GETTING TITLE OUT OF A TRUST

Prepared by Ward P. Graham, Esq.
Vice President, Region H Counsel
Stewart Title Guaranty Company

For

2002 Stewart Title Guaranty Company Agency Seminar

A. INTRODUCTION

For purposes of this seminar, we're going to deal with issues involving getting title out of express trusts, i.e., those created by some form of instrument. We won't be discussing trusts arising or imposed by operation of law, such as constructive trusts and resulting trusts. Nor will we get into the world of charitable trusts or the statutory custodial-type trusts dealt with in G.L. Chapters 201C and 203B. What we will be discussing are the two basic types of trusts that you are most likely to see in your conveyancing practice, testamentary trusts (created by the will of a decedent) and *inter vivos* trusts under written agreements or "declarations". Included among the latter, for purposes of our discussion relating to taking title to real estate out of a trust, are revocable trusts, irrevocable trusts and so-called "nominee" trusts (most commonly containing the words "Realty Trust" in their name and being the most common form of trust used for real estate title holding purposes). But first, let's start with some of the basics of trust law.

B. CREATION OF TRUSTS

1. The Primary Relationship: Trustee and Beneficiary.

To begin with, for our purposes, "No trust concerning land, except such as may arise or result by implication of law, shall be created or declared unless by a written instrument signed by the party creating or declaring the trust or by his attorney." G.L. c. 203, §1. It is not necessary that the instrument be a deed or that the trust be expressed in formal language or in a particular form or that there be consideration. A deed of trust or other instrument creating the trust must be delivered, but the assent of the beneficiary is not necessary in the case of such a "formal trust." 3 Belknap, ***Newhall's Settlement of Estates and Fiduciary Law in Massachusetts*** §36:2 (pp. 20-21) (5th ed. 1998). Whether a trust is created is a matter for construction of the language used but the burden is on the beneficiary to establish a trust relationship. **Id.,** at 24. To begin with, in order to have a valid trust, it is necessary to have a separation of the legal title to property in the trustee(s) and the beneficial, or equitable, rights in the *cestui que trust*, or beneficiaries. **Id.,** at 30-31. Next, there should be some specification of responsibilities, duties and obligations for the trustee to perform on behalf of the beneficiary to know what the object and purpose of the trust is and to provide a basis for enforcement by the beneficiary. Failure to provide even rudimentary terms expressing the rights and obligations between the trustee and beneficiary could result in the failure of the trust for indefiniteness. **Id.**, at 34. At the same time, it has been held that an *inter vivos* trust is valid where the ultimate beneficiaries are to be determined by the will of the settlor (i.e., creator or declarant) of the trust. **Id.**, at 36, citing ***National Shawmut Bank of Boston v. Joy***, 315 Mass. 457, 53 N.E.2d 113 (1944). In addition, a trust is not illegal because its purpose was to deprive a spouse of the spouse's distributive share in the estate of the now-deceased spouse. **Id.**, at 37 and cases cited in fn. 8. Maybe that's not an honorable purpose but it's a purpose and, apparently, a legal one.

2. Subject Matter of a Trust: Property (a/k/a *Res* or *Corpus*).

"Every trust must have some property as its subject matter or *res*. The Trustee's obligation must be to apply defined or ascertainable property to the benefit of another. It cannot be merely to confer benefits from any source chosen by the trustee. The settlor's act of trust creation must apply to some interest recognized by equity as capable of ownership and as transferable. Every act of trust creation involves the disposition by the settlor of an interest in the trust property. The

subject matter [of the trust] must be described by the settlor with such definiteness and certainty that the Trustee and the court can be sure that the intended trust is being carried out." Bogert, ***Trusts***, §25 (6th ed., West Publishing, 1987). Thus, historically, as a general rule, a trust cannot exist without property but any property interest, legal or equitable, may be the subject of a trust. Loring, ***A Trustee's Handbook***, §2.1 (7th ed., Little, Brown & Co.). What, then, about unfunded or "dry" trusts or "pour-over"[1] trusts? Whatever difficulties there may have been historically in dealing with an unfunded trust, *see*, Loring, *supra*, §2.2.1, we don't have to worry about those nuances today, at least in the context of pour over trusts, thanks to the **Uniform Testamentary Additions to Trusts Act**, G.L. c. 203, §3B, effective Dec. 1, 1963.[2] As for other types of initially unfunded trusts, we don't really have to worry too much about those because, if there's no real estate in the trust, we simply won't be dealing with it. But it is important to keep in mind c. 203, §3B, in the case of pour over trusts because you may get questions on the effect of a pour over will on a previously unfunded pour over trust from time to time.

There are a couple of other good things to keep in mind with regard to pour over wills and trusts thanks to c. 203, §3B. First, the devise or bequest over to the *inter vivos* pour over trust is not invalid because the trust is amendable or revocable or both, or because, in fact, the trust was amended after the execution of the will or even after the death of the testator. Belknap, *supra*, §36:4. Further, unless the will provides otherwise, the property so devised or bequeathed (a) is not deemed to be held under a testamentary trust of the testator, but becomes part of the trust to which it is given, and (b) is administered and disposed of in accordance with the provisions of the instrument setting forth the terms of the trust, including any amendments to the trust made before or after the death of the testator. **Id.** Bear in mind, however, that a revocation or termination of the trust before the death of the testator causes the devise or bequest to lapse. **Id.**

3. Trustee(s).

A trustee may be appointed in essentially three ways:

---

[1] A "pour over" trust is an inter vivos trust created prior to or at the same time as a will that contains provisions for the "pouring over" of assets of the testator's estate into the pour over trust. The pour over trust is usually created by the testator as settlor, but it can be a trust created by someone else so long as in existence at the time of the execution of the testator's will. See, Belknap, *supra*, §36:4.

[2] For the text of this statute, *see* **Compendium of Trust-Related Statutes** appended to these materials.

1. First, by being named as such in a will or other trust instrument;
2. Second, where a testator has omitted to appoint (name) a trustee in the will and appointment by a court is necessary to carry into effect the provisions of the will; and
3. Third, where a trustee under a will or other instrument declines, resigns, dies, or is removed before the objects of the trust are accomplished and no adequate provision is made in the trust instrument for filling the vacancy.

Belknap, *supra*, §36:7.

As to the first class of trustees, appointment by being named in an *inter vivos* trust instrument is usually pretty straightforward. With regard to appointment of a trustee under a will, it is noteworthy that the statutes governing testamentary trustees named in the will do not actually provide for any appointment by the court but merely provide for the qualification of the named trustee by giving bond. **Id.** *See*, generally, G.L. c. 203 and, specifically, G.L. c. 205, §1. Consequently, while there may be some difference of opinion as to whether a trustee named in a will that has been allowed is appointed by the testator in the will or by the court, it has been pointed out that older cases seem to support the former view, i.e., that the testator appoints a testamentary trustee named in the will and not the court. Belknap, *supra*, §36:7.[3]

Several theories bear out this view. Among them is that the named trustee is a legatee or devisee as any other person named as a beneficiary under the will would be and, therefore, the trustee takes title under the will as soon as it is allowed;[4] no other types of fiduciaries are in the same position. In addition, other than with respect to the requirement of giving bond in order to "qualify," the statutes related to the appointment of trustees by the court do not address original appointment of a testamentary trustee by the court but rather address situations in which a testator (in a will) or settlor (in an *inter vivos* instrument) omits to provide for appointment or

[3] *See also*, cases cited and discussed in fn. 94 of that section.
[4] Id. *See also*, Eno & Hovey, ***Real Estate Law*** §15.2 (3rd ed. 1995 with 2001 Suppl.).

succession of trustees.[5] **Id.** Also, in addition to older cases that support the proposition that a testamentary trustee is appointed by the will and merely qualifies before the court by filing the bond, at least one fairly modern case touched upon the issue and seemed to assume that proposition without much discussion. ***Mahoney v. Mahoney***, 5 Mass. App. Ct. 720, 370 N.E.2d 1011 (1977).[6]

The Mahoney case dealt with a challenge by testamentary trust beneficiary to the appointment of the testator's widow as trustee because she was also the executor, duly qualified, and was transferring assets to herself individually for her own benefit in disregard of the trust created in the will. As the court pointed out, the action that was brought in the Probate Court was, among other things, "to remove her as trustee"[7] even though the probate court had not had any formal proceeding regarding the trustee other than the allowance of the will and the widow had not filed a trustee's bond. The case proceeded on that basis. A final judgment entered appointing another person as trustee in her stead and requiring her to convey to the new trustee all assets she had previously conveyed to herself individually. On appeal, the Appeals Court held that "[t]here was no error in the judge's refusal to **approve the appointment** of [the widow] as trustee."[8] The Appeals Court did not say that the judge refused to appoint, but rather that the judge refused to **approve** the appointment, indicating that the appointment had been made by the prior allowance of the will but that, on a **complaint to remove** the trustee, the judge's decision to deem her unfit and appoint another person in her stead was proper. It may also be noted that, in this case, it appears there was no alternate or successor trustee named in the will. Thus, having disqualified the named trustee, the court also had the power inherently and under G.L. c. 203, §5 (Appointments to Fill a Vacancy) to **appoint** the alternate trustee. Further, in declining the

---

[5] Compare G.L. c. 203, §§4 (Appointment of Testamentary Trustee when "the testator has omitted in his will to appoint a trustee"), 5 (Appointment to Fill Vacancy when "no adequate provision for filling the vacancy is made [in the will or other trust instrument]") and 6 (Trust Estate to Vest in New Trustee on Giving Bond) with G.L. c. 205, §1 (Form and Necessity of Bonds).

[6] This case is discussed in Belknap, *supra*, § 36:7, at p. 54. In the treatise, it is suggested that perhaps this case may contradict former cases on the issue of whether the will "appoints" the named trustee or the court does. As the court was not faced squarely with that issue, there is no explicit finding on that point. However, as the discussion in the above text indicates, I believe the case can be read to be consistent with former cases. There certainly is nothing in the case that specifically contradicts earlier cases or even calls them into question.

[7] ***Mahoney***, *supra*, 5 Mass. App. Ct. at 722.

[8] **Id**., at 724. [Emphasis added.]

widow's challenge to an injunction issued against her by the probate court, the Appeals Court observed:

> In the case of a license to sell property under G.L. c. 203, § 16, the sale is made under an authority given by the court, while in a case (such as this) where the court has declined to restrain a sale, the sale is not thereby made under the court's authority, but under such authority as the trustee is given by the terms of the trust under which he acts. *See* ***Bremer v. Hadley***, 196 Mass. 217, 219-220 (1907). The distinction is one with important consequences to the trustee and beneficiaries and to a purchaser with notice of the facts. *See* ***Batt v. Mallon***, 151 Mass. 477, 480 {N.E.2d 1016} (1890); ***Hutchinson v. Blanchard***, 247 Mass. 288, 291 (1924); ***Cleval v. Sullivan***, 258 Mass. 348, 353 (1927); Loring, ***Trustee's Handbook*** § 40 (Farr rev. 1962); ***Restatement (Second) of Trusts*** § 283, Comment a (1965).[9]

In this analysis, the court is recognizing the inherent power of the trust instrument to provide authority to a trustee to act with respect to the sale of real estate without a license to sell, even though, of course, there is a statute that is available if a license is desired or otherwise necessary.[10] In other words, if a court is presented with a challenge to a proposed sale of trust property by a trustee and refuses to restrain or enjoin the sale, the sale does not fall under the authority of the court simply because the court has been presented with and reviewed the propriety of the sale, but rather the authority comes from the powers conferred by the trust-creating instrument, including a will. The same rationale should apply to the appointment of the trustee named in the will. *See also*, G.L. c. 203, §12 (Removal of Trustee; Appointment of Successor).

Where the court must step in and appoint a trustee is when a testator or settlor fails to name a trustee in the will or trust instrument or, as in the Mahoney case, when an original trustee can no longer serve for whatever reason and no other trustees exist or are named in the trust-creating instrument. In those cases, in addition to the common law power of equity courts to appoint

---

[9] **Id.,** at 726.
[10] G.L. c. 203, §16.

trustees when necessary,[11] statutes in Massachusetts provide explicit authority for the court to appoint trustees to fill the vacancy. As to the omission of an original trustee in a will, see G.L. c. 203, §4 (Appointment of Testamentary Trustee). As to the failure to name/appoint an alternate or successor trustee in the event of the failure of an original trustee to serve, see G.L. c. 203, §5 (Appointment to Fill Vacancy). In the case of an appointment under §4, the statute provides that the appointed trustee shall have all the powers, rights, duties and title as would the original trustee. In the case of an appointment to fill a vacancy under §5, however, the trustee acquires the same powers, rights, duties and title as the original trustee "upon giving such bond as may be required." G.L. c. 203, §6. The precondition regarding a bond does not apply to trustees appointed under §4. On the other hand, resort to neither §4 nor §5 is necessary if the trust-creating instrument names the alternate or successor trustee(s) and/or the method for filling the vacancy of the original trustee(s). In such a case, the court is bound to follow the appointment in the instrument or the method prescribed for determining the alternate or successor trustee, absent evidence of the unsuitability of such trustee. Belknap, *supra*, §36:7, at 57-58.

4. Foreign Trustees and Appointment of Trustees to Sell or Mortgage Property of Incompetents.

If a foreign trustee derives authority from a court having no jurisdiction in Massachusetts and holds title to real property in this state in trust for persons residing here, the trustee may be compelled to secure appointment from the Massachusetts probate court where the land lies, and, if the trustee fails to do so, the court can declare the trusteeship vacant and appoint a new trustee in whom the title shall vest as if the trustee had been originally appointed in Massachusetts. Belknap, *supra*, §36:7, at 59-60, citing G.L. c. 203, §10 and 11.

Although very rarely seen, a note should also be made to the special power of the court to appoint a trustee to sell real or personal property held in trust by a minor, a person incapacitated by reason of mental illness, a nonresident, or any other person not amenable to process of court, G.L. c. 203, §18, or to sell or mortgage land subject to a vested or contingent remainder, G.L. c. 183, §§49-51.

[11] Belknap, supra, §36:7, at 58-59.

5. Vesting of Title in the Trustee.

If the trust is created by an *inter vivos* deed or trust instrument, i.e., a voluntary trust, the title to both real and personal property vests in the trustee(s) by virtue of the transfers which are either embodied in the trust instrument or accompany it as separate transfers. Belknap, *supra*, §36.10. Thus, for example, in the typical real property situation, when the settor/declarant in a recorded declaration of trust declares that he or she will hold certain property he or she already owns as trustee under the terms of the trust, the declaration vests title in that capacity without more, even though it is typical to see a deed from the settlor/declarant to himself or herself as trustee under the trust. Certainly, a deed would be necessary if the named trustees are persons other than or in addition to the settlor/declarant who holds title at the time of the declaration unless the language of the trust itself contains the grant of title in addition to the declaration of holding the title as trustees. In order to avoid confusion about this automatic vesting issue in an inter vivos trust situation, it is customary to record a deed from the settlor/declarant to the trustees even if he or she is the trustee and even if the trust otherwise has granting language. But, if a deed is missing and a question arises as to who holds title when a declaration of trust has been recorded, this rule of possible automatic vesting may help resolve such a case.

In the testamentary situation, as previously mentioned, if the trust is created by a will and the trustee is named in the will, the trustee takes title to real property as devisee from the moment the will is allowed, retroactive to the date of the testator's death. **Id.** If the trustee is appointed by the probate court to carry out a trust created by a will where the testator neglected to appoint a trustee, the statute provides specifically that the trustee shall have the same title as if originally appointed by the will. **Id.;** G.L. c. 203, §4.

6. Nature of a Trustee's Title.

It is important in many cases to keep the fundamental nature of the trustee's title in mind, remembering that the *sine qua non* of the trust relationship is the separation of legal and equitable ownership. The trustee is the legal owner of the property subject to the equitable rights

of the beneficiary(s). The beneficiary has no title *per se*, but only a right in equity to compel the trustee to carry out the terms of the trust. Belknap, *supra*, §36:12, at 70-71. This is what is referred to as "beneficial ownership." Unless also named as a beneficiary, the trustee does not have beneficial ownership. Thus, while the legal owner of the trust property and subject to the legal burdens of such ownership, the trustee does not get the benefits. The trustee cannot deal with the trust estate in any way for purposes of his or her own benefit or profit or to allow his or her own personal interests to come into competition with the interests of the trust estate and/or the beneficiaries. **Id.,** at 71-72. Third, as to the transferability of the trustee's title, as the legal owner, the trustee can transfer such title even if he or she does not have a power of sale and, if the transfer is to a purchaser for value without notice of the trust, the purchaser will take free from it. **Id.,** at 72; G.L. c. 203, §3. However, inasmuch as a trust as to real property is usually a matter of record, the question about taking without notice does not arise very often. When it does, it usually arises in the context of an indefinite reference situation. (Such situations, involving deeds into one or more people as trustees without any recording reference to a recorded trust instrument, will be discussed later.)

Another issue with regard to the nature of the title of one or more trustees is with respect to who takes title at the death of a trustee. Here again, the principles are well-established. If there are two or more trustees, then on the death of one, the title passes to the remaining trustee(s), since co-trustees hold the legal title as joint tenants. **Id.,** at 73; *see also*, G.L. c. 184, §7. On the death of the sole trustee, or the last remaining trustee, as the case may be, the title passes to the trustee(s) heirs, but in trust, subject to the terms of the trust and subject to being divested by the appointment of a new trustee under the procedures previously described. Belknap, *supra*, §36:12, at 72-73. In a situation in which a trustee resigns or is removed, whether by the court or by the methods prescribed in the trust-creating instrument, a vacancy is created necessitating the appointment of a new trustee to fill the vacancy. Again, if the instrument provides the method, it must be followed.[12] If not, then it is the court which must undertake the appointing. In either case, of course, the trustee must accept appointment, as does an original trustee, as no one is

[12] *See*, ***Plunkett v. First Federal Sav. & Ln. Assoc. of Boston***, 18 Mass. App. Ct. 294, 464 N.E.2d 1381 (1984), rev. den., 393 Mass. 1102, 469 N.E.2d 830 (1984) (trust provision providing that successor or additional Trustees shall be appointed . . . upon request by the Beneficiaries by instruments in writing signed by the remaining Trustee or Trustees then acting under the trust).

impressed with a voluntary trust unless he or she accepts it.[13] **Id.,** §36:7, at 54; Loring, *supra*, §3.4.2, at 30.

