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Chapter 13: Trusts and Estates

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CHAPTER 13

Trusts and Estates

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§ 13.1. Will Compromise — Fee Agreement. During the *Survey* year in *Richmond v. Wohlberg*[1] the Supreme Judicial Court considered the binding effect of a will compromise agreement upon an administratrix with the will annexed who was appointed subsequent to that agreement. In resolving this issue, the *Richmond* Court examined the authority of an attorney acting as a fiduciary to retain his own law firm as counsel.

In *Richmond,* the testatrix, Ronnie W. Brooker, died in December, 1973 with an estate valued at $122,321.02.[2] Her will provided a $25,000 bequest in trust for the benefit of three minor children of a deceased brother.[3] If the children died before final distribution, the trust property was to be distributed to the residuary legatee, if then living, or to her heirs at law.[4] The rest and residue of the estate was to be distributed to a friend of the testatrix.[5] Stephen Richmond, an attorney, was nominated executor and trustee and petitioned for appointment.[6] He was appointed special administrator.[7]

Two brothers of the testatrix who had not been named in the will objected to the will on the basis that their sister lacked testamentary capacity.[8] During the will contest and the period of special administration, Richmond retained his law firm to represent him.[9] The residuary legatee

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§ 13.1 [1] 385 Mass. 290, 431 N.E.2d 902 (1982).

[2] *Id.* at 291, 431 N.E.2d at 903.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 291, 431 N.E.2d at 903-04.

[9] *Id.* at 291, 431 N.E.2d at 904.

was also represented, but the minor trust beneficiaries were not, and no guardian ad litem was appointed.[10] During trial the parties agreed to settle their claims and entered into a compromise agreement, which in pertinent part provided for Janet Wohlberg's appointment as administratrix of the estate and trustee.[11] In return, Richmond obtained an agreement concerning counsel fees payable to his firm.[12] The contestants agreed to pay Richmond's firm $28,000 plus disbursements without contest, and the agreement was memorialized in a letter written by Richmond's counsel.[13] Although the fee agreement was not incorporated into the compromise agreement submitted to the Probate Court, it was reported to the probate judge when the the compromise was presented.[14] The judge approved the compromise and appointed Wohlberg as administratrix with the will annexed.[15]

Richmond then filed his fourth and final account reflecting payment of legal fees and disbursements to his firm in the amount of $28,726.80.[16] Wohlberg and a brother of the testatrix filed timely objections to the "validity and effect of the fee agreement."[17] A guardian ad litem was appointed to represent the minor trust beneficiaries and he concluded that he would not "take any position relative to these objections, particularly as the rights of the beneficiaries of the trust have not been adversely affected."[18] A second probate judge concluded that the fee agreement was enforceable against Wohlberg based upon findings that the fee agreement was "an integral part of the settlement" of the will contest, that the parties had reported it to the first probate judge in conjunction with the presentation of the compromise, and that it "did not affect the ability of the estate to fund [the] trust."[19] A judgment was entered allowing Richmond's account and additional counsel fees and expenses incurred in the defense of his account.[20]

Wohlberg appealed the decision of the second probate judge, claiming that the arrangement between Richmond and his own law firm for legal services in his capacity as special administrator was improper and resulted in an excessive charge against the estate for counsel fees.[21] In addition, Wohlberg argued that the compromise agreement was unen-

[10] *Id.*
[11] *Id.* at 292, 431 N.E.2d at 904.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 293, 431 N.E.2d at 904.
[19] *Id.*
[20] *Id.*
[21] *Id.*

forceable as a matter of policy to the extent it authorized the payment of fees by Richmond.[22] Richmond contended that Wohlberg had no standing to attack the compromise agreement.[23]

The Supreme Judicial Court rejected Richmond's claim that Wohlberg lacked standing to challenge the fee agreement and noted that Wohlberg should be able to question whether the agreement is illegal or contrary to public policy.[24] As the person who must carry out the compromise agreement, the Court observed, Wohlberg has a considerable legal interest in the agreement's validity.[25] The Court continued, however, by observing that Wohlberg could not challenge the agreement's validity by raising third party claims such as those of the minor trust beneficiaries who were not represented in the compromise negotiations.[26]

