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CHAPTER 3

Trusts & Estates

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§3.1. Charitable Trusts—Construction—Conditions on Bequests to a Religious Society. During the *Survey* year the Supreme Judicial Court decided an important case affecting the administration of charitable trusts established for the benefit of religious societies. In *First Bank and Trust Company of Hampden County v. Attorney General,*[1] the Court determined that the merger of the First Unitarian Society of Chicopee (Chicopee Society) with the Third Congregational Society in Springfield (Springfield Society) did not result in the termination of certain charitable trusts which were established for the benefit of the Chicopee Society.

The merger of the Chicopee Society with the Springfield Society was allowed by special statute.[2] Section 2 of the special statute provided that

> [u]pon the completion of the merger . . . the [Chicopee Society] shall no longer continue as a separate society and the [Springfield Society in Springfield] under its existing corporate powers may carry on the activities heretofore carried on by said [Chicopee Society] as part of the activities of said [Springfield Society in Springfield], and all persons who were members of said [Chicopee Society] shall become members of said [Springfield Society in Springfield].[3]

The statute also provided for the transfer of all property of the Chicopee Society, which included bequests, devises and gifts, to the Springfield

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§3.1. [1] 1977 Mass. Adv. Sh. 164, 359 N.E.2d 938.
[2] Acts of 1972, c. 325.
[3] 1977 Mass. Adv. Sh. at 165, 359 N.E.2d at 939.

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Society which was to be vested with all of the powers, rights and privileges possessed by the Chicopee Society with respect to such property.[4]

Persons claiming under the residuary clauses in the wills which created the charitable trusts in question brought suit in probate court, contending that the trusts failed as a result of the merger. The plaintiffs relied upon terms of the trusts which provided for the trusts' termination upon the cessation of specified religious activity by the Chicopee Society. Thus, under the terms of one of the trusts it was provided that the income was "to be applied to the support of Unitarian preaching in Chicopee by the Unitarian Society of said City. If said Society shall fail to continuously support such preaching substantially, the principal to fall into the residue clause of this will."[5] The probate court judge found that following the merger religious services were conducted in Springfield. He therefore concluded that the failure to conduct services in the city limits of Chicopee was fatal to the continuation of the trust.[6] Rejecting this finding, the Supreme Judicial Court concluded that the probate court's construction of the terms of the bequest was "unduly narrow and restrictive and in conflict with our general rule that charitable trusts should be construed liberally."[7] The Court went on to state that

> [t]he dominant intent of the testator was to provide for the perpetuation of Unitarian beliefs among the residents of Chicopee. . . . It is not necessary to require the physical presence of a preacher in a pulpit in Chicopee every Sunday morning to achieve this purpose. The bequest was not conditioned on the continued separate existence of the Chicopee Society.[8]

The Court further pointed out that the merger was brought about because of the substantial decrease in membership in the Chicopee Society and to insure that Unitarian services would continue to be available to the people of Chicopee.[9] The Court therefore stated that "[w]hile the Chicopee Society no longer exists as a separate entity, its religious activities are carried on by the Springfield Society, and we conclude that the Springfield Society has continuously and substantially supported Unitarian preaching within the meaning of the bequest."[10]

The three other trusts litigated in *First Bank and Trust Company* were subject to the following condition: "[I]f the said Unitarian Society ceases to hold religious services as a Unitarian Church Organization, the

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[4] Acts of 1972, c. 325.
[5] 1977 Mass. Adv. Sh. at 167, 359 N.E.2d at 940.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 168, 359 N.E.2d at 940.
[9] *Id.*
[10] *Id.*

bequest given under this clause and those given in paragraphs ten and eleven of this will, shall all of them revert to [the testator's] estate and become a part of the residue of [the testator's] estate. . . ."[11] The probate judge found that these trusts failed as a result of the merger because the Chicopee Society had ceased to hold services as a Unitarian church organization within the meaning of the condition.[12] In reversing this finding, the Supreme Judicial Court pointed out that the Springfield Society was holding services as a Unitarian church organization and as a result of the merger, all members of the Chicopee Society automatically became members of the Springfield Society.[13] The evidence before the probate court judge also indicated that the Chicopee Society was in severe financial difficulty due to the decline in its membership and that the merger was proposed in order to assure that Unitarian services would continue to be available to the residents of Chicopee.[14] Therefore, the Supreme Judicial Court concluded that although the Chicopee Society ceased to exist as a separate organization upon merger, it continued to exist as a part of the merged Springfield Society and to provide religious services for Chicopee residents.[15]

In its liberal construction of this charitable trust, the Court seems to have ignored the intent of the bequests which was to further Unitarian activity *within* Chicopee. Thus, the message is clear that if a testator wishes to create a charitable trust in favor of a religious organization and wishes to condition the trust on the organization's maintaining activity *within* a certain community, that limitation must be expressed unambiguously.

§3.2. Charitable Trusts—Construction—Limitations of Financial Assistance—"Young Men." In *Ebitz v. Pioneer National Bank*[1] the Supreme Judicial Court over Justice Quirico's dissent construed the words "young men" as used in a charitable trust providing for financial assistance to law students as including "young women." Under the terms of his will, the testator provided for the establishment of "The Richard W. and Florence B. Irwin Scholarship Fund."[2] The net income from the fund was to be used "to aid and assist worthy and ambitious young men to acquire a legal education . . . ."[3] Only residents of the city of Northampton were eligible for consideration for assistance from

[11] *Id.* at 169, 359 N.E.2d at 941.
[12] *Id.*
[13] *Id.* at 170, 359 N.E.2d at 941.
[14] *Id.* at 168, 359 N.E.2d at 940.
[15] *Id.* at 171, 359 N.E.2d at 942.

§3.2. [1] 1977 Mass. Adv. Sh. 543, 361 N.E.2d 225.
[2] *Id.*
[3] *Id.* at 544 n.4, 361 N.E.2d at 225-26 n.4.

the fund.[4] However, in the trust the testator expressed his desire to assist as many students as possible.[5] The trust also stated:

> Richard W. Irwin was devoted to Northampton, to which he came as a young man, and where he lived and made for himself an enviable reputation as citizen, lawyer and Judge. He was ably assisted by his wife, Florence Bangs Irwin. Judge Irwin frequently expressed an interest in the educational program of the Knights Templar, of which organization he was a member for many years. It is suggested to my Trustee that it acquaint itself with the educational work of this organization and use its program as a guide in the carrying out of the trust imposed on it under this portion of my will.[6]

The plaintiffs, female law students, made applications to the trustee for assistance from the fund.[7] The trustee rejected their applications on the ground that only male applicants were eligible for consideration. Rejecting the trustee's construction of the trust, the probate judge held that the testator did not intend to exclude female residents of Northampton from eligibility for fund assistance. He therefore construed the term "young men" as used by the testator to include "young women."[8] After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.[9] The majority opinion of the court sustained the finding of the probate judge.[10] The Court stated:

> [t]he term "young men" is unambiguous unless, in the context of the entire instrument, an element of ambiguity is introduced. When such an element of ambiguity appears, we look at the entire trust instrument and to the general scheme it reveals in order to clarify the intended significance of the troublesome term.[11]

The Court found that a reading of the entire trust rendered the term "young men" ambiguous. The Court pointed out that the testator suggested that his trustee use the educational program of the Knights Templar as a guide for carrying out the purposes of the trust.[12] The Court noted, however, that the Knights Templar maintained a trust fund from which it extended loans to students pursuing a higher education, with-

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[4] *Id.*
[5] *Id.* at 545, 361 N.E.2d at 226.
[6] *Id.* at 544 n.4, 361 N.E.2d at 225-26 n.4.
[7] *Id.* at 545, 361 N.E.2d at 226.
[8] *Id.*
[9] *Id.* at 543.
[10] *Id.* at 546, 361 N.E.2d at 226.
[11] *Id.*
[12] *Id.* at 547, 361 N.E.2d at 227. See text at note 6 *supra*.

out regard to sex.[13] Thus, construing the Irwin fund in light of the policies of the Knights Templar, the Court concluded that the testator did not intend to restrict eligibility for grants under the Irwin fund on the basis of sex. In addition, the Court found that the intent of the testator to assist "as many students as possible"[14] and his use of sex-neutral terms throughout the trust implied that the trustee was not to be restricted to awarding financial assistance to male law students. The Court also noted that the testator dedicated the fund not only to Judge Irwin, but also to Florence Irwin, his wife.[15] This again was an indication to the Court that the testator did not intend to limit financial assistance only to male students.