C. POWERS OF TRUSTEES.

1. Powers of Trustees Generally.

There are certain powers inherent in the office of trustee and certain others that are implied as incident to the carrying out of powers expressly conferred. Ultimately, however, especially in case of trustees holding title to real property, it is to the powers expressly conferred by the trust instrument that the trustee and anyone dealing with the trustee must look. A testator or settlor can give the trustee as much or as little power as he or she chooses. Belknap, *supra*, §36:22, at 117.

Where there are several trustees and one dies or resigns, there may be some question as to what powers will pass to the survivors. It was formerly the rule that powers given to several trustees jointly must be exercised by all. This rule has been modified in modern times, however, to the extent that now all powers incident to the carrying out of the terms of the trust pass to the survivors. This is the case even though the trust instrument, for example, provides for three trustees, one dies and the surviving trustees or beneficiaries, as the case may be, fail to exercise their power provided in the trust instrument to name a new trustee to fill the vacancy. The tendency of the court is in favor of the survival of powers, except in those cases where some special confidence is placed in the discretion of the several trustees acting jointly. Belknap, *supra*, §36:22, at 118. However, where it is not absolutely clear in the trust instrument that less than all of the trustees can act, it is the tendency of the conveyancing bar to avoid the necessity of having a court pass on the issue and to require that the trustee vacancy be filled. This tendency among conveyancers is buttressed by the general rule that, where there are several trustees appointed by a trust instrument, any action must be undertaken by all of them jointly. **Id.,** at 119. In trust law, there is no such thing as "the majority rules" unless the trust instrument provides for it. **Id.**

[13] Leaving out of the discussion trusts imposed involuntarily, such as constructive trusts and resulting trusts.

2. Power to Sell and Transfer, Mortgage and Lease Real Property.

To begin with, a trustee has no inherent power to sell property since the original theory of trusts contemplated the holding of the property by the trustee. Belknap, *supra*, §36:23, at 122. Accordingly, a well-drawn will or trust instrument should always provide the trustee a power of sale if real property is involved, unless, of course, the settlor really does intend the trustee to only hold and manage the property for the duration of the trust and, at termination, the title may vest in the ultimate beneficiaries directly, free of the trust, the trustee may be bound to distribute (i.e., deed) the property to the ultimate beneficiaries or the trustee may be directed to liquidate the property and distribute the proceeds. Particularly with respect to trustees appointed to hold title to real property, it is customary to provide a general power of sale, but certainly it is possible for the settlor to set any guidelines, parameters and limitations on the power the settlor chooses.

In some cases, where a power of sale is not expressly given, it may be implied from the nature of the duties which the trust instrument calls upon the trustee to perform. **Id.,** at 123. Apparently, the Restatement of Trusts (Third) §190 (1992) provides that a trustee has an implied power of sale unless otherwise provided in the instrument. **Id.** However, once again, it is not likely that conveyancers would be willing to rely on an "implied" power of sale if given the choice. Implied powers have a nasty habit of finding their way into a courtroom seeking a judge to validate them. They are also very dependent on the interpretation of the trust instrument being relied upon for their existence. **Id.** On the other hand, use of this doctrine may either save a title or allow the quieting of a title that might otherwise be questioned because of the sale of real property by a trustee without an express power of sale in the trust-creating instrument. If there is any doubt about the power of sale in a pending transaction, there is always the availability of a license to sell from the SJC, the Superior Court or the Probate Court. G.L. c. 203, §16.

It is also a basic maxim that a power of sale does not include the power to mortgage and certainly a power to mortgage is not a natural incident of the office of a trustee. Belknap, *supra*, §36:25, at 129. Like the power of sale, the power to mortgage must be expressly given in the trust instrument and may be general in nature (i.e., in the trustee's sole discretion for whatever

purpose related to the administration of the trust) or it may be limited. In the absence of an express power, a license to mortgage may be obtained from the court for certain purposes specified in the statute (mostly the customary reasons related to the preservation and protection of the property). G.L. c. 203, §23.

Conversely, it has been held that the power to give leases *is* a general power incident to the trust office for such terms as are customary. Such leases are binding for their whole term, even though the trust may or does terminate before the lease expires, unless the trust is to terminate on a certain date, in which case the trustee cannot validly enter into a lease that extends beyond that date. Belknap, *supra*, §36:25, at 131, and cases cited. That is, of course, unless the trust instrument provides otherwise and, fortunately, most power-to-lease provisions do.

3. Statutory Short Form Powers.

In terms of describing the trustee's powers in the trust instrument, a draftsperson has been assisted in this regard by two chapters enacted by the legislature in 1981: Chapter 184B (Short Form Terms for Wills and Trusts) and Chapter 201C (Statutory Custodianship Trusts). It is important to just be aware of Chapter 201C as it allows for the incorporation of its provisions into an instrument, such as a deed, without a formal trust instrument, by simply referring to the grantee-trustee as a "Statutory Custodianship Trustee." The more important of the two statutes from a conveyancing standpoint (as, frankly, I haven't seen a Statutory Custodianship Trust yet) is Chapter 184B and, in particular, section 2 of that Chapter. The statute allows for the incorporation into a will or trust of the enumerated powers by reference to the statutory powers sections of the statute to be incorporated. Section 2 enumerates the **"Statutory Optional Fiduciary Powers**," which, by reference thereto, will be given to the fiduciary (trustee, for our purposes) in addition to all common law and other statutory powers and which can be exercised without the necessity of approval of any court. G.L. c. 184B, §2. Of utmost importance to conveyancers are subsections (1)(f), (1)(g), (1)(l) and (1)(o). These subsections allow the fiduciary:

(f) to sell, exchange or otherwise dispose of the property at public or private sale on such terms as he may determine, no purchaser being bound to see to the application of any proceeds;

(g) to lease the property on such terms as he may determine although the term may extend beyond the time when it becomes distributable;

(l) to borrow such amounts as he may consider necessary to obtain cash for any purposes for which funds are required in administering the estate or trust, and in connection therewith, to mortgage or otherwise encumber any property on such conditions as he may determine although the term of the loan may extend beyond the time that would otherwise be needed for completing the administration of the estate or beyond the term of the trust;

(o) to lend, borrow, buy or sell on commercially reasonable terms to or from any fiduciary acting under another instrument made by the testator or settlor.

Under subsection (2), "[s]uch powers, except as expressly limited in the instrument, may be exercised by the person or persons for the time being serving as such fiduciary, whether or not named therein." Further, "[p]owers conferred on the fiduciary shall be exercised only in accordance with a reasonable discretion." On the other hand, "[n]o power conferred upon the fiduciary in this section shall be exercised in favor of any person then serving as fiduciary nor in favor of his estate or his creditors, or the creditors of his estate." G.L. c. 184B, §2 (2).

4. Powers of Successor Trustees.

It is important to keep in mind that, while a trust must have a beneficiary, a purpose and property or assets to be held or managed for the benefit of the beneficiary, "it is an equitable maxim that a trust shall not fail for want of a trustee." Loring, *supra*, §3.4.4.3, at 36. Furthermore, the settlor is presumed to intend that the trust shall continue until its purposes are accomplished. This leads to the general rule that all express and implied powers vested in the original trustee shall pass to the successor trustee(s) unless the settlor expresses a contrary intention in the trust instrument.

Id. Of course, the better practice in drafting a trust instrument is to expressly provide that successor trustees shall have all the powers granted to the original trustees. That is particularly so with respect to discretionary powers if the language of the trust relative to those powers might be construed as being specific to a particular person named or appointed as the original trustee and not intended to be exercised by any successor trustee. **Id.,** at 36-37. As discussed above, appointments made by the court to fill vacancies carry with them the same rights, powers and duties as the original trustee had. *See*, G.L. c. 203, §§4 and 5.

D. TRUSTEES DUTIES AND OBLIGATIONS.

1. Trustee's Duty of Good Faith and Loyalty; Self-Dealing.

A trustee's first duty is to the trust estate and the beneficiaries and, in that regard, to carry out the terms and purpose of the trust. *See*, Belknap, *supra*, §36:28, at 134. A trustee should not put himself or herself in a position where he or she can derive a personal gain or advantage, whether directly or indirectly, at the expense of the trust and/or where his or her interests are in competition with or antagonistic to those of the trust and the beneficiaries. This is a general and fundamental rule. **Id.** On the other hand, if a trustee deals fairly, openly and in good faith, a transaction in which the trustee is personally interested will not necessarily be set aside, but there must be no misrepresentation or concealment of material facts and the beneficiaries must be in a position to understand the nature and effect of the transaction. **Id.,** at 137**.** Thus, it is not always the case that a benefit to the trustee will invalidate a transaction otherwise allowed under the terms of the trust.

In line with these fundamental principles of fidelity and loyalty to the trust and the beneficiaries, it is the general rule that a trustee cannot sell or transfer the trust property to himself or herself, whether title is taken in his or her name or some third person for his or her benefit. Belknap, *supra*, §36:28, at 139. The rule applies equally to private sales or sales at public auction, including a mortgage foreclosure sale. **Id.** In such a case, the beneficiary(s) may have the transfer set aside and have the property reconveyed by the trustee or the person to whom it was transferred on the trustee's personal behalf. **Id.** In other words, a trustee is generally prohibited

from “self-dealing.” However, it is certainly possible for the trust instrument to allow for such self-dealing. A provision for self-dealing might look like this:

> Any and all of my trustees are hereby authorized to engage in self-dealing, without limitation, and nothing contained in this document shall be construed to the contrary. This authority for self-dealing shall include any and all transactions entered into on behalf of a beneficiary in which the trustee may derive a benefit, either directly or indirectly, tangible or intangible. Any transaction entered into by any or all of my trustees pursuant to this authorization shall be binding on this trust and all the beneficiaries and no person dealing with the trustee need inquire any further into the authority of the trustee nor shall any such person be required to see to the application of any proceeds of any such transaction.

Unfortunately, it is the rare trust that contains such a provision, including trusts intended to give a trustee broad powers in dealing with real estate and family trusts created for the protection of the family homestead. In the latter case, it is quite common that the true owners of the property (typically, Mom and Pop) want to refinance and, even though the trust contains a power to mortgage, the lender will not lend to or take a mortgage from a trust and requires a reconveyance of the property to Mom and Pop individually. If Mom and Pop are the trustees, this would be a classic self-dealing situation. It may also have fiduciary loyalty issues associated with it because the transfer back to Mom and Pop individually is usually without consideration. Fortunately, the difficulty of these situations has been mitigated in real estate practice thanks to a Massachusetts Conveyancers Association Title Standard, namely, **Title Standard No. 23**, entitled, **“Self-Dealing by Trustee.”** (A copy of that title standard accompanies these materials for your reference.)

According to the **Self-Dealing Title Standard**, “a title based upon a deed (presumably, this would include a mortgage) from a trustee of record to himself free of trusts is not on that account defective if:

> (1) the instrument establishing the trust expressly authorizes self-dealing on the part of the trustee; or

(2) a court of competent judgment has rendered a judgment authorizing or ratifying the deed; or

(3) a period of 30 years has elapsed since the recording of the deed and the record does not disclose any adverse claim based thereon; or

(4) the trust does not contain spendthrift provisions and (i) all beneficiaries are legally competent and assent to or ratify the conveyance by the trustee; or (ii) barring a prohibition against self-dealing, the recorded declaration recites that third parties may rely without inquiry."

It is rare that you have a situation in which criteria (1), (2) or (3) apply. Usually, you will be relying on criterion (4). The good news is that the majority of real estate title holding trusts do not have spendthrift provisions,[14] but some do and a conveyancer or title examiner needs to review the trust to make sure one way or the other. Similarly, it is not unheard of for there to be beneficiaries who are legally incompetent, usually because they are minors. For that reason, even if all the beneficiaries are available, it may not be possible to get a valid beneficiary's assent to or ratification of the self-dealing transfer. What helps in this situation is that provisions in a trust specifically prohibiting self-dealing are at least as rare as specific authorizations to engage in self-dealing and the vast majority of real estate title holding trusts today contain a third party reliance provision.[15] Accordingly, criterion number (4) of the title standard can usually be satisfied. When such a transfer is accompanied by the customary Trustee's Certificate[16] certifying that the trust is in full force and effect and that the trustee has the requisite authority to engage in the transaction (even though the beneficiaries may not all be of full age and

[14] Spendthrift provisions are designed to protect a beneficiary from improvident actions in assigning or encumbering his or her beneficial interest in the trust, particularly to creditors, or from involuntary liens or attachments against the beneficiary's interest in the trust. Such provisions are recognized in Massachusetts. Eno & Hovey, *supra*, §15.6. It is well-settled in Massachusetts, however, that a settlor may not create a spendthrift trust for his or her protection against creditors and a creditor of the settlor may reach the maximum amount that the trustee has discretion to pay to or for the settlor. **Id.** *See also,* ***Sylvia v. Johnson***, 44 Mass. App. Ct. 483, 691 N.E.2d 608 (1998). A spendthrift provision may be as simple as: "The interest of any beneficiary under this trust shall not be anticipated, transferred, alienated or in any manner assigned or pledged by such beneficiary, or by operation of law or by any other method, and shall not be subject to any legal process, bankruptcy proceedings or the interference or control of creditors or others."

[15] For a sample of third-party reliance provisions, *see* Paragraphs 2.2 and 2.3 of the Massachusetts Conveyancers Association (MCA) Nominee Trust Form (Form No. 20) accompanying these materials.

[16] See, e.g., the MCA form of Trustee Certificate (Form 20F) and the Land Court forms of Trustee Certificate (Land Court Guidelines, 5/1/00, at 101 and 103), which accompany these materials. These forms may have to be modified a bit if the trustee cannot certify that the beneficiaries are of full age and legally competent.

competent), the self-dealing transfer can be passed on. This is of great help, for example, to Mom and Pop who just want to refinance the mortgage they had before they put the title into themselves as trustees.

2. Duty to Act Personally and Not Delegate.

It is also a well-recognized rule that, unless the trust instrument expressly authorizes it, trustees cannot delegate the performance of their duties to others. Belknap, *supra*, §36:30, at 142. The rule applies equally to the delegation of one to another among co-trustees, or the delegation by one or more trustees to a third person. **Id.** Nor may co-trustees divide the duties of the trust so that each has complete control of one portion. **Id.,** at 143. By the same token, trustees may employ agents to perform certain kinds of ministerial or advisory functions, such as banks, accountants, attorneys, stock brokers or real estate brokers, etc. The trustees may not, however, give the agent discretionary authority, such as a Power of Attorney that would allow for disposition by the agent of trust assets without the supervision and participation of the trustees, or provide any powers that would allow the agent to act beyond the trustees' control. **Id.,** at 144. The remedy for all of this, of course, is to expressly provide in the trust instrument for the delegation of all or some of the trustee's authority and duties to third parties chosen in the trustee's discretion or perhaps specifically named persons. In particular, provision should be made for the appointment of third persons in the trustee's discretion to act under a Power of Attorney for the trustee as to some or all of his or her duties. This is especially so in the case of real estate title holding trusts with one trustee where it may be necessary to have others available, for example, to execute documents such as purchase and sale agreements and title transferring, mortgaging and other closing documents, etc. Absent such a provision in the trust instrument, the trustee doesn't have the power to so delegate. On the other hand, as to this and many other matters, a beneficiary who is fully competent and has not been misled by the trustee may, in the absence of fraud, accident or mistake, release any claim against the trustee for breach of trust or otherwise and may assent to any investment or other act by the trustee. Belknap, *supra*, §36:38, at 185. Thus, it may be possible in the absence of a specific provision for delegation to get the beneficiaries' consents for such delegation as with a self-dealing situation.

E. AMENDMENT OR REVOCATION OF A TRUST.

A lot of the problems discussed above having to do with the failure to provide in a trust instrument for various contingencies that may arise over the course of the administration of any trust could be dealt with by means of an amendment to the trust or even a revocation of the trust to revest title in the settlor. However, like many other rules regarding trusts, generally, a trust cannot be revoked or amended by the settlor (or anyone else, for that matter, other than the court on a petition) unless the power is reserved. Belknap, *supra*, §36:3, at 46. It is now well-settled that a valid trust may be created by a settlor who not only is the trustee or a co-trustee and reserves a life interest in the trust, but also who reserves the right to alter, amend and revoke the trust. Eno & Hovey, ***Real Estate Law*** §15.3 (3rd ed. 1995 with 2001 Suppl.). *See also*, Loring, *supra*, §4.2, at 69. While the treatises seem to talk mostly about the reservation of these powers by the settlor of the trust, it would seem that, like all other powers that can be provided to the trustees and beneficiaries, the powers to amend, alter or revoke may be given as well. An unrestricted power to amend may be used to effect a revocation of the trust. Belknap, *supra*, §36:3, at 46. That usually isn't what we want as conveyancers, but at least it's something to look at as a possible curative act in the event it would be good to get title back to a settlor. Otherwise, a power to alter or amend the trust may also be used to fix authority (and other) problems because of omissions or ambiguities in the original trust instrument. But be aware that a power of amendment or revocation must be exercised in strict conformity with the terms of the trust instrument reserving or granting these rights. **Id.,** at 47.