Before considering the effect of the compromise agreement itself, the Court stated some general principles.[27] The Court reviewed the statutory method available to parties disputing the distribution of an estate,[28] and concluded that Richmond complied with proper procedure in this case.[29] The Court then restated the principle that a valid compromise is binding upon an executor or administrator and necessarily upon a subsequently appointed executor or administrator as well.[30] Accordingly, the Court considered the validity of the compromise agreement, including the accompanying fee agreement, to be the primary issue before it.[31]

The Court analyzed Wohlberg's claim that the fee agreement was unenforceable as a matter of policy based upon her contention that the arrangement between Richmond and his firm amounted to such a serious conflict of interest "that the agreement sanctioning it must be held void."[32] The Court rejected this reasoning and cited *Chase v. Pevear*[33] for the proposition that it "is not *per se* improper for a lawyer acting as a special administrator to retain his law firm to perform legal services for the estate he represents."[34] Furthermore, the Court stated, even if such conduct involved a conflict of interest and a resulting breach of trust as claimed by Wohlberg, the agreement authorizing payment of such fees

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[22] *Id.* at 294, 431 N.E.2d at 905.
[23] *Id.* at 295, 431 N.E.2d at 905.
[24] *Id.* at 295, 431 N.E.2d at 905-06.
[25] *Id.* at 295, 431 N.E.2d at 906.
[26] *Id.*
[27] *Id.* at 294, 431 N.E.2d at 905.
[28] *Id.* at 294-295, 431 N.E.2d at 905.
[29] *Id.* at 296-97, 431 N.E.2d at 906-07.
[30] *Id.* at 295, 431 N.E.2d at 905.
[31] *Id.*
[32] *Id.* at 296, 431 N.E.2d at 906.
[33] 1981 Mass. Adv. Sh. 905, 419 N.E.2d 1358.
[34] 385 Mass. at 296, 431 N.E.2d at 906.

would not necessarily be invalid and unenforceable.[35] The Court observed that such an agreement might be invalid only if there was not full disclosure or some other special circumstances not present in this case.[36]

The Court also rejected Wohlberg's argument that the compromise precluded judicial review of the fee arrangement.[37] The Court recognized that in situations where a fiduciary employs himself or his firm, there is a need for "careful scrutiny" of the fees.[38] The Court found that in this case, however, the need for review was satisfied.[39] The first probate judge had been made aware of the fee agreement, the Court noted, and he had approved it.[40]

Finally, the court rejected Wohlberg's claim that Richmond used coercion and overreached in his insistence on the fee arrangement as a condition to his signing the will compromise agreement.[41] Again, the Court emphasized Richmond's full disclosure of the fee to the probate court and the interested parties, and noted that Richmond did not use his position to gain approvals of matters which were not the subject of the negotiations such as prospective assent to his accounts.[42] The Court also observed that it had been the contestants, and not Richmond, who had generated the need for the legal fees paid to Richmond's firm.[43]

§ 13.2. Income Taxation of Estate and Trust Income. During the *Survey* year in *Springall v. Commissioner of Revenue*[1] the Appellate Tax Board decided that income received by a Massachusetts estate which was payable to a Massachusetts trust for a non-resident beneficiary is subject to Massachusetts income tax under chapter 62, section 9 of the General Laws because the income was, in effect, held for a person who was a Massachusetts resident.[2] The Board characterized the pour-over trust as a "person" residing in Massachusetts.[3] Noting that the underlying prop-

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[35] *Id.* at 297, 431 N.E.2d at 906.

[36] *Id.* at 297, 431 N.E.2d at 907.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 297-98, 431 N.E.2d at 907.

[40] *Id.*

[41] *Id.* at 298, 431 N.E.2d at 907.

[42] *Id.*

[43] *Id.* The Court also upheld the probate court's award of counsel fees and expenses to Richmond for defense of his accounts. *Id.* at 299, 431 N.E.2d at 907-08 (citing Berkshire Trust Co. v. Booth, 317 Mass. 331, 335, 58 N.E.2d 161, 163 (1944)).

§ 13.2. [1] 3 Mass. Supp. 804 (October 25, 1982).

[2] *Id.* at 807.