In his dissenting opinion, Justice Quirico found no ambiguity in the use of the term "young men." In his view, even though such a sex-based restriction was currently in disfavor, it was not unlawful.[16] Justice Quirico also expressed his concern as to the possible effects of the Court's decision upon existing instruments. In particular, he reasoned that if "young men" meant "young women" in the case, it would be exceedingly difficult to distinguish other instruments where similar language was used.[17] Justice Quirico concluded by stating that "[i]f the court's decision is 'the product of human impulses', I share those impulses, but I subordinate them to [the testator's] right to impose the restriction limiting the beneficiaries of his trust fund to 'young men'."[18]

Whether or not one agrees with the result advocated by Justice Quirico, it appears that he was correct in recognizing the broader implications of *Ebitz* for other charitable trusts manifesting a facial intent to impose sex-based restrictions. In particular, *Ebitz* indicates that, the lawfulness of such sex restrictions notwithstanding, the Supreme Judicial Court will resolve every conceivable ambiguity against such restrictions.

§3.3. Charitable Trusts: "General Charitable Intent." Under the terms of the trust involved in *Fulton v. Trustees of Boston College,*[1] the trustee was directed "to hold all the remaining assets . . . adding income not expended . . . to principal—until January 15, 2000 A.D., noon, at which time my said Trustee shall turn over said fund and assets to the Trustees of Boston College . . . for the purpose of erection . . .

[13] *Id.*

[14] *Id.*

[15] *Id.* See text at notes 2 & 6 *supra.*

[16] *Id.* at 552, 361 N.E.2d at 229 (Quirico, J., dissenting).

[17] *Id.* at 553, 361 N.E.2d at 229 (Quirico, J., dissenting).

[18] *Id.* at 554, 361 N.E.2d at 229 (Quirico, J., dissenting).

§3.3. [1] 1977 Mass. Adv. Sh. 725, 361 N.E.2d 1297.

of a building for administrative or educational purposes . . . ."[2] The executors filed a federal estate tax return and took a charitable deduction under section 2055 of the Internal Revenue Code.[3] The Internal Revenue Service disallowed the deduction and assessed a tax deficiency on the basis that it was possible that the bequest to Boston College could fail and pass by intestacy.[4]

The plaintiff appealed this determination to the tax court, contending that, as a matter of state law, the bequest would not fail because the bequest indicated a general charitable intent,[5] or, in the alternative, because the doctrine of *cy pres* would apply. The Tax Court recognized that if the bequest would not fail as a matter of state law, the Internal Revenue Service would accept the trust as a qualified charitable bequest.[6] Accordingly, the Tax Court stayed the proceedings pending a determination by the Supreme Judicial Court as to the existence of general charitable intent and as to whether the doctrine of *cy pres* could be applied to the trust.[7]

The Court held "that the charitable trust will not fail in the event circumstances in the year 2000 preclude compliance with its specific provisions,"[8] because of the general charitable intent of the bequest. In particular, the Court concluded that an examination of the trust in its entirety "exhibits a general charitable intent, not only to benefit Boston College but other similar charities. The existence of such an intent is shown by the testator's provision of six other bequests to Catholic charities, all, like Boston College, within the Catholic Archdiocese of Boston."[9] The Court further reasoned that a general charitable intent was also indicated by the failure of the testator to provide for gifts over in the event the trust should fail.[10] Having found that the general charitable nature of the trust would save the trust even if compliance with its provisions would be impossible in the year 2000, the Court found the plaintiff's request that it apply the doctrine of *cy pres* premature.[11]

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[2] *Id.* at 726, 361 N.E.2d at 1298.

[3] I.R.C. § 2055.

[4] 1977 Mass. Adv. Sh. at 726, 361 N.E.2d at 1298.

[5] If a general charitable intent is found, the court will attempt to honor it by liberal construction. If this cannot be done in strict accordance to the terms of the trust, a court will attempt to fulfill the donor's general intent to the extent possible. *See id., citing* Rogers v. Attorney General, 347 Mass. 126, 131, 196 N.E.2d 855, 860 (1964).

[6] This determination is one of state law, and, therefore, a decision of the highest state court is binding on the federal tax authorities. See, e.g., Putnam v. Putnam, 366 Mass. 261, 262 n.2, 316 N.E.2d 729, 731 n.2 (1974).

[7] 1977 Mass. Adv. Sh. at 726, 361 N.E.2d at 1298.

[8] *Id.* at 728, 361 N.E.2d at 1299.

[9] *Id.* at 727, 361 N.E.2d at 1298.

[10] *Id.*

[11] *Id.* at 728, 361 N.E.2d at 1299.

§3.4. Charitable Trusts—Filling Vacant Trusteeships—Role of the Attorney General. The probate court has jurisdiction to fill a vacancy in a trusteeship where no provision is made in the instrument for a successor trustee.[1] In *Frank Wilson, Trustee*[2] the two active trustees of seven charitable trusts petitioned the court to fill the vacancy of a third co-trustee. The Attorney General, however, opposed the appointment of the individual proposed by the petitioners and sought the appointment as co-trustee of a nominee of his own choice.[3] The probate judge found that both the nominees were qualified, but entered a decree appointing the nominee of the two active trustees.[4]

The Attorney General appealed from the probate court's decree, contending that he was entitled to the appointment of his own nominee. In so contending, the Attorney General placed substantial reliance on *Lovejoy, Petitioner.*[5] *Lovejoy* held that where there is a vacancy in the trusteeship of a private trust and the beneficiaries agree upon a qualified successor trustee, "the Probate Court, in the absence of facts strongly indicative of the necessity of a different appointment, should follow the wishes of the parties principally concerned."[6] The Attorney General argued that in a charitable trust he represents all of the beneficiaries, who are the members of the public as a whole.[7] The Court acknowledged this argument but found the present case distinguishable from *Lovejoy,* on which the Attorney General relied.[8] Noting that *Lovejoy* involved a private trust, the Supreme Judicial Court stated that "[i]n the case of a private trust, the compatibility of the trustee with the individual beneficiaries, his sensitivity to their needs and wishes, is highly important. . . . The same kind of intimacy is not needed, and perhaps is not wanted, as between the trustee of a charitable trust and the Attorney General."[9] The Court thus concluded that in the case of a charitable trust providing for plural trustees the factor of paramount importance is not cooperation between the trustees and the Attorney General, but instead cooperation among the co-trustees in the administration of the trust.

The Court also rejected the argument of the Attorney General that he was entitled to have his nominee confirmed by the court since he has

§3.4. [1] *See* 2A Scott, Trusts § 108.2 (3d ed. 1976).

[2] 1977 Mass. Adv. Sh. 692, 361 N.E.2d 1281.

[3] *Id.* at 693, 361 N.E.2d at 1283. The Attorney General is charged with representing the interest of the public in the administration of charitable trusts. *See* Davenport v. Attorney General, 361 Mass. 372, 379, 280 N.E.2d 193, 198 (1972); G.L. c. 12, § 8.

[4] 1977 Mass. Adv. Sh. at 693, 361 N.E.2d at 1283.

[5] 352 Mass. 660, 227 N.E.2d 497 (1967).

[6] *Id.* at 665, 227 N.E.2d at 500.

[7] 1977 Mass. Adv. Sh. at 695, 361 N.E.2d at 1283.

[8] *Id.*

[9] *Id.* at 696, 361 N.E.2d at 1284.

the responsibility for the administration of charitable trusts. The Court held instead that this responsibility does not displace the court's discretion under section 5 of chapter 203 of the General Laws with respect to charitable trusts.[10] The Court based its view on the belief that "the relation between the Attorney General and the court under [section] 5 should be a cooperative one in which the Attorney General offers his views to the court and the court gives them the special consideration due to his official expertness and impartiality."[11]

§3.5. Probate—Final Decrees—Basis for Vacation—Petitions in the Nature of Bills of Review. Prior to the adoption of the Massachusetts Rules of Civil Procedure, after the entry of a final decree the probate court could not revoke or vacate the decree except upon a petition in the nature of a bill of review.[1] During the *Survey* year the Appeals Court decided two cases which arose prior to the adoption of the Rules of Civil Procedure and concerned the circumstances under which a petition to revoke or vacate a decree would be considered in the nature of a bill of review.

In *Olsson v. Waite*[2] the probate court disallowed for probate a signed copy of a will, finding that the original of the will had been destroyed by the testator with the intention of revoking it. The same court subsequently vacated its decree. The bases for this action by the probate judge were the claim by the proponent of the will of his inability to attend the second day of trial and his offer of additional evidence on the issues being litigated.[3] The probate judge also found that the proponent's attorney did not request a continuance which he would have granted.[4] On appeal by the contestant the Appeals Court held that "[t]he instant case does not fall within the purview of a bill of review, . . . nor within any of the exceptions to the general rule. Rather, it falls within a settled application of the general rule, that 'the decree cannot be vacated . . . because the case of the petitioner was not properly presented.'"[5] The original decree disallowing the will was therefore affirmed, and the decree revoking the original decree was reversed.[6]

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[10] *Id.* at 697, 361 N.E.2d at 1284.