F. TERMINATION OF TRUSTS.

1. Methods.

There are several methods by which a trust may be terminated. The first and most obvious is the natural termination of the trust in accordance with its terms or when the purposes for which it was established come to an end. Belknap, supra, §36:33, at 153. The second is by exercise of a right of revocation, including, as discussed above, an unrestricted power of amendment, by the

party having the right to revoke or amend the trust. **Id.,** at 154. The third method is by decree of court where the purposes of the trust have been accomplished and all interests have vested and all parties, including the trustee assent to the termination. The court may also decree termination when the objects of the trust are impossible of fulfillment or there is a complete frustration of purpose. **Id.,** at 157-158. Lastly, the complete merger of legal title and the equitable interest in the same person terminates the trust, although, in order to have a merger, the beneficial interest must be vested, not contingent. **Id.,** at 163. The latter method of termination (merger of legal and equitable title) may not be quite so obvious in many instances, nowadays, where the most common form of title holding trust is the so-called "nominee trust" with undisclosed beneficiaries. In that instance, reliance on a Trustee's Certificate that the trust is still in full force and effect and has not been terminated or revoked will be of some comfort to a bona fide purchaser or mortgagee.

2. Powers and Duties of Trustee After Termination; Distribution.

In general, a trustee's powers and duties necessary to the accomplishment of the provisions of the trust as to the liquidation and/or distribution of assets continue until fulfilled. *See*, Belknap, *supra*, §36:34, at 164, and discussion therein of ***In Re Rothwell's Estate***, 283 Mass. 563, 186 N.E. 662 (1933). The question arises from time to time, though, as to whether, in the case of real estate, the trustee takes such a complete title to the real estate that the title must be conveyed to the remainder beneficiaries or does the legal title automatically vest in the remainder beneficiaries on termination of the trust? Another question is whether the general power of sale continues.

Once again, it depends on what the trust dispositive provisions say and what the overall purpose of the trust was. It is well-established that a trustee takes a legal title commensurate with the duties imposed but, for the most part, it is the wording of the trust provisions that determines whether title vests directly in the remainder beneficiaries or a conveyance from the trustee is necessary and, further, whether the trustee retains a power to sell and distribute proceeds. **Id.,** at 165. In the leading case on point, the trust provided that upon death of the life beneficiary, the trust property should "be divided into two equal parts," one to go to one individual and one to go

to the testator's heirs. The court held that on the death of the life beneficiary, the trustee's power of sale ceased and the real estate vested directly in the remainder beneficiaries. **Id.,** and fn. 73, citing ***Heard v. Read***, 171 Mass. 374, 50 N.E. 638 (1898) and other cases on the same point. Conversely, in another case, where the language was "then the capital of such deceased child's share shall be equally divided among the issue," the court held that a conveyance by the trustees to the remainder beneficiaries was necessary. **Id.,** and fn. 74, citing ***Heard v. Trull***, 175 Mass. 239, 54 N.E. 875 (1899). It seems difficult to reconcile the two cases. But for our purposes, any language that would seem to imply an active duty on the part of the trustee, such as "to convey in fee simple, transfer and pay over the same in equal shares," **Id**., at 166, and fn. 77, citing ***Tifft v. Ireland***, 273 Mass. 56, 172 N.E. 865 (1930), would indicate fee title remaining in the trustee and require a conveyance to the remainder beneficiaries. **Id.**

G. CHARITABLE TRUSTS.

Unlike the private trusts we've been talking about and will focus on for the rest of these materials, a charitable trust is one created for the benefit either of the public at large or of a substantial portion of the public. Eno & Hovey, *supra*, §15.5. Conveyancers rarely see such trusts but we should just keep them in mind. Essentially, charitable trusts are governed by the same rules as private trusts. **Id.** There are a couple of distinctions to be kept in mind, however. For example, while any trustee in doubt as to his powers, duties or proposed actions may petition the court under a complaint for instructions,[17] a charitable trustee must make the Attorney General of the Commonwealth a defendant in the action. **Id.** *See also*, Belknap, *supra*, §2:15, 2001 Suppl., referring to Uniform Practice XXXIV, effective Dec. 1, 1996. The other difference of note is with regard to termination of the trust when assets are still in the trust and termination would otherwise occur because the purposes of the trust have become impractical or impossible. In such circumstances, a complaint may be brought before the court seeking application of the doctrine of *cy pres*[18] to vary the purposes of the trust to another public purpose so as to keep the

[17] There is no special statute authorizing such actions; they fall within the general equity jurisdiction of the probate courts, which have concurrent jurisdiction with the SJC and the superior courts. Belknap, supra, §2:15.

[18] *Cy pres* is defined in Black's Law Dictionary (5th ed.) as meaning "as near as possible." Black's goes on to state: "The rule of *cy-pres* is a rule for the construction of instruments in equity, by which the intention of the party is carried out *as near as may be*, when it would be impossible or illegal to give it literal effect."

trust alive. Eno & Hovey, *supra*, §15.5. Such an action is generally not available to a private trustee.

H. TRUSTS vs. USES.

All that is necessary to point out with respect to trusts vs. uses is that what we've been talking about and will talk about for the remainder of these materials does not involve "uses." Suffice it to say that, in accordance with G.L. c. 183, §14, conveyances or devises "in trust," or with other expressions that might have been construed as creating uses in the past, are deemed to be trusts and not uses. If a use is intended to be executed by the Statute of Uses, the word "use" must be used, as in a conveyance from "A to B to the use of C and D." In such a case, the use is executed and C and D become the owners in fee simple. For a more complete discussion of this dichotomy between trusts and uses, see my colleague Gary Casaly's excellent article on this topic in the Stewart Title Newsletter, **The Massachusetts Focus**, Vol. 1, No. 1 (Spring 2002), at p. 7.

I. MASSACHUSETTS BUSINESS TRUSTS.

Another form of trust rarely seen in the last couple of decades is the Massachusetts Business Trust. From time to time you may see transactions involving such a trust so you should be aware of them. They, too, are governed generally by the rules governing private trusts. However, they are also governed by a specific statutory scheme set forth in G.L. c. 182, §§1-14.[19] The primary distinguishing characteristics are that such trusts have attributes similar to a corporation: a business purpose, centralized management (via the trustee(s)), transferable shares, and continuing existence. Eno & Hovey, *supra*, §15.4. Another distinction for real estate purposes is that the statute, G.L. c. 182, §2, does not require recording of the trust at the Registry of Deeds; rather the trust is filed at the Secretary of State's Office and the Town Clerk of every place where the trust has a usual place of business. Perhaps it is the latter requirement that makes it rare that such a business form is used for real estate title holding. While a business trust may be sued and

[19] Selected sections of the statute important to conveyancers who may run into one of these trusts in the chain of title are included in the **Compendium of Trust-Related Statutes** accompanying these materials.

its property attached, this does not make it a legal entity, as distinguished from its trustees, who are the proper legal entity. Eno & Hovey, *supra*. Although other trusts are subject to the Rule Against Perpetuities,[20] business trusts are not. **Id**. *See also,* MCA **Title Standard No. 9**, **Massachusetts Business Trusts and the Rule Against Perpetuities**, accompanying these materials. Finally, while it is not required by Chapter 182 that a Mass. Business Trust be recorded at the Registry of Deeds, it would be a good idea for two reasons. First, the trust and the trustees would gain the benefit of the constructive notice provisions of G.L. c. 203, §2. Second, the trustee(s) would also get the benefit of the ruling in ***Swartz v. Sher***, 344 Mass. 636, 184 N.E.2d 51 (1962), wherein the Court held that a title conveyed by a trustee of a **recorded** business trust was good clear record and marketable despite that the record title did not disclose the actual issuance of the transferable shares. In deciding the case, the Court gives us a great primer on Mass. Business Trusts and the presumption of regularity resulting from the recording of the trust:

> Trusts with transferable shares have been submitted to substantial statutory regulation (see G.L. c. 182) in many respects similar to the regulation of corporations. To be sure such trusts are not corporations, nor are they entities apart from the trustees. *See* ***Peterson v. Hopson****,* 306 Mass. 597, 612-613; ***State Tax Commn. v. Colbert****, ante,* 494, 497. Nevertheless, this type of business organization (*see* ***State St. Trust Co. v. Hall****,* 311 Mass. 299, 301-311) in practical effect is in many respects similar to a corporation. *See* ***Bomeisler v. M. Jacobson & Sons Trust****,* 118 F.2d 261, 265 (1st Cir.); Bogert, ***Trusts and Trustees****,* §§ 293-310; annotation, 156 A. L. R. 22. *See also* Powell, ***Real Property****,* §§ 137, 573; Peairs, ***Business Corporations***, §§ 12-14 (also 28 B. U. L. Rev. 301). *Cf.* ***Pope & Cottle Co. v. Fairbanks Realty Trust,*** 124 F.2d 132, 135 (1st Cir.). There is, in the interest of certainty in business transactions and of security of property interests and titles, every reason for treating such trusts in respect of affairs in which they engage (and particularly as concerns the

[20] For the Statutory Rule Against Perpetuities, *see* G.L. c. 184A, which is included in full in the **Compendium of Trust-Related Statutes** accompanying these materials. Under the Statutory Rule, "[a] nonvested property interest is invalid unless: (1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or (2) the interest either vests or terminates within ninety years after its creation." G.L. c. 184A, §1. Usually, Perpetuities issues don't arise because many real estate title holding trusts have provisions for termination within 21 years of the death of named individuals or an automatic termination date 20 or 21 years after the date of execution. That period could now be 90 years. Once again, though, it's another thing to keep in mind when reviewing a trust in your chain of title.

> interests of persons dealing with them for value without notice of any irregularity in their proceedings) as having the existence, capacity, status, and powers which they appear to have upon the basis of the information which such trusts must make of record. The proceedings of such organizations should be afforded the benefit of every permissible inference or presumption of regularity. *See* ***Moroni v. Brawders***, 317 Mass. 48, 52-53; ***Massachusetts Charitable Mechanic Assn. v. Beede***, 320 Mass. 601, 611; ***Hale v. Hale***, 332 Mass. 329, 333; Wigmore, ***Evidence*** (3d ed.) § 2534. *See also* McCormick, ***Evidence***, § 309.

Swartz, *supra,* at639-640. The Court went on to say:

> The specific statutory requirements governing filing such declarations of trust and their annual reports (see G.L. c. 182, § 2, as amended through St. 1948, c. 550, § 39; and § 12, inserted by St. 1954, c. 254, § 2) provide the public with reasonable means of obtaining information about such trusts. Recording the trust agreement in the registry of deeds places upon that record the terms of such a trust sufficiently to apprise purchasers of the trustees' powers. In the absence of a specific statutory requirement that a certificate of the issue of shares of such a trust be recorded in the registry of deeds, we think (a) that no such obligation to record exists by implication, and (b) that such recording is not essential to showing upon the record that the trust exists.

Id., at 641-642.

J. NOMINEE TRUSTS.

While in recent years we've begun to see any number of variations on the theme of trusts being used as the device to hold real estate, including various forms of estate planning trusts, pension and profit sharing trusts, Medicaid-related trusts, etc., the most common form of trust created to hold title to real estate remains the so-called "nominee trust."[21] The usual determinant of a nominee trust is the provision that the trustees of the trust have no authority to do anything

[21] A sample of a Nominee Trust, the MCA Form No. 20, accompanies these materials for your reference.

without the direction of the beneficiaries. Eno & Hovey, *supra*, §15.9. As the SJC put it in the case of ***Roberts v. Roberts***, 419 Mass. 685, 646 N.E.2d 1061 (1995),

> The typical features of a nominee trust are: "(1) the names of the beneficiaries are filed with the trustees rather than being publicly disclosed; (2) a trustee may serve simultaneously as a beneficiary; (3) the trustees lack power to deal with the trust property except as directed by the beneficiaries; (4) a third party may rely on the disposition of trust property pursuant to any instrument signed by the trustees, without having to inquire as to whether the terms of the trust have been complied with; and (5) the beneficiaries may terminate the trust at any time, thereby receiving legal title to the trust property as tenants in common in proportion to their beneficial interests. . . . The third listed feature is the key to the nominee nature of the trust." ***In re Grand Jury Subpoena***, 973 F.2d 45, 48 (1st Cir. 1992), citing Birnbaum, ***The Nominee Trust in Massachusetts Real Estate Practice***, 60 Mass. L.Q. 364, 364-365 (1976).

Roberts, *supra*, at 687, fn. 2. The Court went on to observe:

> Nominee trusts have characteristics of both agency and trust; the trustee is an "agent-trustee" who holds title to property "for the benefit of and subject to the control of another." Restatement (Second) of Agency, *supra* at § 14B, at 62.3. Nominee trusts are subject to the rules of agency for certain purposes. ***Apahouser Lock & Sec. Corp. v. Carvelli***, 26 Mass. App. Ct. 385, 388, 528 N.E.2d 133 (1988) ("In [nominee trusts], trustees are frequently seen as agents for the principals' convenience rather than as trustees in the more familiar fiduciary sense"). See also, e.g., ***Druker v. State Tax Comm'n***, 374 Mass. 198, 201, 372 N.E.2d 208 (1978) ("extreme degree of control exercised by beneficiaries . . . vitiates the creation of a trust for purposes of [state income] taxation"). The fact that a nominee trust is held to be an agency in some contexts, however, does not mean that it should be treated as an agency in every instance. Trusts have been recognized for some purposes even though they are ignored for others. For example, revocable inter vivos trusts used in estate planning are ignored for tax purposes, see 26 U.S.C. § 676 (a) (1988), but are effective to hold and pass property, see ***National Shawmut Bank v. Joy***, 315 Mass. 457, 53 N.E.2d 113 (1944); ***Penta v. Concord Auto Auction, Inc.***, 24 Mass. App. Ct. 635, 639, 511 N.E.2d 642 (1987).

Roberts, *supra*, at 688-689. Thus, while not a true trust of the type customarily contemplated by the rules discussed earlier in these materials, nonetheless, Massachusetts courts have recognized the dichotomy between the trust character of a nominee trust and its agency/principal character and still consider it a viable form of trust for the purpose of owning and dealing with assets, particularly real property.

The other incident of nominee trusts that distinguishes them from other forms of trust and, frankly, what makes them a preferred vehicle for holding title to real estate, is the aspect of undisclosed beneficiaries. *See*, Eno & Hovey, *supra*, §15.9. Because the identity of the beneficiaries is off record, a conveyancer may not be aware of a situation in which the beneficiary and the trustee are one and the same and, therefore, a merger of legal and equitable title may have occurred, leaving title in the trustee/beneficiary individually. Fortunately, most nominee trusts contain reliance paragraphs such as those in Paragraphs 2.2 and 2.3 of the MCA form of Nominee Trust. These paragraphs not only allow for reliance on the execution of instruments involving the trust assets as being conclusive as to the trustee's authority to engage in the transaction, but also provide for reliance on a certificate of the trustee as to any matter involving the trust, including the trustee's authority to enter into the transaction and the receipt of direction from the beneficiaries to enter into the transaction and execute documents for it. Consequently, it has become customary to require such a Trustee's Certificate in virtually all transactions involving property to which trustees hold title, especially nominee trusts.

Reliance on such Trustee's Certificates has been buttressed by the case of ***Zuroff v. First Wisconsin Trust Company***, 41 Mass. App. Ct. 491, 671 N.E.2d 982 (1996). This was an action to recover a deposit under a memorandum of sale executed after a foreclosure. The bidder declined the title claiming it was encumbered by two Federal tax liens recorded against the borrower and her husband individually although she held title at the time of the filing of the notices of liens as trustee of a nominee trust. The reason the bidder felt the liens were still in effect is that the foreclosing mortgagee had not picked up the liens and did not give the IRS its special statutory notice as a junior lienholder. The wife had owned the property and conveyed it to herself as trustee of the nominee trust in 1983. She was a 51% beneficiary. In 1987, in order

to mortgage the property, the wife conveyed back to herself individually, granted the mortgage and then conveyed back to herself as trustee of the trust. The Federal tax liens were recorded eight months later and the foreclosure of the mortgage took place some four years after that. In finding that the liens did not affect the trust property, the court reasoned as follows:

> It is axiomatic, under Massachusetts law, that property that one holds as trustee is not subject to payment of the trustee's personal debts; the plaintiffs do not argue otherwise. Rather, they argue, the special incidents of a nominee trust make a beneficiary's interest in many cases subject to the payment of his or her debts. *See, e.g.*, ***State St. Bank & Trust Co. v. Reiser***, 7 Mass. App. Ct. 633, 636-638, 389 N.E.2d 768 (1979); ***Shamrock, Inc. v. Federal Deposit Ins. Corp.***, 36 Mass. App. Ct. 162, 166, 629 N.E.2d 344 (1994); ***Worcester v. Sigel***, 37 Mass. App. Ct. 764, 768, 644 N.E.2d 238 (1994). For purposes of decision we can assume that the IRS could have reached Pamela DiSarro's fifty-one percent equitable interest to apply to payment of her tax liabilities.
>
> It does not follow, however, that the Federal lien attached to 1408 Commonwealth Avenue, the trust res, so as to enable the IRS to reach it in the hands of a purchaser for value. The 1408 Commonwealth Trust is typical of nominee trusts, in that the names of the beneficiaries were filed with the trustee but not in the registry of deeds. *See* ***Roberts v. Roberts,*** 419 Mass. 685, 687 n.2, 646 N.E.2d 1061 (1995). Thus, the fact that Pamela DiSarro was a beneficiary of the trust was not a matter of public record. *See, e.g.*, ***Hudgins v. Internal Rev. Serv.***, 967 F.2d 973, 977 (4th Cir. 1992); ***United States v. Glen Upton, Inc.,*** 378 F. Supp. 1028, 1034 (W.D. Mo. 1974); ***Matter of De La Vergne***, 156 Bankr. 773, 778 (Bankr. E.D. La. 1993). *See generally* ***Teschke v. Keller***, 38 Mass. App. Ct. 627, 632, 650 N.E.2d 1279 (1995). Moreover, because Pamela individually transferred the trust property to Pamela, trustee, before the Federal tax lien was filed against her, nothing in the trust property's record history would indicate that a lien filed against Pamela individually would encumber the trust property. *See* ***TKB Intl., Inc. v. United States***, 995 F.2d 1460, 1465 (9th Cir. 1993). *Contrast* ***Kivel v. United States***, 878 F.2d 301, 304-305 (9th Cir. 1989); ***United States v. Jane B. Corp.***, 167 F. Supp. 352, 355 {N.E.2d 984} (D. Mass. 1958). Thus, a search of the Federal tax lien index and the conveyance documents themselves, however

> extensive, would not reveal to a purchaser of the trust property that it was the subject of a Federal tax lien.
>
> . . .
>
> As there was nothing in the public record to alert a purchaser that the IRS claimed any lien on the trust property, we conclude that under 26 U.S.C. § 6323, the Federal tax liens filed against Pamela DiSarro individually did not constitute a lien on 1408 Commonwealth Avenue that was valid against the plaintiffs as purchasers.