[3] *Id.* at 805 (citing G.L. c. 62, § 10 (e)). One of the trustees was a Massachusetts resident and the trust was created by a Massachusetts resident who died a domiciliary of Massachusetts. Therefore, the trust was a Massachusetts trust, subject to the taxing jurisdiction of the Commonwealth.

erty which earned the income had never been actually transferred to the trustees, the Board refused to consider the "pass through" nature of the trust.[4] It relied upon the general principle of law that estates, trusts and beneficiaries all constitute separate and distinct legal entities to find that they are also separate taxable entities.[5]

The appellants were the executors under the will of deceased Massachusetts resident, Cyrus F. Springall.[6] The residue of the Springall estate poured over to the appellants as trustees of an inter vivos trust created by the decedent.[7] The estate received dividend and interest income of $7,513.89 in the calendar year 1976.[8] This estate income subsequently was transferred to the trustees of the inter vivos trust and thereafter was transferred to the donor's wife, Marjorie L. Springall, who was domiciled in Connecticut in 1976.[9] In 1979, the Commissioner assessed an additional tax on this interest and dividend income, which with interest amounted to $882.93.[10] The appellants applied for an abatement.[11] The Commissioner denied the abatement for the following reasons:

1. The estate is a taxable entity subject to income taxation per Massachusetts General Laws, chapter 62, section 9.
2. The residuary beneficiary of the estate is a Massachusetts inter vivos trust and as such is a separate taxable entity subject to income taxation under Massachusetts General Laws, chapter 62, section 10.
3. Estate income is accumulated for or payable to a Massachusetts inter vivos trust and as such is fully taxable.[12]

The appellants appealed this denial to the Board.[13]

The Board agreed with the Commissioner that the trust was a Massachusetts trust and, therefore, a Massachusetts resident for purposes of applying the tax statute.[14] General Laws, chapter 62, sections 9 and 10 in

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[4] *Id.* at 806. *See* G. NEWHALL, SETTLEMENT OF ESTATES § 86, at 18 (4th ed. 1958), which states in part: "[T]he title is in the executor or administrator and he must make a formal transfer before it can vest in an heir or legatee. . . . Where the executor is also trustee certain other formalities are required in order that the transfer to himself as trustee shall be complete."

[5] 3 Mass. Supp. at 806. "This distinction between the individuality of the estate on one hand and an intervening trust on the other is recognized both by the Internal Revenue Code and Massachusetts law under chapter 62." *Id.*

[6] *Id.* at 804.

[7] *Id.* at 805.

[8] *Id.* at 804.

[9] *Id.* at 804-805, 807. "The vagueness of [the written] stipulation leaves the Board in doubt as to what actually happened as between the executors and trustees concerning their practice of transferring property in these two capacities." *Id.* at 807.

[10] *Id.* at 804-05.

[11] *Id.* at 805.

[12] *Id.* at 805.

[13] *Id.* at 804.

[14] *Id.* at 805.

support of this conclusion.[15] The executors argued, however, that the true basis for Massachusetts tax liability is the residence of the ultimate beneficiary under the trust and that, for income tax purposes, the separate existences of the estate and trust should be ignored.[16] The Board rejected this contention and agreed with the Commissioner that the "essential and fundamental difference" between the decedent's estate and his inter vivos trust could not be ignored for income tax purposes.[17] The Board observed that the Supreme Judicial Court had stressed the separate existence of a trust and its grantor for taxation purposes in *Dexter v. State Tax Commission*.[18] The Board determined that the same approach should be followed as to the separate estate entity.[19] It noted the vast administrative differences between estates and trusts and found it to be significant that the

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[15] *Id.* at 805. Chapter 62, as amended, and applicable to this case, provides in part:

Section 9. The income received by the estates of deceased residents shall be subject to all the taxes imposed by this chapter to the extent that the persons to whom such income is payable, or for whose benefit it is accumulated are residents of the Commonwealth. . . .

. . .

Section 10. The income received by trustees or other fiduciaries shall be taxed in the following manner:

(a) The income received by trustees or other fiduciaries described in subsection (c) of this section shall be subject to the taxes imposed by this chapter to the extent the persons to whom the same is payable, or for whose benefit it is accumulated, are inhabitants of the Commonwealth;

. . .

(c) The provision of subsections (a) and (b) of this section shall apply to guardians and conservators appointed by a Massachusetts court; trustees under the will of a person who died an inhabitant of the Commonwealth; and trustees under a trust created by a person or persons one of whom was an inhabitant of the Commonwealth at the time of the creation of the trust or at any time during the year for which the income is computed, or who died an inhabitant of the Commonwealth, any one of which trustees or other fiduciaries is an inhabitant of the Commonwealth.

[16] 3 Mass. Supp. at 806. "The appellants argue that the taxes assessed to the executor under chapter 62, section 9 are provided only as a matter of convenience." *Id.*

[17] *Id.* at 806.