[11] *Id.*

§3.5. [1] Kennedy v. Simmons, 308 Mass. 431, 32 N.E.2d 215 (1941). Under Mass. R.C.P. 60(b) the court may now relieve a party or his legal representative from a final judgment order or proceeding for, *inter alia,* mistake, inadvertence, excusable negligence, newly discovered evidence, or fraud.

[2] 1977 Mass. App. Ct. Adv. Sh. 144, 359 N.E.2d 656.

[3] *Id.* at 144, 359 N.E.2d at 657.

[4] *Id.* at 145, 359 N.E.2d at 657.

[5] *Id.* at 146, 359 N.E.2d at 657, *quoting* Sullivan v. Sullivan, 266 Mass. 228, 229, 165 N.E. 89, 90 (1929).

[6] *Id.* at 148, 359 N.E.2d at 658.

In *Naughton v. The First National Bank of Boston,*[7] on the other hand, the Appeals Court held that a petition to vacate a decree was of the nature of a bill of review and that the decree was properly vacated.[8] *Naughton* concerned a decree allowing the accounts of trustees under a will. The decedent died in 1961, and by the residuary clause of his will created a trust for the benefit of an aunt.[9] The trust provided, in relevant part, that the aunt should receive one hundred dollars "a month for life, with full power in the Trustees, in the event of an emergency, to use a portion of the principal which, in their discretion, [s]hould be necessary for her comfort and support, consistent with her standard of living for the past five years."[10] Upon the death of the decedent's aunt the executor of her estate requested payment from the trustees for the expenses of her last illness; the trustees refused to make such payment. A demurrer was sustained in a contract action brought by the executor, and judgment entered for the trustees.[11] Subsequently the executor contested in probate court the allowance of the trustees' accounts.[12] However, the probate court, on March 18, 1970, rendered a decree allowing the accounts as filed. The executor appealed and requested a report of material facts.[13] Because the trial judge had resigned without making a report of material facts, no such report of material facts was ever filed.

In August 1972 the executor filed a petition in probate court to vacate the decree allowing the accounts. In accordance with this petition the trial judge vacated the decree and made findings of fact.[14] The trustees appealed, contending that the executor's claim to reimbursement had no merit.[15] Rejecting the trustees' contentions, the Appeals Court sustained the trial court's action. The court noted that a decree may be revoked "for any reason that would warrant a bill of review in equity,"[16] and reasoned that the resignation of the trial judge prior to filing the report of material facts would be one such circumstance.[17] The court also agreed that the facts of the case were worthy of judicial inquiry, since, although a court will not ordinarily review a trustee's exercise of discretion, an exercise of trustee discretion is nevertheless reviewable to deter-

[7] 1976 Mass. App. Ct. Adv. Sh. 1106, 356 N.E.2d 1224.

[8] *Id.* at 1110-11, 356 N.E.2d at 1227.

[9] *Id.* at 1106-07, 356 N.E.2d at 1225.

[10] *Id.* at 1106 n.1, 356 N.E.2d at 1225 n.1.

[11] *Id.* at 1107, 356 N.E.2d at 1225.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 1108, 356 N.E.2d at 1225.

[15] *Id.*, 356 N.E. 2d at 1226.

[16] *Id.* at 1110, 356 N.E.2d at 1227, *quoting* Agricultural Nat'l Bank v. Bernard, 338 Mass. 54, 57, 153 N.E.2d 761, 763 (1958).

[17] *Id., citing* Brooks v. National Shawmut Bank, 323 Mass. 677, 681, 84 N.E.2d 318, 321 (1949).

mine whether it is "plainly wrong."[18] In *Naughton*, the trustee's refusal to pay any of the expenses of the beneficiary's last illness was thus reviewable to determine if it was "plainly wrong" or an abuse of the trustee's discretion.[19]

In light of the adoption of Massachusetts Rule of Civil Procedure 60(b), *Olsson* and *Naughton* will soon be of primarily historical interest. The language of Rule 60(b) would allow for a broader power to vacate than did the "bill of review" standard of *Olsson* and *Naughton*. It appears that under the new rule, the decrees in both cases would have been vacated.[20]

§3.6. Trusts—Suits for Trustee's Alleged Breach of Fiduciary Duty—Res Judicata. In *Dwight v. Dwight*[1] the testator bequeathed his entire interest in Holyoke Transcript, Inc. (Holyoke), a newspaper, to his second wife. The will also established a trust for the benefit of Henry Dwight, the testator's son by his first marriage. Moreover, the will provided that upon the death of his second wife, one-sixth of the testator's interest in Holyoke would be distributed to the trust.[2] During her lifetime the second Mrs. Dwight, together with her son Willian Dwight, transferred most of the assets of the newspaper from Holyoke to two new corporations, leaving as the only assets of Holyoke the plant and presses formerly owned by the newspaper.[3] Thus, after the second Mrs. Dwight's death in 1957, 132 shares of Holyoke were delivered to the trustee for the benefit of Henry Dwight, but these shares represented only a fraction of the assets formerly owned by that corporation. In October 1957 these 132 shares were sold by the trustee to Holyoke and another corporation, both subject to the control of William Dwight.[4] The plaintiffs in *Dwight*, Henry Dwight's sons and sole heirs, sought recision of the sale[5] alleging that their father and the trustee were induced to make the sale by false representations made by William Dwight. In the alternative, the plaintiffs sought payment of damages by William Dwight.[6] The probate court, however, dismissed the action, holding that a prior action presented a res judicata bar.

In the prior action a guardian *ad litem* appointed to represent the

[18] *Id.* at 1109, 356 N.E.2d at 1226, *citing* Woodberry v. Bunker, 359 Mass. 239, 242-43, 268 N.E.2d 841, 844 (1971).

[19] *See id.* at 1108-09, 356 N.E.2d at 1226, and cases cited therein.

[20] See note 1 *supra.*

§3.6. [1] 1976 Mass. Adv. Sh. 2708, 357 N.E.2d 772.

[2] The facts upon which the case was based are set forth in O'Brien v. Dwight, 363 Mass. 256, 294 N.E.2d 363 (1973).

[3] 1976 Mass. Adv. Sh. at 2710, 357 N.E.2d at 774.

[4] *Id.* at 2709, 357 N.E.2d at 773.

[5] *Id.*

[6] *Id.*

interests of Henry Dwight's grandchildren objected to the allowance of the trustee's first account. By that first account, the trustee received a mere one-sixth of the diminished assets of Holyoke.[7] Alleging that Mrs. Dwight, in transferring assets to the new corporations breached her fiduciary duty to the trusts, the guardian sought an order requiring the defendants to turn over a one-sixth interest in the corporations to which the newspaper business had been transferred.[8] The court agreed that Mrs. Dwight had breached her fiduciary duty and granted the order sought by the guardian.[9] Subsequently the executors of Mrs. Dwight's estate complied with the court's order and transferred the shares in question.

The guardian *ad litem* in the prior action also attacked the sale by the trustee of the 132 shares of Holyoke Transcript, Inc. to that corporation, alleging that the trustee was negligent in relying upon the appraisal made by three appraisers appointed by the probate court, and in selling the shares for the appraised price of $760 per share.[10] The probate court in *O'Brien v. Dwight*[11] held that the trustee would be accountable only if he acted in bad faith or without exercising reasonable skill or judgment, and that in the present case it could not be said the trustee had so acted.