Zuroff, *supra*, at 493-494. As you can see, the court relied heavily on the fact that the beneficiaries were undisclosed and, therefore, liens against them could not be discovered in the normal title search, despite that one of the taxpayers was the trustee and that the title had been conveyed from her to herself as trustee, not once, but twice. The power of the undisclosed beneficiary prevailed in this case.

The opposite result was reached by the First Circuit Court of Appeals in ***USA v. Murray***, 217 F.3d 59 (2000). However, it is not clear from the case whether it is contradictory to ***Zuroff*** (which is mentioned in the case but not contradicted) because the case does not indicate that the trust was a nominee trust. Also, in ***Murray***, the IRS affirmatively asserted its lien against the property, which had been owned by the husband and transferred to the wife as trustee of the Murray Family Trust. No third parties were involved and there is no discussion of any undisclosed beneficiaries.[22] I guess we have to await the case that reconciles these two cases. In the meantime, keep in mind the reliance of third parties provisions in the nominee trusts, obtain those Trustee's Certificates and be careful about asking too many questions about the beneficiaries. In addition, for those of you doing estate planning trusts for your clients, consider creating two trusts for the real estate. Make one a nominee trust with undisclosed beneficiaries and let the trustee(s) of that trust take title to the real estate and then make the trustee of the estate planning trust the undisclosed beneficiary of the nominee trust. You've now streamlined the direction of beneficiaries process, you've eliminated many of the competency issues that sometimes arise with estate planning situations and you've created another layer of trust

[22] By the way, the ***Murray*** case also contains a very good discussion of spendthrift provisions and the invalidity of such provisions in the case of the debtor placing property in trust for his own benefit and then trying to shield the assets from creditors with a spendthrift provision. Bottom line: it doesn't work!

protection that creditors and lienholders would have to go through to get to the ultimate beneficiaries' interests.

K. ATTACHMENTS OF TRUST PROPERTY.

Related to the issue of federal liens discussed above in relation to Nominee Trusts is the issue of attachments against trusts and trustees, whether "true" trustees or nominee trustees. While we don't have a title standard regarding federal liens, or Massachusetts state liens, for that matter, we do have the benefit of a MCA **Title Standard No. 38** regarding **Attachments of Trust Property**.[23] That standard provides assistance in three specified scenarios.

1. An attachment in a suit against an individual debtor does not impose a lien upon real estate held of record by that debtor as trustee, unless the attachment at least briefly describes the real estate and identifies the person as trustee.

2. An attachment in a suit against a debtor who is a beneficiary of a trust does not impose a lien on the trust property held by another person ("B") as trustee for the debtor, unless, again, the attachment includes at least a brief description of the property and identifies B as such trustee.

3. An attachment in a suit against a debtor as trustee does not impose a lien on property held by the debtor in another capacity or individually.

For further research in this regard, the title standard cites G.L. c. 223, §67, for authority.

L. ISSUES REGARDING THE WAY TITLE COMES INTO THE TRUSTEE AND THEN COMES BACK OUT AGAIN.

As discussed above, title to trust assets vests in the named or appointed trustee in several ways: by deed to the trustee, which deed may be the instrument which creates the trust, devise to the

[23] A copy of the title standard accompanies these materials.

trustees in a will, including pour-over to an *inter vivos* trust from a will, and a declaration of trust by the owner of the property subjecting it to a trust and declaring himself to be the trustee. Most, if not all, of the issues involving title vesting in all but the deed situation have been discussed above. Here, we'll look at a couple of troublesome issues that arise with a frustrating degree of regularity.

1. Transfers to Trusts.

As also discussed above, trusts are not legal entities which hold title as, for example, a corporation might. A trust arises from the relationship between the trustee, the trust corpus and the beneficiary as established, in most cases, by the trust instrument. The notion of the split of the legal and equitable title is a paramount precept of trust law. It is always the trustee who holds and has the right to legal title, even, as we have seen, in a nominee trust situation. Thus, it is abundantly clear that a conveyance of title to real estate should always be made to a trustee and not the trust. Nonetheless, people will from time to time convey title to the trust rather than the trustee. This, of course, is not right. But, once again, we have a title standard to make things right. MCA **Title Standard 45**, **Transfers to Trusts**,[24] provides that a conveyance to a named trust without also naming the trustees is not defective so long as the deed unambiguously identifies the grantee trust by reference to a recorded trust instrument (including a Mass. Business Trust filed with Secretary of State), even if the trust instrument does not expressly provide for conveyances to be made in the name of the trust. There is a caveat, however, that the standard is not intended to affect situations involving indefinite references under G.L. c. 184, §25. Frankly, I'm not sure how it could as that statute contemplates an instrument that doesn't refer specifically to a recorded trust. And further, strangely enough, one of the cases cited in the title standard, ***Lawrence v. Fletcher***, 49 Mass. 153 (8 Metc. 153) (1844), is precisely about an indefinite reference situation in an assignment of a mortgage to trustees of the United Society in Harvard, Mass., when no such organization existed precisely by that name and no trust instrument was recorded because none existed. Nonetheless, the Court upheld the assignment. In any event, while we're on the subject, why don't we take a look at indefinite references.

[24] Copy included in the accompanying materials.

2. Indefinite References.

Indefinite references usually arise in the context of trusts by virtue of a deed or mortgage to a person "as trustee" or "as trustee for John Smith" or, more recently, "as trustee of the Homebody Realty Trust" or "as trustee of the Shieldmefromcreditors Family Trust" or "as trustee of the Enrichthegrandchildren Estate Planning Trust," etc. The primary characteristic of these grantee clauses is that there is no indication that a written trust instrument exists and there is no recording reference to indicate that a written instrument is recorded so that you can find it and determine any limitations on the trustee's powers to deal with the subject property. As stated in the legislative history[25] of G.L. c. 184, §25 (the "Indefinite Reference Statute")[26],

> This is a common and particularly troublesome defect with court opinions in different directions, leaving a prospective purchaser from A [who was granted the property as "A as trustee"] uncertain whether he will get a title or simply a lawsuit. In 1897, in ***Swazey v. Emerson,*** 168 Mass. 118, at p. 120, Mr. Justice Holmes said that the word "trustee" under the recording act is not notice that there *is* a trust but merely that there "might be" one so that there is not a defect. In 1927, in ***Cleval v. Sullivan***, 258 Mass. 348, the court, without discussing or mentioning the Holmes' [sic] opinion, said there was notice which spoiled the marketability of the land. The Holmes' [sic] opinion was based squarely on the recording act, seems the sound one and is followed in the draft act which we submit.[27]

As to conveyances to trustees, the Indefinite Reference Statute provides:

> No indefinite reference in a recorded instrument shall subject any person not an immediate party thereto to any interest in real estate, legal or equitable, nor put any such person on inquiry with respect to such interest, nor be a cloud on or otherwise adversely affect the title of any such person acquiring the real estate under such recorded instrument if he is not

[25] 34th Report of the Judicial Counsel (1958), Pub. Doc. 144, pp. 27-33, reprinted in 43 Mass. L. Q. No. 4 (1958). This document and the statute both deal with several other indefinite reference issues but we will only deal here with the trust related portions.

[26] This statute is included in the **Compendium of Trust-Related Statutes** accompanying these materials.

[27] Id., at 31. The "draft act" is now G.L. c. 184, §25, and was adopted intact.

> otherwise subject to it or on notice of it. An indefinite reference means . . . (3) a description of a person as trustee or an indication that a person is acting as trustee, unless the instrument containing the description or indication either sets forth the terms of the trust or specifies a recorded instrument which sets forth its terms and the place in the public records where such instrument is recorded, . . .

It has been suggested that a grant to a trustee with no recording reference to the trust because the trust is not recorded would put the title in the grantee individually.[28] This concept has created a school of thought that the application of the Indefinite Reference Statute would be to cause title to the property to be held by the grantee individually, whether or not the trust had, in fact, been recorded.[29] The ambiguity as to the nature of the grantee's title would then necessitate that the trustee execute any deeds or mortgages of the property both as trustee **and** individually. First of all, if such a result were intended, the drafters of the statute, being very experienced real estate attorneys and having given the statute much thought and analysis, would have provided for it. I have not found any reported case to that effect and, based on the legislative history as discussed in the 34th Judicial Council report, such a strong result was certainly not intended.[30] Indeed, such a result would run directly contrary to the basic impetus of the statute, which was to make titles **more** certain, not less. What was intended was to allow a purchaser to be able to take title from the "indefinite trustee" without being bound by any limitations on the trustee's authority or having the title be subject to any equitable claims that might exist in an off-record trust and to provide the purchaser with an unclouded and marketable title to the property acquired from the trustee. It is more of a situation that the "indefinite trustee" is **deemed** to hold the title and be able to deal with it ***as if*** he owned it individually so that he or she can convey it or mortgage it

---

[28] See, Eno & Hovey, *supra*, §15.12. The only case cited in support of this proposition in fn. 3 of this section, ***Berenson v. Nirenstein***, 326 Mass. 285, 93 N.E. 2d 610 (1950), but the case predates the Indefinite Reference Statute and did not involve a conveyance to a trustee but rather dealt with a breach of fiduciary duty action in which a constructive trust was imposed on a broker who purchased stock for himself when he was hired to do so for his client.

[29] Eno & Hovey, *supra*, §§2.19 and 5.53. *See also*, e.g., the last paragraph of MCA **Title Standard No. 53, Indefinite References – Trusts**, wherein it is stated that the cures provided for in the standard would result in the title not being vested in the trustee individually, the negative implication, of course, being that, absent the cures, the title would be held individually. Unlike Eno & Hovey, this title standard (discussed in more detail below) makes an exception for trusts recorded ***simultaneously*** with the deed containing the indefinite reference.

[30] The entire Judicial Report is focused on **protection** of subsequent owners and their titles. There is no discussion whatever of benefiting the trustee individually (which, if an off-record trust did exist, would violate the trustee's fiduciary responsibilities discussed earlier in these materials), the trustees heirs or devisees, or the trustees creditors, all of which would be the potential result of the notion of an indefinite reference creating individual ownership.

with the same freedom as an individual owner and the title of a person taking a deed or mortgage from the trustee is protected unless such person is "an immediate party" to the trust instrument or is "otherwise subject to it or on notice of it." Thus, it should be just fine to have the "indefinite trustee" execute a deed "as trustee" without the necessity of including "individually" because the latter adds nothing. In addition, we have another statute and a title standard that supports this concept.

G.L. c. 184, §34, entitled, Protection of Persons Purchasing Land from Trustees,[31] provides:

> **Any recordable instrument purporting to affect an interest in real estate executed by any person or persons who, in the records of the registry of deeds** for the county or district in which the real estate lies, **are or appear to be the trustees of a trust** shall be **binding on the trust in favor of a purchaser or other person relying in good faith on such instrument**, notwithstanding **(a)** inconsistent provisions of the trust, unless said trust is recorded in said registry of deeds, with the place of recording referred to in some instrument in the chain of title to the real estate affected, **(b)** any amendment, revocation, removal or resignation of trustee, appointment of additional trustee, or other matter affecting the trust, unless the same is recorded in said registry of deeds and noted on the margin of said trust in said registry, or **(c)** any inadequacy in the consideration recited. As used in this section the term "trust" shall not include a trust under a will. [Emphasis added.]

Pursuant to that statute, MCA **Title Standard No. 33**, **Transfers by Trustee**,[32] provides:

> A transferee from the trustee of record of a non-testamentary trust need not inquire into whether
>
> (1) said trustee has authority to transfer, including whether any required conditions have been satisfied; or
>
> (2) there are any unrecorded trust amendments; or
>
> (3) the trust is in existence, provided that:
>
> (a) the recorded declaration of trust recites that third parties may rely without inquiry on the acts of said trustee; or

[31] This statute is also included in the **Compendium of Trust Related Statutes**.
[32] A copy of this title standard also accompanies these materials.

(b) the conveyance is by all persons appearing of record to be the trustees and the declaration of trust is not recorded or registered in the registry district where the land lies or, if so recorded or registered, there is no reference to the place of recording or registration of the trust in any instrument in the chain of title.

Thus, a bona fide purchaser or mortgagee, at least where there are no intervening liens or attachments against the "indefinite trustee" individually, ought to be able to rely on a deed out from the trustee "as trustee" without the necessity of having the trustee sign "individually" as well.

In addition to the foregoing, one should also be able to rely in such circumstances on the **Doctrine of Estoppel of Fiduciary**.[33] Under this doctrine, when a fiduciary deeds property, particularly if with covenants of title (lawfully seised in fee simple) or covenants of authority (lawfully authorized and empowered to make sale or conveyance), the fiduciary will be estopped to set up a title, or a claim against the title, held in his or her individual capacity prior to the conveyance by that person as the fiduciary. This doctrine would seem to apply particularly well in the typical indefinite reference situation where the trustee is usually conveying by at least a quitclaim deed and where the only reason the trustee would have title individually would be based on a heavy interpretation of the Indefinite Reference Statute and in spite of the obvious intent of the trustee to gain, hold and convey title in a trustee capacity. This view is even stronger if the trustee had mortgaged the property as trustee during his or her ownership.

Of further assistance in this regard, as well as with regard to the provisions of G.L. c. 203, §§ 1 and 2,[34] we also have the benefit of MCA **Title Standard No. 53**, **Indefinite References – Trusts**.[35] This title standard essentially allows for the curing of an indefinite reference situation by establishing that the trust is already recorded and then recording an affidavit identifying the recording information for the trust as well as seeing to a marginal reference notation to the affidavit in the instrument of conveyance that had originally omitted the recording information

[33] *See*, H.H. Thayer, *et al*, ***Crocker's Notes on Common Forms***, §151 (8th ed., MCLE 1995 & Supp. 1997, 2000) and ***Kaufman v. Federal National Bank of Boston***, 287 Mass. 97, 191 N.E. 422 (1934).
[34] Dealing with the necessity of a written trust with respect to real estate and the necessity of recording it.
[35] This standard is copied in full in the accompanying materials.

for the trust.[36] If the trust was recorded contemporaneously with the conveyance, no affidavit or marginal reference is required.[37] The trust and any amendments, etc., may also be recorded subsequently along with the affidavit and the marginal reference.[38] According to the Title Standard, if these procedures are followed, the title is not vested in the trustee individually once the affidavits are on record or, in the case of the contemporaneously recorded trust, right from the beginning. A Caveat cautions that, in using the cures in paragraphs (1) and (3), prior to the recording of the affidavit, we need to be aware that third parties, including intervening lienors may have relied on the Indefinite Reference Statute and, presumably, may claim in interest derived from the "indefinite trustee's" assumed individual ownership. As pointed out in the 34th Judicial Council Report, "It is almost more important to know what conveyancers think the law is than to know what it actually is."[39] Thus, as there is still this school of thought out there among some members of the bar that an indefinite reference creates individual ownership, if you run into the situation where there are intervening lienholders or, perhaps, the death of the "indefinite trustee" (which would preclude our ability to rely on G.L. c. 184, §34 and Title Standard No. 33 and raise issues as to the rights or claims of heirs, devisees, creditors and estate tax authorities), call one of your friendly Stewart Title underwriters and we'll discuss the situation.

M. HOMESTEADS AND TRUSTEES.

One issue to keep in mind if you are preparing to assist a client in putting a principal residence into a trust, nominee or otherwise, is that the client may lose the right to declare a homestead. My colleague, Greg Donovan, did a nice job in describing this situation in the Stewart Title Newsletter, **The Massachusetts Focus**, Vol. 1, No. 1 (Spring 2002) at p. 5. According to the case discussed by Greg in his article,[40] the separation of legal and equitable title by the prospective homestead declarant homeowner renders her ineligible for the protection afforded by

[36] Title Standard No. 53, para. (1).
[37] **Id.,** para. 2.
[38] **Id.,** para. 3.
[39] 34th Judicial Council Report, *supra*, at 30, quoting from Richard B. Johnson's article, The Mechanics of Title Examination, reprinted in the 6th and 7th editions of ***Crocker's Notes on Common Forms***.
[40] ***Assistant Recorder of North Registry District of Bristol County v. Spinelli***, 38 Mass. App. Ct. 655 (1995).

the homestead statutes. This is something to keep in mind when weighing the benefits of putting the title to a principal residence in trust.

