully taxable situation, this can produce a gross savings of as much as \$160,000 in Massachusetts estate taxes (for an estate in excess of \$10,000,000), and result in a net savings of up to \$88,000 after giving effect to the deduction allowed for the Massachusetts estate tax on the federal estate tax return. In a situation where marital deduction planning is designed to eliminate the federal estate tax, a pre-death gift can allow full funding of the \$2,000,000 federal credit-shelter amount (\$1,000,000 during life and another \$1,000,000 at death) at a cost of only about \$35,000 in Massachusetts estate taxes,¹ eliminating the need for a separate Massachusetts QTIP election. The avoidance of such an election may well result in a tax savings of several times this amount in the estate of the surviving spouse.

Such a gift can be made directly to the client's descendants or to a "credit shelter"-type trust for the benefit of the client's spouse and descendants. If possible, such a gift should be made with cash or high-basis assets, as the assets will not receive a step-up in basis at the client's death. To enhance the possibility that such a gift can be made, a client should consider executing a durable power of attorney that allows the attorney-in-fact to make sizeable gift to family members or trusts for their benefit.

Endnote:

¹ The state tax due is a circular calculation based on a taxable estate equal to the credit-shelter funding plus the amount of the state death tax.

See Robert C. Pomeroy and Susan L. Abbott, "Deathbed Opportunities," *Trusts & Estates* Vol. 146, No. 6, p. 22 (June 2007). **Robert C. Pomeroy** is of counsel, and **Susan L. Abbott** is an associate at the law firm of Goodwin Procter LLP, Boston.

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