In *Dwight v. Dwight*, the Supreme Judicial Court affirmed the probate court's dismissal of the action and held that its decision in *O'Brien v. Dwight* upholding the sale was res judicata as to the present action.[13] More particularly, the Court relied on the doctrine of merger, which mandates that "[w]hen a valid and final personal judgment is rendered in favor of the plaintiff . . . [t]he plaintiff may not thereafter maintain an action on the original claim or any part thereof. . . ."[14] While the plaintiffs were not parties to the former action, the Court held that their interests were identical with the interests of their children, who were represented by the guardian *ad litem*, and that the transaction was so closely connected to the "'series of connected transactions' out of which the prior claim arose"[15] that it was in effect litigated in the prior action, and any damages suffered could have been claimed in the prior case. Moreover, the Court held that the merger doctrine applied despite the fact that the action in *O'Brien* was for the alleged negligence of the

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[7] 363 Mass. at 271, 294 N.E.2d at 371.
[8] *Id.* at 267, 294 N.E.2d at 371.
[9] *Id.* at 270, 294 N.E.2d at 371.
[10] *Id.* at 274, 294 N.E.2d at 374.
[11] 363 Mass. 256, 294 N.E.2d 363 (1973).
[12] *Id.* at 296, 294 N.E.2d at 386.
[13] 1976 Mass. Adv. Sh. at 2715, 357 N.E.2d at 776.
[14] RESTATEMENT (SECOND) OF JUDGMENTS § 47(a) (Tent. Draft No. 1, 1973).
[15] 1976 Mass. Adv. Sh. at 2714, 357 N.E.2d at 775.

trustee, while the present action was for William Dwight's alleged false representations in inducing the sale. Since there was no evidence that the failure to assert the present claim in the prior case was due to fraud or misrepresentation, the claim was barred.[16]

§3.7. Trusts—Powers of Appointment—Prospective Adoption of Rule 358(e) of the Restatement of Property. The power of a donee of a special power of appointment to appoint the principal to a new trust has received judicial consideration in numerous contexts, and the cases have engendered considerable doubt as to when such an appointment to a new trust is valid.[1] In *Loring v. Karri-Davies,*[2] decided during the *Survey* year, the Supreme Judicial Court has dispelled some of that doubt and indicated that for instruments executed after the date of its opinion[3] the rule applied would be that stated in section 358(e) of the Restatement of Property.

In *Loring,* a trust under the will of the decedent, a Boston attorney, provided that the sum of $250,000 should be held for the benefit of the decedent's daughter "to pay the income quarterly or oftener to . . . [the donee] for life, and upon her death to pay over and convey the principal of the trust property to and among her issue as she may by will appoint, and in default of appointment to her issue then surviving, in equal shares by right of representation."[4] In addition, an inter vivos trust provided that the trustees thereof were . . .

> [t]o pay the whole of the net income of the Trust Estate in semi-annual payments to the said [donee] during her life . . .; and upon the decease of said [donee], upon the further trust to pay over the said Trust Estate . . . discharged and free from trust, to and among her children or issue as she may by her last will and testament appoint, and in default of appointment in equal shares to her children and to the issue of any deceased child by right of representation . . . .[5]

The donee died on August 22, 1974 leaving a will executed December 8, 1969 in which she attempted to exercise the powers of appointment

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[16] *Id.* at 2715, 357 N.E.2d at 776.

§3.7. [1] *See* Hooper v. Hooper, 203 Mass. 50, 59, 89 N.E. 161, 162 (1909) (donee's exercise of power by appointing property in trust held invalid). *Cf.* North Adams Nat'l Bank v. Comm'r of Corps. & Taxation, 268 Mass. 42, 45, 167 N.E. 294, 295 (1929) (exercise valid where language of the special power was broader and gave larger power than in *Hooper*); Greenough v. Osgood, 235 Mass. 235, 241, 126 N.E. 461, 463 (1920) (exercise valid, distinguishing *Hooper* as a case where the donee had mere power of selection amongst children).

[2] 1976 Mass. Adv. Sh. 2607, 357 N.E.2d 11.

[3] That date was November 16, 1976.

[4] 1976 Mass. Adv. Sh. at 2609, 357 N.E.2d at 12-13.

[5] *Id.*, 357 N.E.2d at 12.

by creating two new trusts for the benefit of her children or issue of her deceased children.[6] Each trust was to be terminable upon the happening of a certain event, and the property was to be distributed to the issue of the donee. The question before the Court was whether the donee had validly exercised the special powers of appointment granted under the above-quoted clauses.[7] The Court, citing *Hooper v. Hooper*[8] stated that the issue was to be resolved by a determination of the intention of the donor of the power. The *Loring* Court reasoned that *Hooper* presented an almost identical situation; that the Court there held that in failing to mention further trusts the donor by implication intended an absolute termination of the trust; and that therefore the donee could not validly exercise the power by creating new trusts. The Court thus decided that in the present case the rule set forth in *Hooper* should be followed, since ". . . it is fair to suppose that the [donor] in using the language which appears in the [powers of appointment] 'had in mind the interpretation of similar words and clauses in cases decided in this Commonwealth.' "[10]

While following Massachusetts precedent in the instant case in recognition of the parties' presumed reliance thereon, the Court announced its intention to apply section 358(e) of the Restatement of Property to special powers of appointment in trusts executed after the date of *Loring.*[11] Section 358(e) sets forth a rule more liberal than that of the *Hooper* case. It provides that "[i]f, but only if, the donor does not manifest a contrary intent, the donee of a special power can effectively . . . (e) appoint interests to trustees for the benefit of objects."[12] In support of its adoption of the Restatement rule, the Court noted that the trend of recent decisions is to follow the rule of the Restatement, and that "it would be helpful if the law of this Commonwealth corresponded with the provision of the Restatement . . . ."[13] Consequently, in such instruments executed after the date of *Loring,* unless the donor of the power provides otherwise, the donee of a special power will be able to appoint the property on further trusts.

Justice Braucher, while signifying his agreement with the Court's decision to adopt the rule of the Restatement in future cases, dissented, stating that in his opinion there was a significant difference between the

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[6] *Id.* at 2610, 357 N.E.2d at 13.

[7] *Id.*

[8] 203 Mass. 50, 89 N.E. 161 (1909).

[9] *Id.* at 59, 89 N.E. at 162.

[10] 1976 Mass. Adv. Sh. at 2611, 357 N.E.2d at 13, *quoting* Proctor v. Lacy, 263 Mass. 1, 8, 160 N.E. 441, 443 (1928).

[11] The plaintiff had urged the application of section 358(e) to the instant case. *Id.* at 2612, 357 N.E.2d at 14.

[12] RESTATEMENT OF PROPERTY § 358(e) (1940).

[13] 1976 Mass. Adv. Sh. at 2616, 357 N.E.2d at 16.

language used by the donors in *Hooper* and in the present case. Justice Braucher reasoned that the less restrictive language in the present case warranted a finding that the power was validly exercised.[14]

§3.8. Rights of Holders of Notes Against a Guarantor's Estate—Statute of Limitations—Matured and Unmatured Claims. *Cantor v. Newton,*[1] decided by the Appeals Court during the *Survey* year, involved twenty-three separate actions to recover balances due on certain notes made by two entities, a partnership and a corporation. The notes were of four classes: demand notes, notes payable "on demand, with 30 days notice," long term subordinated notes, and so-called "senior notes."[2] All of the notes except the senior notes had been guaranteed by Goodman.[3] Goodman died in 1967, at which time both the partnership and the corporation were solvent.[4] Goodman's widow was appointed executrix of Goodman's estate, and, after the expiration of a year, distributed the residue of the estate to herself and a bank as co-trustees of two trusts created by Goodman's will. The widow was the beneficiary of the two trusts for her life.[5]

In 1970 the partnership and corporation began to default on the notes, and various holders of the notes filed petitions with the probate court under the then-existing provisions of section 13 of chapter 197 of the General Laws,[6] to require the executrix to retain assets sufficient to pay

[14] *Id.* at 2618-20, 357 N.E.2d at 16-17 (Braucher, J., dissenting).

§3.8. [1] 1976 Mass. App. Ct. Adv. Sh. 1214, 358 N.E.2d 247.

[2] *Id.* at 1215, 358 N.E.2d at 249.

[3] *Id.* The latter were senior to the long term notes.

[4] *Id.*

[5] *Id.* at 1216, 358 N.E.2d at 249.

[6] *Id.* at 1217, 358 N.E.2d at 249. At the time this case was brought G.L. c. 197, § 13 provided:

> A creditor of the deceased, whose right of action does not accrue within one year after the giving of the administration bond, or within such further time as may be allowed by any extension granted under section nine, or in the case of an administrator de bonis non, within the period allowed by section seventeen, may present his claim to the probate court at any time before the estate is fully administered; and if, upon examination thereof, the court finds that such claim is or may become justly due from the estate, it shall order the executor or administrator to retain in his hands sufficient assets to satisfy the same. But if a person interested in the estate offers to give bond to the alleged creditor with sufficient surety or sureties for the payment of his claim if it is proved to be due, the court may order such bond to be taken, instead of requiring assets to be retained as aforesaid. If because of partial distribution already made, or because of inability to sell the real estate of the deceased, the executor or administrator is unable to retain sufficient assets to satisfy the claim in full as finally established, the creditor may enforce his claim for the balance under section twenty-nine, within one year from the final settlement of said estate or from the time when the amount of said balance is finally determined.

the claims. After the executrix filed accounts with the probate court showing that she no longer possessed any such assets, the court dismissed the creditors' petitions.[7]

The holders of the notes filed a bill in equity in the superior court in order to reach the assets of the trust and of its beneficiaries, pursuant to sections 28 and 29 of chapter 197 of the General Laws.[8] Those sections provide that a creditor whose right of action accrues after the settlement of an estate or whose claim could not legally be presented to the probate court, may reach the assets of the trust and beneficiaries. The superior court entered judgment for the holders of the notes, whereupon the widow and trustee appealed.[9] The appellants' primary contention was that the superior court should have held the creditors' claims barred by the applicable statutes of limitations.