N. INTRA-FAMILY AND ESTATE PLANNING TRUST TRANSFER ENDORSEMENT.

One of the more common situations affecting residential real estate in the last decade or so is the phenomenon of individuals transferring title to other family members, most often as remainders with the transferor(s) retaining a life estate, or to an *inter vivos* estate planning trust. The latter type of intra-family transfer (to a trust, or more accurately, to the trustee(s) of a trust) might terminate coverage under an ALTA 1992 version of an owners policy of title insurance because the transfer of title is in the nature of a purchase (in the common law concept) and does not occur "by operation of law." In the Definitions portion of the standard 1992 ALTA owners policy jacket, the **definition of "insured"** includes "those who succeed to the interest of the insured **by operation of law as distinguished from purchase**, including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate fiduciary successors." Conditions and Stipulations, para. 1. (a) [emphasis added]. Paragraph 2 of the Conditions and Stipulations of the owners policy entitled, **"Continuation of Insurance After Conveyance of Title,"** provides for continuation of coverage so long as the insured "retains an estate or interest in the land," holds a purchase money mortgage given by a purchaser from the insured or has liability under warranty covenants (the latter being rare in Massachusetts, at least in the Eastern 2/3 of the state). In some instances, it is not clear when individuals transfer title to a trust, particularly a nominee trust with undisclosed beneficiaries, whether the original insured retained "an estate or interest in the land." In order to avoid any issue regarding the status of trustees of an *inter vivos* trust getting the benefit of the continuation of coverage provisions of an owners policy, the industry has come up with an endorsement form to document the title insurance company's acceptance of the trustees or other intra-family transferee's status as an insured under the policy. The Stewart Title version is the INTRA-FAMILY AND ESTATE PLANNING TRUST TRANSFER ENDORSEMENT, which is attached at the end of these materials (after the trust-related Land Court Guidelines). This endorsement can be attached to an existing owners policy and a copy of it reported to Stewart Title. The charge for the endorsement is currently $50.00, to which your normal agency split applies. The endorsement

should be accompanied by the Assignment of Title Insurance Policy form also included in the materials. This confirms that the original insured desires the change and that the new insured accepts the change along with the terms and conditions of the policy and the fact that the Company is not insuring the validity of the transfer but simply substituting the insured. Feel free to call any of the local underwriters if you have any questions about the Endorsement or the Assignment forms.

O. APPENDIX OF ATTACHMENTS.

Immediately following this page are the attachments accompanying the main seminar materials, most, if not all, of which are referred to in the text of the materials. They appear in the following order:

1. Compendium of Trust Related Statutes.
2. Trust Related Mass. Conveyancers Association Forms and Title Standards.
3. Trust Related Land Court Guidelines.
4. The Intrafamily and Estate Planning Trust Transfer Endorsement together with the Assignment of Title Insurance Policy form.

COMPENDIUM OF TRUST-RELATED STATUTES

TABLE OF CONTENTS

Chapter 203 - Trusts

§ 6. Trust Estate to Vest in New Trustee on Giving Bond.
§ 10. Letters Required of Foreign Trustee in Certain Cases.
§ 11. Notice to Foreign Trustee.
§ 12. Removal of Trustee; Appointment of Successor.
§ 14A. Personal Liability of Trustee.
Sale Of Trust Estate
§ 16. Order for Sale of Trust Estate; Procedures.
§ 17. Order for Sale; Proceedings in Case of Persons Not Ascertained; Effect.
§ 17A. Sale of Real Estate by Foreign Testamentary Trustees.
§ 18. Property Held in Trust by Minors, etc.; Sale or Conveyance.
Mortgage Of Trust Estate
§ 23. Trustees May Be Authorized to Mortgage Trust Real Estate for Certain Purposes.
Distribution of Trust Estate
§ 25. Trust Consolidation or Termination; Distribution of Trust Property; Petitions, Orders and Proceedings.

Chapter 204 General Provisions Relative to Sales, Mortgages, Releases, Compromises, Etc., by Executors, Etc.
§ 8. License to Sell to Remain in Force for One Year.
§ 24. Ratification of Doubtful Acts of Executor, etc.

Chapter 205 - Bonds of Executors, Administrators, Guardians, Conservators, Trustees, and Receivers
§ 1. Form and Necessity of Bonds.

Chapter 182 Voluntary Associations and Certain Trusts [a/k/a Mass. Business Trusts]

§ 1. Definitions.
§ 2. Copy of Instrument or Declaration of Trust Filed With Secretary and City or Town Clerk; Consolidation or Merger of Association or Trust into Limited Liability Company; Fees; Penalty.
§ 6. Suits Against Associations or Trusts; Seals.
§ 12. Annual Reports; Filing with State Secretary.

COMPENDIUM OF TRUST-RELATED STATUTES

Chapter 183: Alienation of Land

§ 14. Uses and Trusts.

When a conveyance or devise of real estate is made to a grantee or devisee to a use intended to be executed by the statute of uses, the word "use" shall be employed in declaring the use; and provisions introduced by the words "in trust", or other expressions that might otherwise create uses, shall be deemed to create trusts and not uses. If no use is declared in a conveyance or devise of real estate, the same shall take effect as if it were expressed to be for the use of the grantee or devisee.

HISTORY: 1912, 502, § 15

CONVEYANCE OF ESTATES SUBJECT TO REMAINDER, ETC.

§ 49. Probate Court May Appoint Trustees to Convey or Mortgage.

If land is subject to a vested or contingent remainder, executory devise, conditional limitation, reversion or power of appointment, the probate court for the county where such land is situated may, upon the petition of any person having an estate or interest therein, either present or future, vested or contingent, and after notice and other proceedings as hereinafter required, appoint one or more trustees and authorize him or them to sell and convey land or any part thereof in fee simple, if such sale and conveyance appears to the court to be necessary or expedient, or to mortgage the same for such an amount, on such terms and for such purposes as may seem to the court judicious or expedient; and such conveyance or mortgage shall be valid and binding upon all parties.

HISTORY: 1868, 287, §§ 1, 2; 1869, 331; 1871, 322, §§ 1-3; 1873, 280, § 2; PS 1882, 120, § 19; 1895, 183, § 1; 1897, 136; RL 1902, 127, §§ 28, 29; 1914, 108; 1917, 306, §§ 1, 2; 1923, 71

§ 50. Notice and Appointment of Guardian Ad Litem or Next Friend.

Notice of a petition under the preceding section shall be given in such manner as the court may order to all persons who are or who may become interested in the land to which the petition relates, and to all persons whose issue, not in being, may become interested therein; and the court shall of its own motion in every case appoint a suitable person to appear and act therein as the next friend of all minors, persons not ascertained, and persons not in being, who are or may become interested in such land; and provisions of sections thirty-four and thirty-five of chapter two hundred and one consistent herewith shall apply in the case of such appointment.

HISTORY: 1868, 287, § 2; 1871, 322, § 2; PS 1882, 120, § 20; 1895, 183, § 2; RL 1902, 127, § 30; 1917, 306, § 3

§ 51. Trustee to Give Bond, and Hold or Apply Proceeds of Sale or Mortgage.

A trustee appointed under section forty-nine shall give bond in such form and for such amount as the court appointing him may order, and he shall receive and hold, invest or apply the proceeds of any sale or mortgage made by him for the benefit of the persons who would have been entitled to the land if such sale or mortgage had not been made, and the probate court of any county where any part of such land is situated shall have jurisdiction of all matters thereafter arising relative to such trust.

HISTORY: 1868, 287, §§ 1, 3; 1871, 322, § 1; PS 1882, 120, § 21; 1895, 183, § 2; RL 1902, 127, § 31; 1917, 306, § 4

APPENDIX OF FORMS:

Form (3). Deed of Executor, Administrator, Trustee, Guardian, Conservator, Receiver or Commissioner

---- executor of the will of ---- administrator of the estate of ---- trustee under ---- guardian of ---- conservator of ---- receiver of the estate of ---- commissioner by the power conferred by ----, and every other power, for ---- dollars paid, grant to ---- the land in ---- (description) ----.

Witness ---- hand and seal this ---- day of ----.

(Here add acknowledgment.) (Seal.)

(1912, 502, § 4.)

Form (13). Acknowledgment of Individual acting in his Own Right

NOTE: Appendix doesn't have specific one for Trustees, but can use the individual one by inserting **"Trustee(s), as aforesaid,"** after the name(s) and, at the end of "free act and deed", inserting **"as Trustee."**

(Caption specifying the state and place where the acknowledgment is taken)

On this ---- day of ---- 19----, before me personally appeared AB (or AB and CD), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

(Signature and title of officer taking acknowledgment. Seal, if required.)

(1894, 253, § 1; RL 1902, 127, § 18.)

Chapter 184: General Provisions Relative to Real Property

§ 7. Conveyances and Devises to Two or More Persons.

A conveyance or devise of land **to two or more persons** or to husband and wife, **except** a mortgage or **a devise or conveyance in trust**, shall create an **estate in common and not in joint tenancy**, unless it is expressed in such conveyance or devise that the grantees or devisees shall take jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy. A devise of land to a person and his spouse shall, if the instrument creating the devise expressly so states, vest in the devisees a tenancy by the entirety.

A conveyance or devise of land to a person and his spouse which expressly states that the grantees or devisees shall take jointly, or as joint tenants, or in joint tenancy, or to them and the survivor of them shall create an estate in joint tenancy and not a tenancy by the entirety. In a conveyance or devise to three or more persons, words creating a joint tenancy shall be construed as applying to all of the grantees, or devisees, regardless of marital status, unless a contrary intent appears from the tenor of the instrument.

A conveyance or devise of land to two persons as tenants by the entirety, who are not married to each other, shall create an estate in joint tenancy and not a tenancy in common.

HISTORY: 1785, 62, § 4; RS 1836, 59, §§ 10, 11; GS 1860, 89, §§ 13, 14; PS 1882, 126, §§ 5, 6; 1885, 237; RL 1902, 134, § 6; 1954, 395, § 1; 1973, 210, § 1; 1979, 239, § 1

§ 25. Protection of Land Titles Against the Effects of Indefinite References.

No indefinite reference in a recorded instrument shall subject any person not an immediate party thereto to any interest in real estate, legal or equitable, nor put any such person on inquiry with respect to such interest, nor be a cloud on or otherwise adversely affect the title of any such person acquiring the real estate under such recorded instrument if he is not otherwise subject to it or on notice of it. An **indefinite reference means** (1) a recital indicating directly or by implication that real estate may be subject to restrictions, easements, mortgages, encumbrances or other interests not created by instruments recorded in due course, (2) a recital or indication affecting a description of real estate which by excluding generally real estate previously conveyed or by being in general terms of a person's right, title or interest, or for any other reason, can be construed to refer in a manner limiting the real estate described to any interest not created by instruments recorded in due course, **(3) a description of a person as trustee or an indication that a person is acting as trustee, unless the instrument containing the description or indication either sets forth the terms of the trust or specifies a recorded instrument which sets forth its terms and the place in the public records where such instrument is recorded,** and (4) any other reference to any interest in real estate, unless the

instrument containing the reference either creates the interest referred to or specifies a recorded instrument by which the interest is created and the place in the public records where such instrument is recorded. No instrument shall be deemed recorded in due course unless so recorded in the registry of deeds for the county or district in which the real estate affected lies as to be indexed in the grantor index under the name of the owner of record of the real estate affected at the time of the recording. This section shall not apply to a reference to an instrument in a notice or statement permitted by law to be recorded instead of such instrument, nor to a reference to the secured obligation in a mortgage or other instrument appearing of record to be given as security, nor in any proceeding for enforcement of any warranty of title.

HISTORY: 1959, 294, § 1

Editorial Note—
Section 2 of the inserting act provides as follows:

> Section 2. Section twenty-five of chapter one hundred and eighty-four of the General Laws, inserted by section one of this act, shall apply to indefinite references made before the effective date of this act as well as to those made thereafter except that it shall not apply to any interest which appears of record in accordance with this section before the expiration of one year after said effective date. Any interest appears of record if (a) there is recorded in the registry of deeds for the county or district in which the real estate affected lies an instrument creating the interest or a notice of claim signed and acknowledged by the holder of the interest fully describing it and specifying his residence and the name of the owner of record of the real estate affected at the time of the recording, and (b), in case of an instrument not so recorded as to be indexed in the grantor index under the name of the owner of record of the real estate affected at the time of its recording, whether before or after said effective date, there is also recorded a notice of recording identifying the instrument and specifying the place of its recording in the registry of deeds and the name of the owner of record of the real estate affected at the time of the recording of the notice. All notices of claim and notices of recording shall be indexed in the grantor index under the name of the record owner specified therein.

§ 34. Protection of Persons Purchasing Land from Trustees.

Any recordable instrument purporting to affect an interest in real estate executed by any person or persons who, in the records of the registry of deeds for the county or district in which the real estate lies, **are or appear to be the trustees of a trust** shall be **binding on the trust in favor of a purchaser or other person relying in good faith on such instrument**, notwithstanding **(a)** inconsistent provisions of the trust, unless said trust is recorded in said registry of deeds, with the place of recording referred to in some instrument in the chain of title to the real estate affected, **(b)** any amendment, revocation, removal or resignation of trustee, appointment of additional trustee, or other matter affecting the trust, unless the same is recorded in said registry of deeds and noted on the margin of said trust in said registry, or **(c)** any inadequacy in the consideration recited. As used in this section the term "trust" shall not include a trust under a will.

HISTORY: 1973, 199

Chapter 184A - Statutory Rule Against Perpetuities

Special Note--
Acts 1989, Ch. 668, § 1, entitled "An act relative to the rule against perpetuities", approved January 8, 1990, by § 2, effective June 30, 1990, replaced Chapter 184A, with new provisions in §§ 1-11

§ 1. Nonvested Property Interests; Powers of Appointment; Conditions Determining Validity.

(a) A nonvested property interest is invalid unless:
(1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or
(2) the interest either vests or terminates within ninety years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:
(1) when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than twenty-one years after the death of an individual then alive; or
(2) the condition precedent either is satisfied or becomes impossible to satisfy within ninety years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than twenty-one years after the death of an individual then alive; or
(2) the power is irrevocably exercised or otherwise terminates within ninety years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under clause (1) of paragraph (a), clause (1) of paragraph (b), or clause (1) of paragraph (c), the possibility that a child will be born to an individual after the individual's death is disregarded.

HISTORY: 1989, 668, § 1

§ 2. Time of Creation; Property Interest; Power of Appointment.

(a) Except as provided in paragraphs (b) and (c) and in paragraph (a) of section five, the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this chapter, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in paragraph (b) or paragraph (c) of section one, the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(c) For purposes of this chapter, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

HISTORY: 1989, 668, § 1

§ 3. Reformation of Disposition by Court.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety years allowed by clause (2) of paragraph (a), clause (2) of paragraph (b) or clause (2) of paragraph (c) of section one if:
(1) a nonvested property interest or a power of appointment becomes invalid under said section one;
(2) a class gift is not, but might become, invalid under said section one and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or
(3) a nonvested property interest that is not validated by clause (1) of paragraph (a) of said section one can vest but not within ninety years after its creation.

HISTORY: 1989, 668, § 1

§ 4. Exemptions From Rule.

Section one shall not apply to:
(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this state.

HISTORY: 1989, 668, § 1

§ 5. Thirty-Year Limit; Options in Gross; Leases; Easements in Gross; Fifty-Year Limit with Respect to Affordable Housing.

(a) An option in gross with respect to an interest in land or minerals or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land or minerals becomes invalid if it is not exercised within thirty years after its creation.

(b) A lease to commence at a time certain or upon the happening of a future event becomes invalid if its term does not actually commence in possession within thirty years after its execution.

(c) A nonvested easement in gross becomes invalid if it does not vest within thirty years after its creation.

(d) Any option in gross with respect to an interest in land or minerals, or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land or minerals, or a lease, or a nonvested easement in gross which option in gross, preemptive right in the nature of a right of first refusal in gross, lease, or nonvested easement in gross held by a government or government agency or subdivision or by a public instrumentality or public authority or by a quasi-public entity, or by an instrumentality created pursuant to chapter forty F becomes invalid if it is not exercised or becomes vested within fifty years after its creation.

HISTORY: 1989, 668, § 1; 1991, 434

§ 6. Applicability of Rule; Time of Creation of Interest or Power.

(a) Except as extended by paragraph (b), this chapter applies to a nonvested property interest or a power of appointment that is created on or after the effective date of this chapter. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before the effective date of this chapter and is determined in a judicial proceeding, commenced on or after the effective date of this chapter, to violate the commonwealth's rule against perpetuities as that rule existed before the effective date of this chapter, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

HISTORY: 1989, 668, § 1

§ 7. Fee Simple Determinable in Land, When to Become Fee Simple Absolute; Exceptions.

A fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty years from the date when such fee simple determinable or such fee simple subject to a right of entry becomes possessory. If such contingency occurs within said thirty years the succeeding interest, which may be an interest in a person other than the person creating the interest or his

heirs, shall become possessory or the right of entry exercisable notwithstanding the rule against perpetuities.

HISTORY: 1989, 668, § 1

§ 8. Chapter Applicable to Legal and Equitable Interests.

This chapter shall apply to both legal and equitable interests.

HISTORY: 1989, 668, § 1

§ 9. Chapter Not Applicable to Valid Pre-1955 Limitations.

Except as provided in the first sentence of section seven, this chapter shall not be construed to invalidate or modify the terms of any limitation which would have been valid prior to January first, nineteen hundred and fifty-five.

HISTORY: 1989, 668, § 1

§ 10. Application to Be Uniform.

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

HISTORY: 1989, 668, § 1

§ 11. Chapter Supersedes Common Law.

This chapter shall supersede the rule of the common law known as the rule against perpetuities.