[18] *Id.* at 806 (citing Dexter v. State Tax Commission, 350 Mass. 380, 215 N.E. 2d 94 (1966)). In *Dexter* the Court said: "Nevertheless, legal title to the trust property (and trust income before its distribution) is in the trustee and the transfer in trust is an event of significance until and unless the trust is revoked." 350 Mass. at 385, 215 N.E.2d at 98-99. The *Dexter* case involved a grantor/beneficiary who sought to disregard the separate existence of the trust and to take a trust deduction as a personal deduction because of the "economic realities of the situation." *See* 350 Mass. at 382, 215 N.E.2d at 96-97.

[19] 3 Mass. Supp. at 806. "Significant periods of time might have passed before title to the property was actually transferred to the trustees and under the executors' broad powers, many changes in the assets might have occurred." The Board indicated that part of its rationale was based on the fact that the Commissioner should not have to track down every receipt of fiduciaries to determine in whom it will eventually vest. *Id.*

underlying property which gave rise to the income in question was not shown to have been transferred to the trustees during the pertinent time period.[20] The Board pointed out the importance of actual formal transfer by executors, administrators and trustees.[21]

The decision of the Board is currently on appeal to the Supreme Judicial Court and due to the impact which this decision would have on fiduciary income taxation, if upheld, the Massachusetts Bankers Association has filed an amicus curia brief supporting the executors of the Springall estate. The decision constitutes a significant change in the scheme of taxation of estates and trusts and in fact is contrary to the Regulations of the Department of Revenue which in principle state that the taxation of fiduciary income in Massachusetts is controlled by the status of the beneficiary or beneficiaries who ultimately will enjoy the income.[22] Massachusetts fiduciaries and their legal advisors should be alert for the Supreme Judicial Court's decision.

§ 13.3. Update on the Prudent Fiduciary Rule. In the 1981 decision of *Chase v. Pevear*[1] the Supreme Judicial Court reaffirmed the "prudent fiduciary rule"[2] of trust investments which it originally announced in

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[20] *Id.* at 806-07.

[21] *Id. See supra* note 18.

[22] *See* MASS. ADMIN. CODE tit. 830, § 9.02, *Method of Taxation of Trust.* These regulations, in pertinent part, provide:

> (1) *General.* Although in Massachusetts the trust and not the beneficiary is the taxpayer, the actual tax liability is controlled by the status of the beneficiary.
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> (2) *Character of Beneficiaries.*
>
> (a) *Resident Beneficiaries.* To the extent that trust income is payable to or accumulated for the benefit of resident beneficiaries, all income is taxable to the trust in Massachusetts.
>
> (b) *Non-Resident Beneficiaries.* Where trust income is payable to or accumulated for the benefit of non-resident beneficiaries, only the net income derived from professions, trades or businesses carried on in the Commonwealth is taxable to the trust.
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> . . .
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> (i) *Trust as Beneficiary.* Where a trust subject to the taxing jurisdiction of Massachusetts has income payable to, or to be accumulated for another trust, the incidence of taxation is to be determined by the character of the beneficiaries of the latter trust. . . ."

See also MASS. ADMIN. CODE tit. 830, § 9.04(1), *Estates,* which states: "The treatment of estates for Massachusetts income tax purposes is substantially the same as that of trusts set forth in [title 830, sections 9.01 through 9.03]."

§ 13.3. [1] 1981 Mass. Adv. Sh. 905, 419 N.E.2d 1358 (1981).

[2] The "prudent fiduciary rule," also known as the "prudent man rule" or the "prudent trustee rule," was originally enunciated in Harvard College v. Armory, 26 Mass. (9 Pick.) 446 (1830). *See* Connolly, *Trusts and Estates,* 1981 ANN. SURV. MASS. LAW § 9.1., at 210-15. Although *Amory* involved a trustee, the rule in fact applies to all fiduciaries in their

Harvard College v. Amory.[3] During the *Survey* year the investment principles set forth in *Chase* were applied in two Probate Court decisions, providing further guidance and instruction to fiduciaries faced with the responsibility of acting in a prudent manner with respect to investment decisions.

The first decision, *In Re New England Merchants National Bank of Boston*,[4] involved challenges by a guardian *ad litem* to the acquisition of two securities, the retention of seven securities and the timeliness of the sale of seven securities by a common trust fund managed by Bank of New England, N.A. The probate court ruled in favor of the trustee with respect to all objections raised. In doing so, the court applied several principles emphasized by the *Chase* court regarding prudent investment and paid particular attention to the investment decision making process which the trustee had established and to which the trustee had adhered in its investment decisions.