With regard to the demand notes the Appeals Court upheld the appellants' contention and held that claims upon such demand notes were barred by the statute of limitations applicable to decedents' estates, since such an obligation is due as soon as the note is delivered.[10] Similarly the notes payable "on demand, with thirty days notice" could have been sued upon for an eleven month period (excluding the 30 day notice period) after the executrix was appointed, and the court therefore held that claims brought after that period were barred.[11]

By Acts of 1976, c. 515, § 18 this section was amended to permit creditors to bring suits under G.L. c. 197, § 29 within *nine* months from the date of final settlement of the estate.

[7] 1976 Mass. App. Ct. Adv. Sh. at 1217, 358 N.E.2d at 250.

[8] G.L. c. 197, §§ 28 & 29 provide as follows:

§ 28. After the settlement of an estate by an executor or administrator, and after the expiration of the time limited for the commencement of actions against him by the creditors of the deceased, the heirs, next of kin, devisees and legatees of the deceased shall be liable in the manner provided in the following sections for all debts for which actions could not have been brought against the executor or administrator, and for which provision is not made in the preceding sections.

§ 29. A creditor whose right of action accrues after the expiration of said time of limitation, and whose claim could not legally be presented to the probate court, or whose claim, if presented, has not been allowed, may, by action commenced within one year next after the time when such right of action accrues, recover such claim against the heirs and next of kin of the deceased or against the devisees and legatees under his will, each of whom shall be liable to the creditor to an amount not exceeding the value of the real or personal property which he has received from the estate of the deceased. But if by the will of the deceased any part of his estate or any one or more of the devisees or legatees is made exclusively liable for the debt in exoneration of the residue of the estate or of other devisees or legatees, such provisions of the will shall be complied with, and the persons and estate so exempted shall be liable for only so much of the debt as cannot be recovered from those who are first chargeable therewith.

[9] 1976 Mass. App. Ct. Adv. Sh. at 1223, 358 N.E.2d at 251.

[10] Id. at 1219-20, 1223, 1227, 358 N.E.2d at 251-53, 255.

[11] *Id.* at 1221-22, 358 N.E.2d at 251-52.

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In the case of the subordinated notes, however, the court found that the requirements of section 28 of chapter 197 were met.[12] Thus, the court affirmed the portion of the decree determining that Goodman's widow and the trustee were liable for their payment, subject to the requirement that the widow was not liable for any amount in excess of what she had received from the trust.[13] In determining that the requirements of section 28 had been met, the court reasoned that the statute of limitations did not bar the note-holders' suits because none of the subordinated notes came due within the period permitted for actions against an executor.[14]

Having found the executrix not liable on the two classes of "demand notes" and liable on the subordinated notes, the court turned to the question of the executrix' liability on the senior notes. The court held that Goodman's estate was not liable on the senior notes because they were executed after Goodman's death. Accordingly, the court reversed the part of the superior court judgment which determined that the holders of the subordinated notes were liable to the holders of the senior notes. In so holding, the court noted that to hold otherwise would have prevented the holders of the subordinated notes from ever realizing on the guaranty.[15] This result would have followed because under the terms of the superior court decree, the holders of the subordinated notes were ordered to pay to the holders of the senior notes all amounts received by them from Goodman's trustees.

§3.9. Wills—Illegitimate Children as Omitted Heirs—Equal Protection. *Hanson v. Markham*[1] involved a constitutional challenge to section 20 of chapter 191. That section provides that "[i]f a testator omits to provide in his will for any of his children, . . . [such omitted children] shall take the same share of his estate which they would have taken if he had died intestate, . . . unless it appears that the omission was intentional . . . ." The section has been construed as applying only to legitimate children.[2] The plaintiff, the illegitimate daughter of a decedent, contended that the statute as construed deprived her of equal protection by not entitling her to the share she would have been entitled to had she been a legitimate child.[3] In so contending she relied on a line of Supreme Court cases establishing that "a State may not invidiously

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[12] *Id.* at 1225, 358 N.E.2d at 253.

[13] *Id.*

[14] *Id.* at 1223-24, 358 N.E.2d at 253.

[15] *Id.* at 1229, 358 N.E.2d at 255.

§3.9. [1] 1976 Mass. Adv. Sh. 2504, 356 N.E.2d 702.

[2] *See* Fiduciary Trust Co. v. Mishou, 321 Mass. 615, 635, 75 N.E.2d 3, 15 (1947); Kent v. Barker, 68 Mass. [2 Gray] 535, 536-38 (1854).

[3] 1976 Mass. Adv. Sh. at 2504, 256 N.E.2d at 702.

discriminate against illegitimate children by denying them substantial benefits accorded children generally."[4]

The Court somewhat summarily rejected the plaintiff's contention that section 20 denied her equal protection of the law, reasoning that the decisions relied on by the plaintiff ". . . have no application to the interpretation of a will and the legal effect of words used."[5] Moreover, the Court stated that:

> The statute here under attack forbids nothing and compels nothing; it merely provides a framework within which private testamentary decisions may be freely made. There would be nothing invidious in a legislative judgment that omission of a legitimate child from a will is an indication of possible mistake but that omission of an illegitimate child is not.[6]

In addition, the Court found that even if section 20 were constitutionally required to be applied to the plaintiff, she would not be entitled to inherit because of the effect of section 5 of chapter 190.[7] Under section 5, an illegitimate child inherits from her mother but not from her father. Thus, if section 20 were made applicable to the plaintiff so that she would have taken as if her father had died intestate, the plaintiff would have come away empty-handed.

Both grounds for the Court holding appear problematic. The second reason advanced by the *Hanson* Court has been rendered unpersuasive, at least as to future cases, by a subsequent decision of the United States Supreme Court. Shortly after *Hanson* was decided, the Supreme Court, in *Trimble v. Gordon,*[8] struck down as violative of the equal protection clause of the fourteenth amendment an Illinois law permitting illegitimate children to inherit only from their mothers. The Illinois provision was almost identical to section 5 of chapter 190 of the General Laws. Thus, the validity and precedential value of the second ground of the *Hanson* opinion seem doubtful at best in the wake of *Trimble.*

Moreover, the Court's reasons for dismissing the plaintiff's equal protection contentions appear less than convincing. For instance, the Court's implication to the contrary notwithstanding, the equal protection clause of the fourteenth amendment would not seem to apply only where a state statute "forbids" or "compels" activity of a particular kind. Thus, it is unclear why the mere fact that *Hanson* involved the

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[4] *Id.* at 2506, 356 N.E.2d at 703.

[5] *Id.* at 2507, 356 N.E.2d at 703.

[6] *Id.*

[7] G.L. c. 190, § 5 provides: "An illegitimate child shall be heir of his mother and of any maternal ancestor, and the lawful issue of an illegitimate person shall represent such person and take by descent any estate which such person would have taken if living."

[8] 430 U.S. 762, 776 (1977).

interpretation and legal effect of a will exempted the plaintiff from the protections of the fourteenth amendment. Moreover, it would appear that "a legislative judgment that omission of a legitimate child from a will is an indication of possible mistake but that omission of an illegitimate child is not," could be viewed as establishing an invidious distinction, despite the Court's declaration to the contrary. Indeed, in *Trimble,* the Supreme Court appeared to cast considerable doubt upon legislative presumptions of intent where the group disadvantaged as a result of the presumption "has been a frequent target of discrimination, as illegitimates have. . . ."[9] Particularly, the Court indicated that with respect to presumptions of intent in such circumstances, "we doubt that a state constitutionally may place the burden on [the disadvantaged] group by invoking the theory of 'presumed intent.' "[10]

§3.10. Lost Will. Some attorneys follow the practice of having a will executed in duplicate. The reason for this procedure is to assure the existence of a duplicate original copy of the will for probate in the event that at the death of the testator the executed original cannot be found. The execution of a single instrument, however, does not prevent an unexecuted carbon copy from being probated if the original is lost.[1]

Under Massachusetts law "when a will once known to exist cannot be found after the death of the testator, there is a presumption that it was destroyed by the maker with an intent to revoke it."[2] Such a presumption may, however, be rebutted by competent evidence to the contrary.

In *Lombard v. Zola*[3] the Appeals Court sustained the decision of the probate court in approving and allowing a tissue executed copy of the decedent's will when the original copy could not be found. The proponent, the decedent's daughter, testified, and the court held that her testimony warranted an inference that the will had not been destroyed.[4]

§3.11. Trusts—Allowability of Charges of Attorney-Trustee. In *Lembo v. Casaly*[1] the Appeals Court reversed a probate court decision surcharging the defendant, an attorney who was serving as sole trustee

[9] *Id.* at 775 n.16.