HISTORY: 1989, 668, § 1

FORMS

NOTE: The following forms are provided in the Lexis "Massachusetts Law on Disc" to help with Perpetuities problems, although the actual forms appear right after G.L. c. 184, §1, rather than in c. 184A.

Form 1. Saving Clause Provision Avoiding Violation of Rule Against Perpetuities
Form 2. Termination of Testamentary Trust to Avoid Violation of Rule Against Perpetuities
Form 3. Termination of Inter Vivos Trust to Avoid Violation of Rule Against Perpetuities

Form 4. Termination of Inter Vivos Trust to Avoid Violation of Rule Against Perpetuities on Court Holding of Invalidity
Form 5. Termination of Testamentary or Inter Vivos Trust to Avoid Violation of Rule Against Perpetuities-Reference to Law of Trustor's Domicile
Form 6. Exercise of Power of Appointment Within Period of Perpetuities

Form 1. Saving Clause Provision Avoiding Violation of Rule Against Perpetuities

Anything herein to the contrary notwithstanding, each estate or interest created hereby shall be given effect only to the extent to which it does not violate any applicable rules against perpetuities or the suspension of the power of alienation, of any other rules of law. The failure of any such estate or interest for such violation shall not render invalid any other estate or interest hereunder.

Form 2. Termination of Testamentary Trust to Avoid Violation of Rule Against Perpetuities

Notwithstanding the foregoing, the provisions of this will shall not postpone the vesting of the trust property or any portion thereof for a period more than 21 years after the death of the last survivor of the following persons living at the time of my death: ____ [name measuring lives]. If not previously vested, then immediately prior to the expiration of such period, such trust property or portion thereof shall vest in and be distributed to the then income beneficiaries hereunder in the same proportions as they are then entitled to such income.

Form 3. Termination of Inter Vivos Trust to Avoid Violation of Rule Against Perpetuities

Notwithstanding anything herein contained to the contrary, the provisions of this trust agreement shall not postpone the vesting of the trust property or any portion thereof for a period more than 21 years after the death of the last survivor of the following persons living at the time of the execution of this agreement: ____ [name measuring lives]. If any interest hereby created has not sooner vested, trustee shall at such time pay over the trust estate then in its possession to the persons then entitled to receive the income therefrom, in the same shares or portions in which such income is then being paid to them.

Form 4. Termination of Inter Vivos Trust to Avoid Violation of Rule Against Perpetuities on Court Holding of Invalidity

If a court of competent jurisdiction, in a proceeding in which the question of the validity of this trust is in issue, holds that this trust is void for violating the rule against perpetuities, then I direct that at such time trustee shall hold the trust res in trust, to pay over and deliver the same to such person or persons as may be entitled to receive the net income thereof, and in the same proportions, absolutely and free from further trusts.

Form 5. Termination of Testamentary or Inter Vivos Trust to Avoid Violation of Rule Against Perpetuities-Reference to Law of Trustor's Domicile

If, in any contingency, the vesting of any interest hereunder may occur after the expiration of a longer period than is permitted by the law of the state of my domicile, then upon the happening of any such contingency such portion of the trust shall immediately be paid over absolutely to the person or persons to whom, and in the proportions in which, the income therefrom is then payable.

Form 6. Exercise of Power of Appointment Within Period of Perpetuities

Each power of appointment created by this ____ [will or trust agreement] shall be exercisable by the designated donee if, and only if, the power is exercised prior to 21 years after the death of the last to die of ____ [name measuring lives, such as: my children in being at the time of ____ (my death or execution of this agreement)].

Chapter. 184B Short Form Terms for Wills and Trusts

Editorial Note--
Section 9 of the inserting act (**Chapter 688 of the Acts of 1981**) provides in part as follows:

> "Chapter 184B of the General Laws, inserted by section one of this act shall apply to wills and trusts executed on or after the effective date of this act. . . ."

§ 1. Terms May Be Used in Any Will or Trust; Effect.

The terms defined in this chapter may be used in any will or trust and, except as otherwise provided in the instrument, shall have the full force, meaning and effect of the words by which they are so defined. Adoption or employment in substance of a defined term in such instrument shall be a sufficient incorporation by reference of the applicable section of this chapter in effect at the date of the execution of the instrument, but this provision shall not preclude other methods or incorporation of any section in part only or subject to such modification as the incorporating instrument may provide. An attorney at law preparing a will or trust who uses a term defined in this chapter shall furnish to the testator or settlor a copy of the section of this chapter by which the term is defined; provided, however, that failure to do so shall not affect the validity of the incorporation by reference.

HISTORY: 1981, 688, § 1

§ 2. Statutory Optional Fiduciary Powers.

The following powers shall be known as the **"Statutory Optional Fiduciary Powers"** and may be given to the fiduciary in a will or trust by specific reference thereto in said will **or trust** in addition to all common law and other statutory powers:

(1) Said fiduciary shall have the power **without approval of any court**:

(a) to retain any property in the form in which it is received and, while a trust is revocable by the settlor, to purchase or retain any property the purchase or retention of which is requested by the settlor;

(b) to accept additional property in any trust hereunder from any source and upon any special terms;

(c) with respect to any tangible personal property, to repair, store, insure or otherwise care for such property and to pay such shipping or other expense relating to such property as the fiduciary deems advisable;

(d) to abandon any property which the fiduciary determines to be worthless;

(e) to invest principal and income in such property as the fiduciary may determine, and, without limiting the generality of the foregoing, to invest in investment company shares or in shares or undivided portions of any common trust fund established by any fiduciary without notice to any beneficiary;

(f) to sell, exchange or otherwise dispose of the property at public or private sale on such terms as he may determine, no purchaser being bound to see to the application of any proceeds;

(g) to lease the property on such terms as he may determine although the term may extend beyond the time when it becomes distributable;

(h) to decide all questions between principal and income according to law;

(i) to keep registered securities in the name of a nominee;

(j) to pay, compromise or contest claims or controversies, including claims for estate or inheritance taxes, in such manner as he may determine;

(k) to participate in such manner as he may determine in any reorganization, merger or consolidation of any entity the securities of which constitute part of the property held, and to deposit such securities with voting trustees or committees of security holders even though under the terms of deposit such securities may remain deposited beyond the time when they become distributable, to vote upon any securities in person or by special, limited or general proxy, with or without power of substitution, and otherwise to exercise all the rights that may be exercised by any security holder in his individual capacity;

(l) to borrow such amounts as he may consider necessary to obtain cash for any purposes for which funds are required in administering the estate or trust, and in connection therewith, to mortgage or otherwise encumber any property on such conditions as he may determine although the term of the loan may extend beyond the time that would otherwise be needed for completing the administration of the estate or beyond the term of the trust;

(m) to allot in or towards satisfaction of any payment, distribution or division, in such manner as he may determine, any property held at then current fair market values determined by him;

(n) to hold trusts and shares undivided or at any time to hold the same or any of them set apart one from another;

(o) to lend, borrow, buy or sell on commercially reasonable terms to or from any fiduciary acting under another instrument made by the testator or settlor; and

(p) to combine all or part of the property for investment with property held by a fiduciary acting under another instrument upon substantially similar terms made by the testator or settlor or by his or her spouse, except that property qualifying for a marital, orphan or charitable deduction for federal tax purposes may not be so combined.

(2) Such powers shall be subject to such exceptions, limitations and conditions as to property otherwise qualifying for marital, orphan or charitable deductions allowable under federal tax laws as are contained in all special provisions relating thereto in the instrument or as may be necessary to conform to the requirements of federal tax laws at any time applicable for qualification of such property for such deduction, including consent of the surviving spouse or child, if any, of the testator or settlor, if so required. Such powers, except as expressly limited in the instrument, may be exercised by the person or persons for the time being serving as such fiduciary, whether or not named therein. Powers conferred on the fiduciary shall be exercised only in accordance with a reasonable discretion. **No power conferred upon the fiduciary in this section shall be exercised in favor of any person then serving as fiduciary nor in favor of his estate or his creditors, or the creditors of his estate.**

HISTORY: 1981, 688, § 1

Cross References:
Sale of trust estate, generally, see ALM GL c 203 § 16
Distribution of trust estate, see ALM GL c 203 § 25

CASE ANNOTATIONS:
Where trust is permitted to disclaim under ALM GL c 191A § 1, trustee rather than beneficiaries may disclaim on behalf of trust. ***McClintock v Scahill***, 403 Mass 397, 530 N.E.2d 164 (1988).

§ 3. Statutory Disability Discretionary Powers.

The following discretionary powers, which shall be known as the **"Statutory Disability Discretionary Powers"**, may be conferred by reference upon any fiduciary, and, unless otherwise provided in the instrument by which it is conferred, shall apply to all distributions to be made under the terms of the instrument or under powers or discretions granted to the fiduciary by the instrument to a minor, to a person under such other age as may be specified in the instrument, or to a person whom the fiduciary determines to be unable to properly care for his property by reason of advanced age, mental weakness or physical incapacity:

The fiduciary may make distribution to any person to whom this discretion is applicable or apply or distribute the same for his benefit or account, or retain all or any part of the same, whether principal or income, in trust for him and thereafter at any time or times distribute part or all to him or apply or distribute the same for his benefit or account. When the discretion hereunder terminates, whether by reason of the age, or otherwise, the fiduciary shall distribute any property retained in trust for such person hereunder to such person, or to his guardian or conservator or to his estate, as the case may be. Such discretion shall not apply to any distribution to which the spouse, surviving spouse or surviving child of the testator or settlor making the instrument is entitled either outright or under a trust or share which qualifies for a marital or orphan deduction under applicable federal tax laws, except that distributions may be made to or applied for the benefit of such spouse, surviving spouse or surviving child, as the case may be.

HISTORY: 1981, 688, § 1

§ 4. Statutory Principal Discretionary Powers.

The following discretionary powers, which shall be known as the **"Statutory Principal Discretionary Powers"**, may be conferred by reference upon any fiduciary, and, unless otherwise provided in the instrument by which it is conferred, the term **"primary beneficiary"** in the statutory discretion shall mean each person currently entitled under the instrument to a share of income, or, if no person is currently entitled to income as of right or for priority of consideration, each person to whom income may currently be paid in the discretion of the fiduciary.

The fiduciary may at any time pay to or for the benefit of the primary beneficiary, the spouse of the primary beneficiary and children of the primary beneficiary under the age of twenty-five years such amounts of the principal held for the benefit of the primary beneficiary as the fiduciary deems advisable, giving reasonable consideration to other resources available to the distributee, for the comfort, maintenance, support or benefit of the distributee. The fiduciary may at any time pay to or for the benefit of other issue of the primary beneficiary and spouses and surviving spouses of issue of the primary beneficiary such amounts of the principal as the fiduciary deems necessary, after use of other resources available to the distributee so far as practicable without undue hardship, for the comfort, maintenance and support of the distributee and consistent with the best interests of the primary beneficiary and a due regard for the interests of all persons affected. Said discretion may be exercised even though the share of principal held for the primary beneficiary is thereby exhausted. Said discretion to pay principal to or for the

benefit of any person includes the discretion after his death to pay or reimburse his estate for expenses incurred prior to his death and for reasonable funeral and burial expenses. If continuation of a trust or share has become impractical, the fiduciary may terminate it by distribution to the primary beneficiary or primary beneficiaries of the trust or share.

Principal, which in the exercise of such discretion is paid to or used for the benefit of any issue of the primary beneficiary or spouse or surviving spouse of such issue, shall be charged against any share of income or principal thereafter existing for such person or for any ancestor or issue of such person or for the spouse or surviving spouse of such person, ancestor or issue, unless the fiduciary upon equitable considerations shall otherwise determine. While the spouse or surviving spouse or surviving child of the testator or settlor is primary beneficiary of any trust or share which qualifies for a marital or orphan deduction under applicable federal tax laws, this discretion shall not apply to such trust or share except to permit the fiduciary to pay principal to or apply it for the benefit of such spouse or surviving spouse or surviving child, as the case may be. This discretion shall not be exercised in favor of any person then serving as such fiduciary who is otherwise eligible except for his maintenance or support nor in favor of his estate or his creditors or the creditors of his estate.

HISTORY: 1981, 688, § 1

Chapter 191A Disclaimer of Certain Property Interest Act

Special Note--
Section 2 of Chapter 573, Acts of 1975, effective by act of governor, October 29, 1975, provides as follows:

> Section 2. The provisions of chapter one hundred and ninety-one A, inserted by section one of this act, shall apply to all interests in property, except those interests which have become indefeasibly vested in a finally ascertained beneficiary prior to the effective date of this act

§ 1. Definitions.

The following words as used in this chapter shall have the following meanings, unless otherwise expressly provided or the context otherwise requires:--

"Beneficiary", any person to whom, and any estate, trust, corporation or other legal entity to which, an interest in property would pass in any manner described in section two, except for the execution and filing of a disclaimer in accordance with the provisions of this chapter.

An **"interest in property"** which may be disclaimed shall include:--
1. **any legal or equitable interest or estate**, whether present, future or contingent, in any real or personal property, or in any fractional part, share, or portion thereof, or in any specific asset or assets thereof;

2. any power to appoint, consume, apply, or expend property or any other right, power, or privilege, relating thereto;

3. any fractional part, share or portion of any interest described in clause (1) or (2).

HISTORY: 1975, 573, § 1

§ 2. Disclaimer of Particular Interests.

Unless barred by the provisions of section eight, a beneficiary may disclaim any interest in property which, except for the execution and filing of a disclaimer in accordance with the provisions of this chapter, pass to the beneficiary:--

1. By intestate succession, devise, legacy, bequest, exercise or nonexercise of a power of appointment exercisable by will, or testamentary exercise or nonexercise of a power of appointment exercisable by either deed of trust or will; as beneficiary of a testamentary trust, beneficiary of a testamentary gift to a nontestamentary trust, or donee of a power of appointment created by will; by succession in any manner described in this clause to a disclaimed interest; or in any other manner not specified above under a testamentary instrument or by operation of any statute or rule of law governing devolution or disposition of property upon or after a person's death.

2. **As donee, grantee, beneficiary of an inter-vivos trust,** beneficiary of an insurance or annuity contract, **donee of a power of appointment created by a nontestamentary instrument**, or as surviving joint tenant or tenant by the entirety, except that a surviving joint tenant or tenant by the entirety may not disclaim that portion of an interest in joint property or property held by the entirety which is allocable to amounts contributed by him or her to the interest in such property; through exercise or nonexercise of a power of appointment exercisable by deed, or nontestamentary exercise or nonexercise of a power of appointment exercisable by deed of trust or will; under any deed, assignment, or other nontestamentary instrument of conveyance or transfer; by succession in any manner described in this clause to a disclaimed interest; or in any other manner not specified above under a nontestamentary instrument or by operation of any statute or rule of law.

Disclaimer may be made for a beneficiary under a legal disability by the duly appointed guardian or conservator of such beneficiary, and for a deceased beneficiary by the legal representative of such beneficiary's estate; provided, in any case, however, that the probate court having jurisdiction of the estate of such beneficiary shall have decreed, upon complaint filed by such guardian, conservator, or legal representative, that such disclaimer is in the best interests of those interested in the estate of such beneficiary and not detrimental to the best interests of the beneficiary or the estate of such beneficiary, and that such guardian, conservator, or legal representative is authorized to execute and file such disclaimer on behalf of such beneficiary in accordance with the provisions of this chapter.

HISTORY: 1975, 573, § 1

CASE ANNOTATIONS:

Trustee under inter vivos grandchildren's trust created by decedent and his wife could properly disclaim distribution from trustees of decedent's revocable trust (directing such distribution at his death) in order to provide favorable estate tax consequences to decedent's estate**.** ***McClintock v Scahill***, 403 Mass 397, 530 N.E.2d 164 (1988).

Where trust is permitted to disclaim under ALM GL c 191A § 1, trustee rather than beneficiaries may disclaim on behalf of trust. **Id.**

§ 3. Execution and Filing of Disclaimer; Time.

A disclaimer shall be executed and filed pursuant to the provisions of this chapter at any time after the creation of the interest in property being disclaimed, but in any event not later than nine months after the event determining that the beneficiary is finally ascertained as the beneficiary of such interest and that such interest is indefeasibly vested and in the case of a beneficiary who is a surviving joint tenant or tenant by the entirety, a disclaimer shall be executed and filed in any event not later than nine months after the death of the other joint tenant or tenants or tenant by the entirety; provided, that any court having jurisdiction of the property, an interest in which is being disclaimed, may, upon petition filed by the beneficiary, the duly appointed guardian or conservator of a beneficiary under a legal disability, or the legal representative of a deceased beneficiary's estate, permit an extension of time to execute and file a disclaimer, for such further period of time as the court in its discretion deems advisable.

HISTORY: 1975, 573, § 1

§ 4. Form of Disclaimer.

A disclaimer shall be in writing, shall describe the interest in property being disclaimed, shall declare the disclaimer and the extent thereof, shall be clear and unequivocal, and shall be signed

by the beneficiary, the duly appointed guardian or conservator of a beneficiary under a legal disability, or the legal representative of a deceased beneficiary's estate.

HISTORY: 1975, 573, § 1

§ 5. Filing in Probate Court; Acknowledgment; Service.

The original of the disclaimer or an attested copy thereof, if filing is required to be made with more than one probate court, shall be filed with the probate court, or probate courts, if any, wherein a duly appointed fiduciary, if any, having custody or control of the property, an interest in which is being disclaimed, is required to file periodic accounts.

If the property, an interest in which is being disclaimed, is real property, the disclaimer shall be acknowledged in the manner provided for deeds of real property. The disclaimer shall not be valid as against any person, except the beneficiary, the heirs and devisees of the beneficiary, and any person, estate, trust, corporation or other legal entity having actual notice of the disclaimer, unless the original thereof or an attested copy thereof if the original is required to be filed with a probate court, is recorded in the registry of deeds for the county or district in which the real property is situated or, in the case of registered real property, is filed and registered in the office of the assistant recorder for the registry district in which the real property is located.