The probate court focused initially on the application of the prudent fiduciary rule to trust investments. The court concluded as a matter of law that the rule is a standard which "avoids inflexibility of definite classification of securities, disregards the optimism of the promotor and eschews the exuberance of the speculator. It holds fast to common sense and depends on practical experience."[5] A trustee "must exercise prudence in making or retaining each investment and is chargeable with any loss by failing to do so."[6]

In the case before it, the court found that the trustee employed prudence, care and common sense in its use of and adherence to lists of appropriate trust investments. The court referred to these lists as "careful

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investment decisions. For this reason and in view of more modern parlance, the rule is referred to here as the "prudent fiduciary rule." The prudent fiduciary rule was originally stated as follows:

> all that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested.

26 Mass. (9 Pick.) at 461.

[3] 26 Mass. (9 Pick.) 446 (1830). *See* Connolly, *supra* note 2, at § 9.1, for an in-depth discussion of the *Chase* decision and the prudent fiduciary rule.

[4] Suffolk Probate and Family Court No. 410,090 (Warner, J., November 23, 1982) [hereinafter cited as New England Merchants].

[5] New England Merchants, *supra* note 4, at 21. This language originally appeared in Kimball v. Whitney, 233 Mass. 321, 331, 123 N.E. 665, 666 (1919), and is quoted in the *Chase* decision, 1981 Mass. Adv. Sh. at 917, 419 N.E.2d at 1365.

[6] New England Merchants, *supra* note 4, at 21 (quoting Chase v. Pevear, 1981 Mass Adv. Sh. 905, 919, 419 N.E.2d 1358, 1366). *See also* Creed v. McAleer, 275 Mass. 353, 362, 175 N.E. 761, 764 (1931).

and comprehensive."[7] The trustee maintained two lists: 1) a "working list" which included only stocks which the trustee's Investment Policy Committee and the trustee's Trust Committee had judged to be appropriate and attractive for purchase for its trust accounts; and 2) a "guidance list" which contained stocks judged to be sound but not as attractively priced for purchase as the stocks on the working list. The working list was further divided into categories designated "general use," which were appropriate for all equity portfolios, and "approval required," which were purchased only if appropriate for the particular trust fund.[8] The trustee's investment staff continually monitored the stocks on these lists and the Trust Committee reviewed each decision to add or delete a stock from a list, to move a stock from one list to another, and to designate a stock as one recommended for sale.[9]

After carefully studying the circumstances of acquiring, retaining and selling each common stock to which the guardian *ad litem* objected, the probate court noted that of the various securities challenged by the guardian *ad litem* only two securities were recommended for sale during the accounting periods before the court and that each was sold promptly after the "sell" designation was applied.[10] With respect to one security, the sales took place on several different dates between nine and fourteen days following imposition of the "sell" designation. The sales occurred withing twelve days of such designation with respect to the other security.[11] The probate court did not specifically state that it considered such intervals reasonable, but such a finding is implicit in the court's decision.[12]

In addition, the probate court noted that each security whose retention was challenged was listed on either the working list or the guidance list during the accounting periods before the court.[13] The two securities whose acquisition was challenged were both listed on the working list at the time of acquisition.[14] The probate court also reiterated a policy set forth in *Chase* that a fixed number of years is not required before a security is considered "seasoned" and therefore acceptable.[15]

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[7] New England Merchants, *supra* note 4, at 9.

[8] *Id.* at 5-6.

[9] *Id.* at 7.

[10] *Id.* at 8.

[11] *Id.* at 18-19.

[12] See the probate court's Conclusions of Law No. 5 and No. 10. *Id.* at 21 and 22.

[13] *Id.* at 8.

[14] *Id.* One security was designated for general use by all equity portfolios while the other was designated "approval required" because it paid no dividend and therefore was not an appropriate investment in accounts which required current yield. *Id.* at 8.

[15] *Id.* at 12. *See* Chase v. Pevear, 1981 Mass. Adv. Sh. 905, 922-924, 419 N.E.2d 1358, 1368-69.