[10] *Id.* For a further discussion of *Hanson*, see Ortwein, *Constitutional Law, infra* § 10.6, at 215-20.

§3.10. [1] Gannon v. MacDonald, 361 Mass. 851, 279 N.E. 2d 668 (1972).

[2] Smith v. Smith, 244 Mass. 320, 321, 138 N.E. 539 (1923).

[3] 1977 Mass. App. Ct. Adv. Sh. 224, 359 N.E. 2d 1324.

[4] In Olsson v. Waite, 1977 Mass. App. Ct. Adv. Sh. 144, 359 N.E. 2d 656, the court reached an opposite result in sustaining the trial judge's finding that the original will had been destroyed with the intention of revoking it, and thus disallowed a signed copy for probate.

§3.11. [1] 1977 Mass. App. Ct. Adv. Sh. 422, 361 N.E.2d 1314.

of a living trust he created for the plaintiff's decedent, the settlor and original plaintiff in the action.[2]

In 1964 the settlor owned substantial real estate, all of the capital stock of Holliston Realty Co., Inc. (Holliston) and Pinecrest Country Club, Inc. (Pinecrest).[3] Holliston owned substantial real estate, and Pinecrest owned and operated a 13-hole golf course.[4] The settlor was in poor health and in financial difficulty. A mortgage on some of the real estate was in default and foreclosure proceedings had been commenced. In an attempt to extricate himself from his financial difficulties, the settlor retained the services of the defendant to assist him in the managing of his business affairs.[5] At the settlor's suggestion the defendant created a trust under which the defendant was to serve as sole trustee and to be the sole beneficiary.[6] The trust was to continue for a period of ten years, following which its assets were to be sold and distribution made to the settlor. During the term of the trust the net income was to be distributed to the settlor at reasonable times. Following the creation of the trust the settlor transferred his real estate holdings together with his Holliston and Pinecrest stock to the trust.[7]

Under the trust instrument the defendant was authorized to carry on any business operations he might deem necessary. He was also authorized to borrow money on behalf of the trust and pledge or mortgage trust assets to secure the payment of loans made to the trust.[8] The trust instrument also specifically authorized the defendant "to fix reasonable compensation for his own services to the [t]rust . . . [and] to represent the [t]rust . . . in legal proceedings relating to the property of the [t]rust."[9]

The defendant was able to obtain a bank loan in the sum of $150,000.00 on the conditions that the loan be secured by a mortgage on the bulk of the trust properties and that the note be executed by him individually as well as in his capacity as trustee.[10] The settlor agreed that the defendant would be entitled to reasonable compensation for his services in arranging the refinancing, creating the trust and serving as trustee.[11]

The probate court judge disallowed as a matter of law several items

[2] *Id.* at 423, 361 N.E.2d at 1316.
[3] *Id.* at 424, 361 N.E.2d at 1316.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 425, 361 N.E.2d at 1316.
[7] *Id.* at 426, 361 N.E.2d at 1317.
[8] *Id.* at 425, 361 N.E.2d at 1316.
[9] *Id.*
[10] *Id.*
[11] *Id.*

of compensation to which the plaintiff objected.[12] The first item challenged by the plaintiff related to the defendant's fee paid from the proceeds of the bank loan. In the transaction in question the defendant acted for the bank in examining the title to the mortgaged real estate and in preparing closing documents. The master had determined that the defendant did not "specifically" advise the plaintiff that he was acting for the bank. The probate court upheld the plaintiff's objection to this payment on the ground that "profits intentionally derived by the . . . [defendant] from a nondisclosed conflict of interest are impermissible as a matter of public policy and law."[13] The Appeals Court reversed and found that the services rendered by the defendant were necessary and proper to effectuate the closing of the bank loan, payment of which he personally guaranteed.[14] Furthermore, there was no evidence that the defendant concealed his representation of the bank.[15] Therefore the court held that there was nothing improper—absent a contrary provision in the trust—in allowing extra compensation to a trustee who is also an attorney for his performance of legal services in behalf of a trust.[16]

The probate court had also disallowed charges made by the defendant to the trust for (a) his legal services rendered in defending suits against Holliston and Pinecrest; (b) his services in managing the business affairs of Pinecrest as an officer and director; and (c) the services of his office employees who had performed routine fiscal affairs of Pinecrest.[17] The basic ground for the disallowance was that these charges should have been made to and paid by the corporations. In reversing this finding, the Appeals Court stressed that the plaintiff was the sole income beneficiary of the trust and would be the sole distributee at the termination of the trust.[18] Since the purpose of the trust was to benefit the plaintiff's financial condition without regard to the nature of the assets held by the trustee the court concluded that "the trust's paying these items resulted in nothing more startling than loans by the trust to the corporations, loans of a type the defendant was authorized to make under the express provisions of the trust."[19] Since the plaintiff did not suggest that the corporations were incapable of repaying these loans the court concluded that "the plaintiff . . . failed to show any injury to the trust as a whole

[12] *Id.* at 426, 361 N.E.2d at 1317. With regard to each of the disallowed items, however, the master had found that the amount of the charge by the defendant was fair and reasonable.

[13] *Id.* at 427, 361 N.E.2d at 1317.

[14] *Id.*

[15] *Id.* at 428, 361 N.E.2d at 1317.

[16] *Id.* at 427-28, 361 N.E.2d at 1317.

[17] *Id.* at 430, 361 N.E.2d at 1318.

[18] *Id.*

[19] *Id.* at 431, 361 N.E.2d at 1319.

or himself in particular."[20] Thus the court found that the probate court was wrong in surcharging the defendant for these items.[21]

§3.12. **Omnibus Probate Bill.** Chapter 515 of the Acts of 1976, the so-called "Omnibus Probate Bill" ("bill"), became effective January 1, 1978.[1] The bill makes numerous changes in the probate law, practice and procedure of the Commonwealth. The bill has its source in the Uniform Probate Code ("Code").[2] However, the legislature declined to adopt the Code in its entirety. Instead, the approach of the legislature was to adopt those provisions of the Code considered to constitute improvements over prior Massachusetts law.[3] Among the interests the bill seeks to further are "simplicity, clarity, uniformity with other jurisdictions, speeding up the probate process and the settlement of estates, reducing probate expense, avoiding unnecessary complications, bringing the laws of intestacy and construction of wills into line with the expectations of most citizens, and avoidance of traps for the unwary."[4]

Some of the bill's changes relate to substantive rights in decedent's estates, others to the manner in which wills may be made and estates administered. In addition to these substantive and procedural changes, new canons of construction have also been added. This chapter will not discuss all of the bill's provisions, but rather will focus upon several provisions of particular importance. In light of the scope and importance of the changes effected by the bill, the practitioner is encouraged to read the bill in its entirety.

One of the bill's most important changes relates to the share of a surviving spouse of an intestate decedent. Section 2 of chapter 515 amends section 1 of chapter 190 to provide that when an individual dies intestate leaving both a surviving spouse and issue, the surviving spouse will take one-half of the real and one-half of the personal property in the estate. Formerly, a surviving spouse would have been entitled to a one-third share when the decedent left issue.

Certain of the bill's provisions relate to the manner in which wills shall be executed. Section 3 amends section 1 of chapter 191 to provide that wills executed after January 1, 1978 will require two competent witnesses. Prior to the enactment of this change, three witnesses were required. In addition and in accordance with this change, section 5 of the bill amends section 2 of chapter 191 to provide that a devise or legacy

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[20] *Id.*
[21] *Id.*

§3.12. [1] Acts of 1976, c. 515, § 35, *as amended by* Acts of 1977, c. 76.
[2] For a good discussion of the bill's background, see generally Young, *Probate Change,* 20 BOSTON BAR J. 6, 6-8 (December 1976) [hereinafter cited as Young].
[3] *Id.* at 7.
[4] *Id.* at 6.

to a subscribing witness or to a husband or wife of a subscribing witness will be void unless there are two other subscribing witnesses who are not benefited under the will.

Section 4[5] of the bill adds a new section 1A to c. 191 which sets forth rules of construction which will be applicable to wills executed or republished on or after January 1, 1978. Section 1A provides that a will shall be construed under the law of the Commonwealth or another jurisdiction specified by the testator unless the application of that law is contrary to the public policy of Massachusetts.[6] Under this new section, a testator may presumably choose the law which will govern the construction of his will.