A copy of the disclaimer shall be served by delivering in hand or by mailing by certified mail to the last known address of the person or persons or other legal entity or entities having custody or possession of the property, an interest in which is being disclaimed. Failure to comply with these requirements of service shall not affect the validity of the disclaimer.

HISTORY: 1975, 573, § 1

§ 6. Liability for Distribution of Disclaimed Property; Reliance on Disclaimer.

No person or other legal entity having custody or possession of the property, an interest in which is being or has been disclaimed, shall be liable for any distribution or other disposition made prior to the delivery to him or it of a copy of the disclaimer, pursuant to the requirements of section five; and no such person or other legal entity shall be liable for any good faith distribution or other disposition made in reliance upon a disclaimer, the form of which is in accordance with the requirements of section four, and a copy of which has been delivered to him or it pursuant to the requirements of section five.

If a disclaimer certifies, with particularity, that none of the contingencies specified in section eight, which would result in waiver or bar of the beneficiary's right to disclaim, are applicable, any person or other legal entity having custody or possession of the property, and any third party purchaser of the property, an interest in which is being or has been disclaimed, shall be entitled to rely without further inquiry upon the aforesaid certifications.

HISTORY: 1975, 573, § 1

§ 7. Disclaimer Irrevocable; Extinguishment of Powers; Presumption of Death; Vesting; Complaint for Declaratory Judgment or Instructions.

A disclaimer complying with all the applicable requirements of this chapter shall be effective according to its terms, and shall be irrevocable, upon execution in accordance with the provisions of section four, and filing in accordance with the provisions of section five.

If the interest in property being disclaimed is a power to appoint, consume, apply, or expend property, as described in clause (2) of the second paragraph of section one, or any fractional part, share, or portion thereof, such interest shall be extinguished.

Except as provided in the preceding paragraph, and unless such a result would substantially impair the provisions or intent of any instrument, statute or rule of law relating to the interest in property being disclaimed, such interest shall pass in the same manner as if the beneficiary had died immediately preceding the event determining that he, she or it is the beneficiary of such interest and that such interest is indefeasibly vested.

The interest in property being disclaimed shall never vest in the beneficiary.

Any person or other legal entity having custody or possession of the property, an interest in which is being disclaimed may file a complaint for instructions or complaint for declaratory judgment seeking a determination of the effect of a disclaimer, in

1. A probate court, if any, having jurisdiction of such property; or

2. If no probate court has jurisdiction of such property, any other court having jurisdiction of such property.

HISTORY: 1975, 573, § 1

§ 8. Barring of Right to Disclaim.

The right to disclaim an interest in property shall be barred by:--

1. assignment, conveyance, encumbrance, pledge, transfer or other disposition of such interest, or any contract therefor, by the beneficiary or sale or other disposition of such interest pursuant to judicial process made before the beneficiary has disclaimed such interest as herein provided;

2. insolvency of the beneficiary at the time of attempted disclaimer. For purposes of this paragraph only, sections one to four, inclusive, and sections eight to thirteen, inclusive, of chapter one hundred and nine A shall be applicable as if the disclaimer were a conveyance;

3. a written waiver of the right to disclaim such interest pursuant to the provisions of this chapter, signed by the beneficiary, the duly appointed guardian or conservator of a beneficiary under a legal disability, or the legal representative of a deceased beneficiary's estate;

4. acceptance of such interest by the beneficiary; if the beneficiary, having knowledge of the existence of such interest, receives without objection a benefit from such interest, such receipt shall be deemed to constitute acceptance of such interest.

The assignment, conveyance, encumbrance, pledge, transfer or other disposition or any contract therefor, sale or other disposition pursuant to judicial process, written waiver of the right to disclaim, or acceptance of a part of an interest in property shall not bar the right to disclaim any other part of such interest.

HISTORY: 1975, 573, § 1

§ 9. Effect of Restraints on Alienation on Right to Disclaim.

The right to disclaim pursuant to the provisions of this chapter shall exist irrespective of any limitation in the nature of an express or implied spendthrift provision or other similar restraint on alienation imposed by any instrument, statute, rule of law or otherwise on the interest in property being disclaimed.

HISTORY: 1975, 573, § 1

§ 10. Effect on Other Laws.

Except for the provisions of section eight, this chapter shall not abridge the right of any person to disclaim, waive, release, renounce, or abandon any interest in property under section fifteen of chapter one hundred and ninety-one or any other statute or rule of law.

HISTORY: 1975, 573, § 1

Chapter 201C Statutory Custodianship Trusts

Editorial Note--
Section 9 of the inserting act (Chapter 688 of the Acts of 1981) states, in part, as follows:

Section 9. ". . . Section eight shall be applicable to gifts or transfers made on or after the effective date of this act."

§ 1. Transfer to Statutory Custodianship Trustee.

An adult person may, during his lifetime, transfer any property owned by him, in any manner otherwise consistent with law, to one or more named persons designated, in substance, as a **"Statutory custodianship trustee"**. Such transfer shall be sufficient to create a trust upon the terms set forth in this chapter as it is in effect at the date of the transfer without any further trust instrument or designation of terms and without appointment or qualification by any court, and shall be complete upon acceptance of the trust by the trustee or trustees manifested in any form. The trustee or trustees shall serve without giving bond or surety unless the transferor by written instrument, or the probate court upon the application of any person interested in the estate of the transferor and upon good cause shown, shall provide for a bond. All transfers in trust under this chapter shall be revocable by the transferor at any time he has legal capacity by a writing signed by him and delivered to the person, or if more than one to any person serving as trustee.

HISTORY: 1981, 688, § 8

§ 2. Powers and Duties of Trustee.

During the life of the transferor the trustee or trustees shall apply the income and principal, by payment to the transferor or by direct expenditure, as may be necessary for the comfortable and suitable maintenance and support of the transferor and his family in accordance with the principles applicable to a conservator. Upon the death of the transferor the remaining property shall be delivered and paid over to the estate of the transferor. With respect to the property in the trust, except as modified in the instrument of transfer, the trustee or trustees shall have the statutory optional fiduciary powers as provided in chapter one hundred and eighty-four B and such additional rights and powers as the transferor may provide by written instrument. The trustee or trustees shall account at least annually to the transferor or to his guardian or conservator, if any, and after the death of the transferor to his executor or administrator. In the event of the incompetency of the transferor the trustee or trustees may apply to the probate court in the same manner as a guardian or conservator for authority to deal with property held in trust in any manner in which the court might authorize a guardian or conservator to deal with property of the transferor.

HISTORY: 1981, 688, § 8

§ 3. Resignation and Removal of Trustee; Vacancies.

A trustee may resign by an instrument in writing delivered to the transferor or to his guardian or conservator, if any. A trustee may be removed by the transferor by an instrument in writing delivered to such trustee. If there is more than one person serving as trustee, a vacancy need not be filled, and until a successor is appointed the remaining trustee or trustees may act alone. In the event of a vacancy a successor may be appointed by the transferor, if legally competent, or as

the transferor shall have provided by written instrument, and otherwise by his guardian or conservator, if any, and if none, by his heirs presumptive, and such appointment shall become effective upon acceptance.

HISTORY: 1981, 688, § 8

Chapter 203 - Trusts

Creation Of Trusts

§ 1. Creation of Trust Concerning Land; Writing Required.

No trust concerning land, except such as may arise or result by implication of law, shall be created or declared unless by a written instrument signed by the party creating or declaring the trust or by his attorney.

HISTORY: 29 Car. II, c. 3, § 7; 1692-3, 15, § 5; 1783, 37, § 3; RS 1836, 59, § 30; GS 1860, 100, § 19; PS 1882, 141, § 1; RL 1902, 147, § 1

Cross References:
Record to be notice of trust, GL c 203, § 2, and the notes thereto
Contracts of married women, GL c 209, § 2, and the notes thereto
Purchasers without notice of trust, GL c 203, § 3, and the notes thereto
Necessity for writing in contracts for the sale of land, see GL c 259, § 1, clause 4, and the notes thereto

§ 2. Recording to Be Notice of Trust

If a trust concerning land is created or declared by such instrument, the recording of the instrument in the registry of deeds for the county or district where the land lies shall be equivalent to actual notice to every person claiming under a conveyance, attachment or execution thereafter made or levied.

HISTORY: RS 1836, 59, § 32; GS 1860, 100, § 21; PS 1882, 141, § 2; RL 1902, 147, § 2

CASE ANNOTATIONS:

GL c 203 § 2, concerning constructive notice of terms of trust regarding land, did not apply where buyer did not know of existence of trust**.** ***Rogaris v Albert,*** 431 Mass 833, 730 N.E.2d 869 (2000).

Bank which granted mortgage had notice of trust's provisions from recording of trust, and should have known that mortgage from newly appointed trustee, not complying with trust instrument,

could convey no security title. ***Plunkett v First Federal Sav. & Loan Ass'n*** , 18 Mass. App. 294, 464 N.E.2d 1381, review den (1984) 393 Mass 1102, 469 N.E.2d 830 (1984).

§ 3. Purchasers Without Notice.

No trust concerning land, whether implied by law or created or declared by the parties, shall defeat the title of a purchaser for a valuable consideration without notice of the trust, or prevent a creditor who has no notice of the trust from attaching the land or from taking it on execution as if no such trust existed.

HISTORY: RS 1836, 59, § 31; GS 1860, 100, § 20; PS 1882, 141, § 3; RL 1902, 147, § 3

Appointment And Removal Of Trustees

§ 4. Appointment of Testamentary Trustee.

If a testator has omitted in his will to appoint a trustee in this commonwealth and such appointment is necessary to carry into effect the provisions of the will, the probate court may, after notice to all persons interested, appoint a trustee who shall have the same powers, rights and duties and the same title to the estate as if originally appointed by the testator.

HISTORY: 1845, 158; 1855, 307, § 1; GS 1860, 100, § 7; PS 1882, 141, § 4; RL 1902, 147, § 4

§ 5. Appointment to Fill Vacancy.

If a trustee under a written instrument declines, resigns, dies or is removed before the objects of the trust are accomplished and no adequate provision for filling the vacancy is made therein the supreme judicial court, the superior court or the probate court shall, after notice to all persons interested, appoint a new trustee to act solely or jointly with the others as the case may be.

HISTORY: 1817, 190, §§ 40, 41; RS 1836, 69, §§ 7, 8; 1843, 19; 1852, 212; GS 1860, 100, § 9; 1877, 31; PS 1882, 141, § 5; RL 1902, 147, § 5

CASE ANNOTATION:

Upon death of original trustee, legal title to land held in trust, passed to sons of trustee under GL c 190, § 3, but they did not thereby become trustees, but simply held legal title until appointment of new trustee. ***Estey v Gardner,*** 291 Mass 303, 197 N.E. 72 (1935).

§ 6. Trust Estate to Vest in New Trustee on Giving Bond.

A trustee appointed under the preceding section, or appointed in the place of a former trustee in conformity with a written instrument creating a trust, shall, upon giving such bond as may be required, have the same powers, rights and duties and the same title to the estate, whether as sole or joint trustee, as if originally appointed; and the court may order any conveyances to be made by the former trustee or his representatives or by the other remaining trustees which it may find proper or convenient to vest the trust estate in the new trustee either solely or jointly with the others.

HISTORY: 1817, 190, § 40; RS 1836, 69, § 8; 1843, 19; 1852, 212; GS 1860, 100, §§ 9, 10; 1878, 254, § 1; PS 1882, 141, § 6; RL 1902, 147, § 6

§ 10. Letters Required of Foreign Trustee in Certain Cases.

If a trustee who derives his appointment or authority from a court having no jurisdiction in the commonwealth holds land in the commonwealth in trust for persons resident therein, he shall, upon petition to the probate court for the county where the land lies, and after notice, be required to take out letter of trust from said court; and upon his neglect or refusal so to do, the court shall declare such trust vacant, and shall appoint a new trustee, in whom the trust estate shall vest in like manner as if he had been originally appointed or authorized by said court.

HISTORY: 1871, 327, § 1; PS 1882, 141, § 7; RL 1902, 147, § 9

§ 11. Notice to Foreign Trustee.

The notice to the trustee required by the preceding section may be given by serving him with a copy of the petition, and of the citation thereon, fourteen days at least before the return day of such citation, or in such other manner as the court may order.

HISTORY: 1871, 327, § 2; PS 1882, 141, § 8; RL 1902, 147, § 10

§ 12. Removal of Trustee; Appointment of Successor.

The supreme judicial court, the superior court or the probate court may, upon petition of a party beneficially interested in a trust under a written instrument, and after notice to the trustee and all persons interested, remove the trustee if it finds that such removal is for the interests of the beneficiaries of the trust or if he has become incapacitated by reason of mental illness or otherwise incapable or is unsuitable therefor. If the petition for removal contains a prayer therefor, the court may, upon such notice as it considers reasonable, appoint a successor to fill the vacancy caused by such removal, without the filing of a separate petition for that purpose.

HISTORY: 1817, 190, § 41; RS 1836, 69, § 7; 1843, 19; 1852, 212; GS 1860, 100, § 8; PS 1882, 141, § 9; RL 1902, 147, § 11; 1954, 478, § 3; 1987, 522, § 8

§ 14A. Personal Liability of Trustee.

Unless otherwise provided in the contract, a trustee shall not be personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he failed to reveal his representative capacity and identify the trust estate in the contract.

A trustee shall be personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he was personally at fault.

Claims based on contracts entered into by a trustee in his individual capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee was personally liable therefor.

The question of liability as between the trust estate and the trustee individually may be determined in an accounting, surcharge, indemnification or other appropriate proceeding.

HISTORY: 1976, 515, § 28

Sale Of Trust Estate

§ 16. Order for Sale of Trust Estate; Procedures.

If the sale and conveyance, transfer or exchange of any real or personal property held in trust appears to be necessary or expedient, the supreme judicial court, the superior court or the probate court may, upon petition of a trustee or other person interested, after notice, order such sale and conveyance, transfer or exchange to be made, and the investment, reinvestment and application of the proceeds of such sale in such manner as will best effect the objects of the trust. In the case of a petition to sell real estate, the court, if satisfied that such action will not be prejudicial to the interests of the estate, may authorize the petitioner to become the purchaser of such real estate, either at public or private sale. In the case of personal property the probate court may make such order with or without notice and without the appointment of a guardian ad litem or next friend as provided in the following section. The fact that the trustee has the necessary authority under the terms of the instrument creating the trust or by law to make such sale and conveyance, transfer or exchange without order of the court shall not bar proceedings under this section, but nothing herein contained shall be deemed to require a license where such authority exists.

HISTORY: 1820, 54, § 3; RS 1836, 69, § 11; 1846, 242; GS 1860, 100, §§ 14, 16; 1864, 168, § 1; 1869, 331; PS 1882, 141, § 20; RL 1902, 147, § 15; 1907, 262; 1917, 155; 1917, 279, § 42; 1934, 157, § 2

§ 17. Order for Sale; Proceedings in Case of Persons Not Ascertained; Effect.

If the court, upon proceedings under the preceding section, finds that said estate may be held in trust for, or that a remainder or contingent interest therein may be limited over to, persons not ascertained or not in being, notice shall be given in such manner as the court may order to all persons who are or may become interested in such estate, and to all persons whose issue, not then in being, may become so interested; and the court shall of its own motion in every such case appoint a suitable person to appear and act therein as the next friend of all persons not ascertained or not in being, who are or may become interested in such estate, and the provisions of sections thirty-four and thirty-five of chapter two hundred and one consistent herewith shall apply to such appointment. A conveyance or transfer made after such notice and proceedings shall be conclusive upon all persons for whom such guardian ad litem or next friend was appointed.

HISTORY: 1863, 25; 1864, 168, § 2; PS 1882, 141, § 21; RL 1902, 147, § 16

§ 17A. Sale of Real Estate by Foreign Testamentary Trustees.

A trustee duly qualified and acting in another state or country under the will of a person who was not at the time of his death a resident of this commonwealth and upon whose estate letters testamentary or of administration or of trusteeship have not been granted in this commonwealth, may file an authenticated copy of such will and of the probate thereof, together with an authenticated copy of the record of appointment or qualification of such trustee and of his bond, if any, in the probate court for any county in which there is real estate of his deceased testator, and such trustee, after such notice to the commissioner of revenue, creditors and all other persons interested as the court orders, may be licensed to sell any real estate in the commonwealth, which is subject to such trust, or an undivided interest therein, in such manner and upon such notice as the court orders. But such license shall not be granted unless the court finds that one year has expired since the death of the deceased, that such trustee will be liable to account for the proceeds of the sale in the state or country where he was appointed or where said trust is in course of administration, that no beneficiaries under the trust reside in the commonwealth and that no creditor or other person interested will be prejudiced thereby. The net proceeds of such sale, after deducting the expenses thereof, may be taken by said foreign trustee out of the commonwealth to be accounted for in the court in which he received his appointment or to which he is bound to account. The provisions of section seventeen shall apply in case of proceedings under this section.

HISTORY: 1932, 50; 1978, 514, § 227

§ 18. Property Held in Trust by Minors, etc.; Sale or Conveyance.

If a person who is seized or possessed of real or personal property or of an interest therein upon a trust, express or implied, is a minor, incapacitated by reason of mental illness, out of the commonwealth or not amenable to the process of any court therein having equity powers, and if in the opinion of the supreme judicial court, the superior court or the probate court a sale should be made of such property or of an interest therein, or a conveyance or transfer should be made

thereof in order to carry into effect the objects of the trust, the court may order such sale, conveyance or transfer made and may appoint a suitable person in the place of such trustee to sell, convey or transfer the same in such manner as it may require. If a person so seized or possessed of an estate or entitled thereto upon a trust is within the jurisdiction of the court, he or his guardian may be ordered to make such conveyances as the court orders.

HISTORY: 1845, 64; GS 1860, 100, § 15; 1869, 331; PS 1882, 141, § 22; RL 1902, 147, § 17; 1987, 522, § 9

Mortgage Of Trust Estate

§ 23. Trustees May Be Authorized to Mortgage Trust Real Estate for Certain Purposes.

The court having jurisdiction of a trust created by a written instrument may, upon petition and after notice to all persons interested, if upon hearing it appears to be for the benefit of the trust estate, authorize trustees to mortgage any real estate held by them in trust for the purpose of paying assessments upon the trust estate for betterments or for the expense of repairs and improvements on such estate made necessary by such betterments or by the lawful taking of such estate or of a part thereof by public authority; for the purpose of paying the expense of erecting, altering, completing, repairing or improving a building on such estate; or for the purpose of paying the expense of other improvements of a permanent nature made or to be made on such estate; or for the purpose of paying an existing lien or mortgage on such estate or on a part thereof; or it may authorize such trustees to make an agreement for the extension or renewal of such existing mortgage.

HISTORY: 1869, 451, § 1; 1872, 370, § 1; 1876, 199, § 1; PS 1882, 141, § 23; 1889, 66; RL 1902, 147, § 18

Distribution of Trust Estate

§ 25. Trust Consolidation or Termination; Distribution of Trust Property; Petitions, Orders and Proceedings.

If under a written instrument a trust estate is to be distributed in whole or in part, the probate court, upon petition of a person interested, after such notice as it may direct, may order the trustee to convert said estate, both real and personal, or either, into cash and distribute it among such persons as under such instrument are entitled thereto.

In the event that two or more petitions for the termination of charitable trusts are brought in the same division of the probate court, the court may, in order to reduce the expense of such petitions, consolidate such cases and hear them concurrently.

The court having jurisdiction of a trust under a will or other instrument, upon petition and after notice to the beneficiaries and other interested parties, may order either the consolidation or termination and distribution of the trust property. Such order may be issued regardless of any

spendthrift or other such similar protective provision, if the court finds that the costs of administration thereof are such that the continuance of the trust, or the establishment of the trust if it is to be established upon distribution from an estate, would be uneconomical or would defeat or substantially impair the purposes of the trust. In ordering either the consolidation or termination and distribution of such trust the court shall consolidate the trust with other trusts where such consolidation is in the best interests of the trust beneficiaries, where consolidation will result in a more economical administration of the trust and where consolidation would not substantially impair the purposes of the trust. If consolidation of the trust is impractical in light of the foregoing considerations, the court may order the termination and distribution of the trust. In addition, the court may make such other and further orders as it deems proper or necessary to protect the interests of the beneficiaries and the trustee.

Such petition may be filed by the trustee, by any person interested in such trust or by the personal representative of a decedent's estate. The order shall specify the appropriate share of each beneficiary who is to share in the proceeds of the trust, taking into account the interests of income beneficiaries and remaindermen so as to conform as nearly as possible to the intention of the settlor or testator, but a trust qualifying for the marital deduction for tax purposes shall be distributed only to the surviving spouse of the decedent. The order may direct that the interest of a minor beneficiary, or any portion thereof, be distributed to a custodian pursuant to the Uniform Transfer to Minors Act or as otherwise provided by law. In the event that two or more petitions for the termination of such trusts are brought in the same division of the probate court, the court may, in order to reduce the expense of such petitions, consolidate such cases and hear them concurrently. Nothing in the preceding paragraphs shall limit the right of a trustee acting alone to terminate a trust without an order of the court in accordance with applicable provisions of the governing instrument.

HISTORY: 1898, 65, § 1; RL 1902, 147, § 20; 1986, 549; 1987, 629

Chapter 204 General Provisions Relative to Sales, Mortgages, Releases, Compromises, Etc., by Executors, Etc.

§ 8. License to Sell to Remain in Force for One Year.

No license to sell by an executor, administrator, guardian, conservator or trustee shall be in force for more than one year after the granting thereof, except as provided in section eighteen of chapter two hundred and two.

HISTORY: 1817, 190, § 12; RS 1836, 71, § 19; RS 1836, 72, § 13; GS 1860, 102, § 43; PS 1882, 142, § 8; RL 1902, 148, § 8; 1915, 23

§ 24. Ratification of Doubtful Acts of Executor, etc.

If the authority or validity of an act or proceeding of the probate court or of a person acting as executor, administrator, guardian, conservator, receiver, commissioner or other fiduciary officer appointed by the probate court, or trustee is drawn in question by reason of an alleged irregularity, defective notice or want of authority, any party interested in or affected by such act or proceeding may apply to the probate court having jurisdiction of the subject matter relative to which the act or proceeding has been had, and the court, after notice to all parties interested, and to the persons who may be the parents of such parties not in being, with power to appoint a guardian or next friend to represent the interests of any person unborn or unascertained, may hear and determine the matter and confirm the act or proceeding, in whole or in part, and may authorize and empower the executor, administrator, guardian, conservator, receiver, commissioner or other fiduciary officer appointed by the probate court, or trustee, or any successor or other person who may be legally appointed to act in the same capacity, to ratify and confirm such act or proceeding and to execute and deliver such deeds, releases, conveyances and other instruments as may be found necessary therefor; **but no act or proceeding shall be ratified or confirmed which the court might not have passed or authorized in the first instance upon due proceedings**.

HISTORY: 1874, 346, § 1; PS 1882, 142, § 23; 1888, 420; RL 1902, 148, § 24; 1915, 23; 1921, 44, § 2

Chapter 205 - Bonds of Executors, Administrators, Guardians, Conservators, Trustees, and Receivers

§ 1. Form and Necessity of Bonds.

An executor, temporary executor or temporary administrator with the will annexed, administrator, administrator with the will annexed, special administrator, receiver of an absentee, conservator, temporary guardian and, unless otherwise expressly provided, a guardian or trustee under a will or appointed by the probate court, including a trustee under a will holding property for public charitable purposes, before entering upon the duties of his trust, shall give bond with sufficient sureties, in such sum as the probate court may order, payable to the judge of said court and his successors, and with condition substantially as follows:

. . .

7. In the case of a trustee under a will or appointed by the probate court:

First, To make and return to the probate court at such time as it orders a true inventory of all the real and personal property belonging to him as trustee which at the time of the making of such inventory shall have come to his possession or knowledge;

Second, To manage and dispose of all such property, and faithfully to perform his trust relative thereto according to law and to the will of the testator or the terms of the trust as the case may be;

Third, To render upon oath at least once a year, until his trust is fulfilled, unless he is excused therefrom in any year by the court, a true account of the property in his hands and of the management and disposition thereof, and also to render such account at such other times as said court orders;

Fourth, At the expiration of his trust to settle his account in the probate court, and to pay over and deliver all the property remaining in his hands, or due from him on such settlement, to the person or persons entitled thereto.

. . .

HISTORY: 1692-3, 14, § 1; 1726-7, 12, §§ 6, 7; 1731-2, 14 §§ 6, 7; 1737-8, 9 §§ 3, 4; 1783, 24, § 17; 1783, 36, § 8; 1783, 38 § 5; 1810, 86, § 1; 1816, 94, § 1; 1817, 190, §§ 14, 34, 37, 41; 1834, 174, § 5; RS 1836, 63, §§ 2, 8; RS 1836, 5, 64, § 7; RS 1836, 69, 1, 9; RS 1836, 79, §§ 5, 7; 1855, 280; GS 1860, 93, §§ 2, 8; GS 1860, 94, §§ 2, 7; GS 1860, 100, §§ 1, 11; GS 1860, 109, §§ 6, 16; 1869, 357; 1870, 285; 1876, 200 § 2; 1878, 154, §§ 1, 2; 1880, 152 § 1, PS 1882, 129, § 5; PS 1882, 130 §§ 2, 8, 11; PS 1882, 139, § 22; PS 1882, 141, §§ 12, 13; 1897, 135, § 3; 1897, 447, § 2; 1898, 527, § 2; 1900, 345, § 4; RL 1902, 145, § 41; RL 1902, 149, § 1; 1908, 295; 1910, 95; 1915, 23; 1976, 515, § 29

Chapter 182 Voluntary Associations and Certain Trusts [a/k/a Mass. Business Trusts]

§ 1. Definitions.

The following words, as used in this chapter, shall, except as otherwise expressly provided in section two A, have the following meanings: **"Association", a voluntary association under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares.** "Secretary", the state secretary. "Department", the department of telecommunications and energy. When used in sections two to seven, inclusive, and twelve to fourteen, inclusive, of this chapter**, the word "trust" shall**, except as otherwise expressly provided in section two A, **mean a trust operating under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares**, other than a trust established for the sole purpose of exercising the voting rights pertaining to corporate stock or other securities in accordance with the terms of a written instrument.

HISTORY: 1909, 441, § 1; 1914, 471; 1919, 350, § 117; 1926, 290, § 1; 1931, 426, § 278; 1954, 254, § 1; 1962, 750, § 67; Amended by 1997, 164, § 278, approved, with emergency preamble, Nov 25, 1997 [relating to reporting requirements and regulatory review issues involving certain types of associations under the auspices of the Department of Telecommunications and Energy]

CASE ANNOTATIONS:

Action may be brought directly against business trust. ***Town of Hull v Tong***, 14 Mass. App. 710, 442 N.E.2d 427 (1982).

There is sound and well recognized distinction between voluntary association and express trust even though both are established by written instruments or declarations of trust, managed by trustees, and beneficial interest in both is divided into and represented by transferable certificates or shares; voluntary association established by written instrument imports some element of association and cooperation among beneficiaries, while express trust may exist without it. ***Bouchard v First People's Trust***, 253 Mass 351, 148 N.E. 895 (1925).

Express trust "under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares," is not association of character described in this section and § 6, if shareholders are unassociated, have no organization, and each has merely equitable interest in trust without any legal power or voice, direct or remote, in management of trust or choice or conduct of trustees; therefore, it cannot be sued as entity under § 6 of this chapter. **Id.**

Under this chapter, trusts with transferable shares are submitted to substantial statutory regulation in many respects similar to regulation of corporations, and while such trusts are neither corporations nor entities apart from trustees, they are in practical effect in many respects similar to corporations. ***Swartz v Sher,*** 344 Mass 636, 184 N.E.2d 51 (1962).

§ 2. Copy of Instrument or Declaration of Trust Filed With Secretary and City or Town Clerk; Consolidation or Merger of Association or Trust into Limited Liability Company; Fees; Penalty.

The trustees of an association or trust shall file a copy of the written instrument or declaration of trust creating it with the secretary and with the clerk of every city or town where such association or trust has a usual place of business. . . . Such trustees shall also, within thirty days after the adoption of any amendment thereof, file a copy of said amendment with said secretary and said clerk. The trustees of every association or trust, whose written instrument or declaration of trust creating it is not filed as required in this section shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than three months.

An association or trust may consolidate or merge with or into one or more domestic limited liability companies, as defined in section two of chapter one hundred and fifty-six C in the manner described, and with the effects set forth in said chapter one hundred and fifty-six C.

The trustees of an association or trust which is not the resulting or surviving entity in any such consolidation or merger shall file (1) a copy of the certificate of consolidation or merger with the secretary if no other entity which is a party to the transaction has done so within thirty days after the effective date of such transaction, and (2) a copy with the clerk of every city or town where such association or trust has a usual place of business.

. . .

HISTORY: 1909, 441, § 1; 1914, 471; 1922, 272; 1926, 290, § 2; 1948, 550, § 39; 1962, 750, § 68; 1972, 684, § 119; 1980, 572, § 399; 1995, 281, § 19, approved Nov 28, 1995, declared emergency law by Governor, by § 22, effective Jan 1, 1996

CASE ANNOTATIONS:

Sections 2 and 12 of this chapter, containing requirements governing filing of declarations of trusts and of annual reports, provide public with reasonable means of obtaining information about such trusts. ***Swartz v Sher***, 344 Mass 636, 184 N.E.2d 51 (1962).

When declaration or instrument creating business trust which provides for transferable shares is recorded in registry of deeds and in public offices mentioned in this section, trust is held out to public as operative trust for benefit of its then existing and future certificate holders. **Id.**

Where instrument creating business trust with transferable shares is recorded in registry of deeds, there is no additional requirement for recording certificate that shares of such trust have actually been issued as prerequisite for showing upon record that trust exists, and recording of such instrument together with record showing title to be in trust is sufficient to show that trust holds record title and trustee possessed power to sell, and conveyance by such trustees, in absence of showing by buyer of defect in existence of trust, is sufficient to transfer good title. **Id.**

§ 6. Suits Against Associations or Trusts; Seals.

An association or trust may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association or trust, in the performance of their respective duties under such written instruments or declarations of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient.

An association or trust may have a seal, which it may alter at pleasure, and which may be used by the trustee or trustees of such association or trust as his or their seal. An impression of a seal purporting to be the seal of such an association or trust shall be sufficient for all purposes without the use of a wafer or wax.

HISTORY: 1916, 184; 1926, 290, § 5; 1929, 107, § 2

CASE ANNOTATIONS:

1. In general
2. Suits against association
3. Powers and liabilities of trustees

1. In general

Trust with transferable shares representing beneficial interest may be sued, but save for purpose of being sued, trust, as distinguished from trustee, is not made separate legal entity; trust, as distinguished from trustee, cannot contract or act. ***Peterson v Hopson***, 306 Mass 597, 29 N.E.2d 140, 132 ALR 1 (1940); ***Griswold v United States,*** 36 F Supp 714, 26 AFTR 58 ***(***1941, DC Mass), affd 124 F.2d 599, 28 AFtr 834 (CA1 Mass); ***Commissioner of Corps. & Taxation v Springfield,*** 321 Mass 31, 71 N.E.2d 593 (1947).

Business trusts are regulated in certain ways not applicable to conventional trusts of the probate variety**.** ***First Eastern Bank, N.A. v Jones,*** 413 Mass 654, 602 N.E.2d 211 (1992).

2. Suits against association

Under this section and § 1 of this chapter, voluntary association "under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares" may in restricted and specified instances be sued as if it were corporation. ***Tyler v Boot & Shoe Workers' Union***, 285 Mass 54, 188 N.E. 509 (1933).

Trust is not legal entity which can be sued directly, with exception of business trust. ***Morrison v Lennett***, 415 Mass 857, 616 N.E.2d 92 (1993).

The "property" referred to in this section is property of association-derived from its stockholders, its creditors, or in usual course of its business; it is not property of its shareholders as partners. ***Gallagher v Hannigan,*** 5 F.2d 171 (1925, CA1 Mass), cert den 269 US 573, 70 L Ed 419, 46 S Ct 101 (1925) and app dismd 273 US 667, 71 L Ed 830, 47 S Ct 470 (1927).

Where trust had practically all attributes of corporation, had shareholders, shares were transferable, trustees were not liable personally, and it could make no contracts binding shareholders personally, it was distinct entity and, under laws of Massachusetts, could be sued in its own name without joining shareholders. ***Mulloney v United States***, 79 F.2d 566 (1935, CA1 Mass), cert den 296 US 658, 80 L Ed 468, 56 S Ct 383 (1935).

Association or trust within meaning of § 1 of this chapter, and capable of being sued under this section, has "practically all the attributes of a corporation." ***Byrne v American Foreign Ins. Asso.*** 3 FRD 1 (1943, DC Mass).

3. Powers and liabilities of trustees

Provision that "an association or trust may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees" does not change relation of trustee to trust estate, nor, in absence of stipulation or express agreement, relieve trustee from common law obligation. ***Tebaldi Supply Co. v Macmillan,*** 292 Mass 384, 198 N.E. 651 (1935).

Statute [ALM GL c 203 § 14A] limiting personal liability of trustee does not apply to trustee acting under trust not of donative type associated with probate practice, such as Massachusetts business trust created to develop real estate project. ***First Eastern Bank, N.A. v Jones***, 413 Mass 654, 602 N.E.2d 211 (1992).

Action may be brought directly against business trust. ***Hull v Tong,*** 14 Mass. App. 710, 442 N.E.2d 427 (1982).

One trustee, in his dealings with plaintiff firm, could not bind trust without concurrence, in some form, of his co-trustees; however, unanimity may be achieved by subsequent ratification of acts of single trustee, and such ratification may be inferred from knowledge of course of dealing and failure to object to it***. Bomeisler v M. Jacobson & Sons Trust***, 118 F.2d 261 (1941, CA1 Mass), cert den 314 US 630, 86 L Ed 505, 62 S Ct 61 (1941).

§ 12. Annual Reports; Filing with State Secretary.

Every association or trust shall annually on or before June first file with the state secretary a report signed under the penalties of perjury by its trustees stating (a) the name of the association or trust; (b) the location (with street address) of its principal office in this commonwealth and elsewhere if the trust or association does business outside the commonwealth; (c) the number of its issued and outstanding transferable certificates of participation or shares; and (d) the names and addresses of its trustees.

HISTORY: 1954, 254, § 2; 1963, 420, § 1

Editorial Note--
The 1963 amendment substituted the state secretary for the state tax commission

Codes of Massachusetts Regulations:
Annual reports, 950 CMR 109.05
Penalties for failure to file, 950 CMR 109.08
Forms and fees, 950 CMR 109.09

CASE ANNOTATIONS:

Sections 2 and 12 of this chapter containing requirements governing filing of declarations of trusts and of annual reports provide public with reasonable means of obtaining information about such trusts. ***Swartz v Sher,*** 344 Mass 636, 184 N.E.2d 51 (1962).