Section 1A, in addition, changes the law with respect to bequests of securities.[7] Under its terms, a legatee who receives a bequest of securities will be entitled to as much of the bequeathed securities as are a part of the testator's estate. The legatee will also be entitled to other additional securities of the same issuer owned by the testator as a result of an action initiated by the issuer,[8] and securities of other issuers received by the testator in exchange for the bequeathed securities as a result of a merger, consoldiation, reorganization, or other similar action. These entitlements exist, however, only to the extent that a contrary intent is not indicated by the will.[9] The most significant aspect of the securities provisions of section 1A is their recognition of a legatee's entitlement to securities accruing to the estate as a result of stock splits. In this respect section 1A is a codification of a recent opinion of the Supreme Judicial Court[10] in which the Court overruled its earlier approach to the devisability of securities acquired in stock splits.

Prior to 1973, the Court generally viewed the issue as turning upon whether a devise was intended by the testator to be "general" or "specific." In particular, when a devise was determined to be "general," the executor or administrator of the estate would be required, if the

[5] Subsequent to the *Survey* year, the legislature amended Acts of 1976, c. 5.5, § 4 by deleting clause 1 of G.L. 191, § 1A, which provided:

> A legatee or devisee who fails to survive a testator by one hundred and twenty hours shall be deemed to have predeceased the testator unless the will of the decedent otherwise provides by express reference to survivorship or with respect to simultaneous deaths or common disaster, or by other like provision.

Acts of 1977, c. 637, § 1. This subsequent amendment did not alter the other clauses of G.L. c. 191, § 1A, except insofar as it required their renumbering.

[6] G.L. c. 191, § 1A, cl. 1, *added by* Acts of 1976, c. 515, § 4, *as amended by* Acts of 1977, c.637, § 1.Formerly, the only references in G.L. c. 191 to "choice of law" were those of § 5, which provides that wills executed in accordance with either the law of the testator's domicile or the law of the place where executed, shall be deemed valid.

[7] *Id.*, cl. 3.

[8] Specifically excluded are securities acquired by exercise of purchase options. *Id.*

[9] G.L. c. 191, § 1A, cl. 2.

[10] Bostwick v. Hurstel, 364 Mass. 282, 304 N.E.2d 186 (1973).

shares described in the will were not in the testator's possession at the time of his death, either to purchase the described number of shares or to turn over an equivalent amount in cash.[11] A general devise, however, would not entitle the legatee to receive additional shares issued to stockholders as a result of a stock split which occurred prior to the testator's death. In the case of a "specific" devise, the result was, in effect, the reverse. Thus, if the bequest were deemed specific, the legatee would receive nothing unless the described securities were, in fact, owned by the testator at his death. However, unlike the general legatee, a specific legatee would be entitled to receive shares resulting from a stock split.[12]

The Supreme Judicial Court has expressly rejected the general vs. specific test in dealing with stock splits. In *Bostwick* v. *Hurstel*[13] the Court held that in the absence of an indication of a contrary intent, a legatee of a bequest of stock is entitled to shares of stock received as a result of a stock split occurring between the time of the execution of the will and the testator's death.[14] The decision was based upon the rationale that a stock split is declared by the corporation and the testator has no control over his receipt of such shares.[15] Section 1A, which recognizes the legatee's entitlement to securities owned by the testator or his estate "by reason of action initiated by the issuer" clearly incorporates the holding and reasoning of *Bostwick.*[16]

Section 1A also modifies existing Massachusetts law by providing that a general residuary clause will not exercise a power of appointment created by another instrument unless there is a reference to the power, or an indication of the testator's intention to exercise the power.[17] Previously, it had been held in Massachusetts that a residuary clause will

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[11] Fall River Nat'l Bank v. Estes, 279 Mass. 380, 384, 181 N.E. 242, 244 (1932).

[12] Igoe v. Darby, 343 Mass. 145, 149, 177 N.E.2d 676, 678 (1961).

[13] 364 Mass. 282, 304 N.E.2d 186 (1973).

[14] *Id.* at 292, 304 N.E.2d at 192. Other jurisdictions have adopted a similar rule. *See, e.g.,* Egavian v. Egavian, 102 R.I. 740, 232 A.2d 789 (1967); In Re Harvey Estate, 110 N.H. 484, 272 A.2d 603 (1970).

[15] Another reason proffered by the Court for the result reached was that a stock split does not change the proportionate interest of any stockholder of the corporation. 364 Mass. at 292-95, 304 N.E.2d at 192-3.

[16] The *Bostwick* decision did not consider the question of shares received in exchange for the bequeathed shares as a result of a merger or reorganization. However, the provision of §1A concerning mergers or reorganizations, see text at notes 8-9 *supra,* appears to be an outgrowth of *Bostwick.*In particular, since the testator ordinarily has little control over his receipt of shares received in a reorganization, the *Bostwick* rationale would appear to apply as well in the case of a reorganization as in the case of a stock split. For a further discussion of this subject, see generally *Annotation: Change in Stock or Corporate Structure, or Split or Substitution of Stock of Corporation, as Affecting Bequest of Stock,* 46 A.L.R. 3rd 7 (1972).

[17] G.L. c. 191, §1A, cl. 4, *added by* Acts of 1976, c. 515 § 4, *as amended by* Acts of 1977, c. 637, § 1.

exercise a general power of appointment unless there is an affirmative indication of a contrary intent.[18] In view of this change, those drafting wills for individuals who have been given powers of appointment should be careful to ascertain the client's wishes, and to make specific reference to the power if there is an intent that it is to be exercised.

Finally, section 1A of chapter 191[19] provides that where a testator makes residuary gifts to two or more persons, and the share of one fails for any reason, that share will pass proportionately to the remaining residuary legatees. This provision abrogates the rule previously recognized in Massachusetts according to which a gift of a share of the residue to a person not deemed to be a member of a class would lapse and pass as intestate property. The exception to this rule was the legatee who was a child or other relation of the testator and left issue surviving, in which case the so-called anti-lapse statute would control.[20]

Section 6 of chapter 515 significantly alters the law as to the effect of a testator's divorce upon his or her preexisting will. Prior to the enactment of the bill, the rule in Massachusetts was that divorce would not operate to revoke or modify a will.[21] This rule has been abrogated by section 6 of the bill, which adds a paragraph to section 9 of chapter 191[22] providing that a divorce or annulment which occurs subsequent to the execution of a will, shall operate to revoke any disposition in the will to the former spouse, or any appointment of the former spouse as executor, guardian, conservator or trustee. Moreover, property devised to the former spouse shall pass as if the former spouse had failed to survive the decedent.[23]

Section 7 of the bill specifies that section 22 of chapter 191, the so-called "anti-lapse statute," is applicable to class gifts. Section 22 provides *inter alia*:

> If a devise or legacy is made to a child or other relation of the testator, who dies before the testator, but leaves issue surviving the

[18] Beals v. State Street Bank and Trust Co., 367 Mass. 318, 325-26, 326 N.E.2d 896, 900-01 (1975).

[19] G.L. c. 191, § 1A, cl. 5, *added by* Acts of 1976, c. 515, § 4, *as amended by* Acts of 1977, c. 637, §1.

[20] G.L. c. 191, §22. *See* Buffington v. Mason, 327 Mass. 195, 97 N.E.2d 538 (1951).

[21] Hertrais v. Moore, 325 Mass. 57, 61, 88 N.E.2d 909, 911 (1949).

[22] G.L. c. 191, § 9 provides *inter alia,* that "[t]he marriage of a person shall act as a revocation of a will made by him previous to such marriage, unless it appears from the will that it was made in contemplation thereof." Acts of 1976, c. 515, §6 does not alter the provisions of § 9 as to the effect of marriage upon a will.

[23] G.L. c. 191, § 9, *as amended by* Acts of 1976, c. 515, §6, also provides that "[i]f provisions shall be revoked solely by this section, they shall be revived by the testator's remarriage to the former spouse." Section 9 indicates as well that "[a] decree of separation which does not terminate the status of husband and wife is not a divorce for the purpose of this section."

testator, such issue shall, unless a different disposition is made or required by the will, take the same estate which the person whose issue they are would have taken if he had survived the testator. . . .

Section 7 of the bill adds the following sentence to section 22: "[t]his section shall apply to a devise or legacy under a class gift whether the death occurred before or after the execution of the will."[24] Thus, property left to a class—such as, for example, "my children in equal shares"—will not be divided only among the members of the class surviving at the death of the testator. Rather, the "anti-lapse statute" will apply to preserve a predeceased class member's share for his issue. Section 7, in applying the "anti-lapse statute" to class gifts, constitutes a codification of prior judicial interpretation of the statute.[25]

The bill also addresses situations in which property passes subject to a security interest. Previously, unless the will specifically provided otherwise, a specific devise of real estate subject to a mortgage was deemed to be a devise of only the interest possessed by the testator;[26] the real estate passed to the devisee subject to the mortgage. The rule was otherwise with regard to personal property and the legatee of personal property subject to a security interest was entitled to the property free of any security interest. Section 8 of the bill eliminates this distinction between devises of real and personal property, and amends section 23 of chapter 191 to provide that encumbered property, whether real or personal, will pass to the legatee or devisee subject to any security interest given by the testator "unless the contrary shall plainly appear by [the] will." Moreover, section 23 now provides that the executor or administrator who is required to pay any mortgage or obligation of the testator may apply to the probate court for leave to sell the asset in order to reimburse the estate.

In addition to amending chapter 191 in the aforementioned respects, the bill has also effected changes in chapter 197. Thus, for example, the bill[27] has added section 25A to chapter 197, providing that property given to a pecuniary legatee by a testator subsequent to the execution of the will shall be considered, to the extent of the gift, to have been given in satisfaction of the legacy only if the will so provides; if the testator so declared in a contemporary writing; or if the legatee has so acknowledged in writing.[28]By this enactment the legislature has overri-

[24] Acts of 1976, c. 515, §7.

[25] *See* In Re Stockbridge [Stockbridge, Petitioner], 145 Mass. 517, 520, 14 N.E. 928, 929 (1888).

[26] G.L. c. 191, § 23.

[27] Acts of 1976, c. 515, §21.

[28] § 25A also provides that for purposes of partial satisfaction the property so received will be valued as of the date of the gift or as of the date of the death of the testator,

den the ancient Massachusetts rule that "an advancement of money or goods to a child [of the testator], especially on marriage, is presumed to be an ademption of a legacy, for like money or goods specified in a will previously made by the father, on a presumption that it was so intended."[29]

Sections 9 through 12 of the bill amend chapter 192 to simplify procedures relating to the probate of wills. For instance a will may now be allowed without testimony if it is self-proved by affidavits of the testator and the witnesses, which affidavits are attached to the will at the time of execution.[30] Under this procedure, the testator and both witnesses sign the will and then appear before a notary before whom they are sworn and make oath that the will is the testator's free act and deed; that the witnesses signed as witnesses; and that to the best of their knowledge the testator is over eighteen years of age and of sound mind. This procedure thus avoids the difficulty of securing witnesses at the time the will is offered for probate.

Section 10 of the bill adds four sections to chapter 192[31] relating to the appointment and powers of temporary executors. The temporary executor concept was developed to speed up procedure and avoid delays in probate.[32] Accordingly, section 13 of chapter 192 provides *inter alia*:

> The probate court may, without the necessity of any notice, appoint the executor or executors named in a will, if suitable, temporary executor or executors upon application contained in the petition for probate or made subsequent to the filing thereof, if the testator has requested such appointment, or if said application is assented to in writing by the widow or husband, if any, of the deceased, and by all the heirs at law and next of kin of the deceased of full age and legal capacity.

Section 13 further provides that where the appointment is made at the testator's request without the assent of the described heirs and next of

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whichever occurred first.

[29] Paine v. Parsons, 31 Mass. [14 Pickering] 318, 320 (1833).

[30] G.L. c. 192, §2, *as amended by* Acts of 1976, c. 515, §9. The described procedure applies only where "it appears to the probate court, by the consent in writing of the heirs, or by other satisfactory evidence, that no person interested in the estate of [the] deceased person intends to object to the probate of an instrument purporting to be the will of such deceased,. . ." *Id.* Moreover, in the absence of such objecting persons, the probate court may grant probate of an instrument without testimony if the probate of such instrument is assented to in writing by the widow or husband of the deceased, if any, and by all the heirs at law and next of kin. *Id.*

[31] G.L. c. 192, §§ 13-16, *added by* Acts of 1976, c. 515, §10.

[32] The temporary executor concept was envisioned by the legislature as an alternative to the more liberal Uniform Probate Code concept of "informal probate." Probate judges in the Commonwealth objected to the "informal probate" concept as inviting abuse of trust. *See* Young, *supra* note 2, at 3.

kin, those heirs and next of kin must be given seven days prior written notice of the petitioner's intent to seek the appointment.[33]

Under section 14 of chapter 192[34] the temporary executor will have substantially the powers granted to the executor under the will, which powers will cease upon the appointment of the executor. Under section 16, where the temporary executor and executor are one and the same, the executor may account for the period during which he acted as temporary executor in his account as executor. Section 15 concerns the termination of the powers of the temporary executor and provides that such powers terminate upon approval of the executor or administrator, upon decree of the court, or, in any event, within ninety days of the appointment of the temporary executor. However, section 15 also provides that the probate court has discretion to grant one or more extensions of not more than ninety days each.

The provisions of sections 13, 14, 15 and 16 will be extremely helpful in simplifying administration of estates and will be particularly useful where the decedent operated a business. Practitioners who are drafting wills for such individuals should plan to include a provision requesting that the court appoint the executor to serve as temporary executor while the appropriate notice is being given relative to the appointment of an executor.

Section 14 of the bill amends section 2 of chapter 197 to provide that where an executor has not had notice, within four months after the approval of his bond of claims indicating that the estate may be insolvent, he may upon the expiration of the four month period, pay debts due from the estate. This section is part of a general revision of the procedure for presenting claims against a decedent's estate. Since 1972, creditors of a decedent's estate have been subject to a special "short" statute of limitations which requires that any action be commenced within nine months after the filing of the executor's bond.[35] Section 9 of chapter 197 required that the executor or administrator be served in hand prior to the expiration of the nine month period, or that a notice of the claim and the action be filed with the registry of probate in which the decedent's estate was being administered. This requirement became troublesome where claims were made and the executor or administrator failed to indicate whether or not the claims would be paid. Importantly, section 15 of the bill amends section 9 of chapter 197 so that a creditor may protect himself by mailing or delivering the claim to the personal representative and filing the claim with the registry of probate within

[33] This notice provision appears to have been designed to modify the Uniform Probate Code's concept of total lack of notice. *See* Young, *supra* note 2, at 11.

[34] G.L. c. 192, §14, *added by* Acts of 1976, c. 515, §10.

[35] G.L. c. 197, §9, *as amended by* Acts of 1972, c. 256.

the first four months after the approval of the executor's or administrator's bond. Alternatively, the claimant may bring suit against the executor in any court in which the executor may be subject to jurisdiction; however, such suit must still be commenced within nine months of the date of filing of the executor's or administrator's bond and must be served in hand or an appropriate notice filed with the probate court.[36]

If an executor receives a claim filed within four months of his bond, he will have sixty days within which to notify the claimant of the disallowance of the claim. If no action is taken within this period, the claim will be deemed allowed.[37] If the creditor receives notice of disallowance, he may commence an action within sixty days after mailing to him of such notice or within nine months after the giving of the executor's bond, whichever is the later date. As in the prior statute, the probate court may extend the time for filing an action against a decedent's estate to a time not more than one year from the date of filing of the executor's or administrator's bond. However, application for such an extension must be made within the original nine month period.[38]

In accordance with these changes in procedure, section 21 has been amended to provide that the probate court may require that a legatee or next of kin who demands payment of his share prior to the expiration of the time for commencement of actions by creditors provide a bond to indemnify the executor or administrator against any losses on account of such payment.[39]

Chapter 515 also amends the General Laws by the addition of chapter 199A applicable to the authority of foreign fiduciaries to act in the Commonwealth. Prior to the enactment of the bill, guardians, conservators, executors, or administrators appointed under the laws of a foreign jurisdiction lacked power to act in Massachusetts, or to sue or be sued, except in certain limited instances for the most part set forth by statute.[40] Under the provisions of chapter 199A, a foreign fiduciary may collect debts, and may maintain actions in the Commonwealth[41] provided that no local fiduciary has been appointed, and provided further that he files with the probate court authenticated copies of his appointment and his official bond.[42] Where the conditions set forth in the statute are applicable, a creditor who makes payment to a foreign fiduciary will also be protected.[43] Generally, chapter 199A should have the impor-

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[36] *Id., as amended by* Acts of 1976, c. 515, §15.

[37] *Id.*

[38] *Id.*

[39] *Id.*, § 21, *as amended by* Acts of 1976, c. 515, §20.

[40] *See, e.g.*, Saporita v. Litner, 1976 Mass. Adv. Sh. 2929, 358 N.E.2d 809 (1976).

[41] G.L. c. 199A, §§2, 6, *added by* Acts of 1976, c. 515, §22.

[42] The proviso is set forth in *id.*, §7.

[43] *Id.*, §2.

tant effect of affording increased protection to Massachusetts creditors, debtors and fiduciaries in their transactions with foreign fiduciaries.[44]

[44] *See generally* Young, *supra* note 2, at 16-17.