The trustee also established certain policies and strategies for its trust accounts. These policies included the decision for its common trust funds to increase holdings of liquid assets such as commercial paper, Treasury Bills and certificates of deposit to twenty or thirty percent of the common trust fund. The policy was instituted in order to be in a position to purchase more equities when the recession of the early 1970's abated.[16] The guardian *ad litem* challenged the sale of two securities which were sold to establish the cash reserves in accordance with this policy. The probate court held that these sales resulted from the exercise of a good faith judgment in pursuance of the trustee's cash reserve goal and, therefore, that such sales were prudent.[17]

The second decision, *In Re State Street Bank and Trust Company*,[18] presented an analogous situation in which a guardian *ad litem* had challenged certain investments by the State Street Bank as trustee of its Equity Common Trust Fund. In its finding that the bank had acted properly with respect to the guardian's objections, the probate court carefully reviewed the investment decision making process established by the bank and found that the bank had adhered to the process in managing the common trust fund. The court concluded that "the trustee in making investment decisions affecting the trust, was required to act in good faith and in the exercise of sound discretion and was not required to guarantee the success of each of its investments or to sell stocks at their peak prices."[19]

These two probate court decisions reflect at least one judge's view of the factors which are relevant to the application of the prudent fiduciary rule in Massachusetts. They represent important authority for the practitioner who may be faced with the preparation of a case involving questions of prudent investments or with advising a Massachusetts fiduciary on the establishment of a satisfactory investment decision making process.

§ 13.4. Bequest to Spouse of Subscribing Witness. Under General Laws, chapter 191, section 2, a bequest to the spouse of a necessary subscribing witness to a will is void. During the *Survey* year in *Dorfman v. Allen*[1] the Supreme Judicial Court determined[2] that section 2[3] is constitutional. The

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[16] New England Merchants, *supra* note 4, at 8-9.

[17] *Id.* at 19.

[18] Suffolk Probate and Family Court No. 463,343 (Warner, J., November 23, 1982).

[19] *Id.* at 44.

§ 13.4. [1] 386 Mass. 186, 434 N.E.2d 1012 (1982).

[2] Because of a procedural deficiency in the reservation and report of the case from the Probate and Family Court, the Supreme Judicial Court only stated its views with respect to the two questions of law presented. *See infra* text accompanying note 14.

[3] The case involved G.L. c. 191, § 2, before its amendment by Acts of 1976, c. 515, § 5.

Court also decided that the voided bequest should pass under the will rather than by intestacy because the will provided for a gift over to the issue of the beneficiary whose bequest was voided.

By a will executed March 24, 1965, and a codicil executed November 1, 1976, the testator left the entire residue of his estate, if his wife did not survive him by thirty days, in equal shares to his daughters, Muriel and Iris, and their issue by right of representation.[4] The law in effect when the will and codicil were executed required three subscribing witnesses to a will.[5] Also, General Laws, chapter 191, section 2, as then in effect, provided that a beneficial devise or legacy to a subscribing witness or to the spouse of a subscribing witness was void unless there were three other subscribing witnesses who were not similarly benefitted under the will.[6] Both the will and the codicil were subscribed to by three witnesses, but in both cases one of those witnesses was the husband of the testator's daughter Muriel.[7]

The testator died December 28, 1976, and his wife did not survive him by thirty days.[8] Because Muriel's husband was a necessary subscribing witness to both the will and the codicil, chapter 191, section 2 voided the residuary bequest to Muriel.[9] At the time of the testator's death, Muriel had two issue, both her children.[10]

A will dispute was commenced in the probate court.[11] The probate judge reported two questions of law to the Appeals Court, pursuant to General Laws, chapter 215, section 13.[12] The Supreme Judicial Court,

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[4] 386 Mass. at 137, 434 N.E.2d at 1013.

[5] G.L. c. 191, § 1, before its amendment by Acts of 1976, c. 515, § 3, required three subscribing witnesses to a will. The 1976 amendment, made effective with respect to decedents dying on or after January 1, 1978, changed the number of required subscribing witnesses to a will from three to two.

[6] G.L. c. 191, § 2, before its amendment by Acts of 1976, c. 515, § 5, read:

> Any person of sufficient understanding shall be deemed to be a competent witness to a will, notwithstanding any common law disqualification for interest or otherwise; but a beneficial devise or legacy to a subscribing witness or to the husband or wife of such witness shall be void unless there are three other subscribing witnesses to the will who are not similarly benefitted thereunder.

The 1976 amendment, made effective January 1, 1978, substituted the number "two" for the number "three" in the second clause.

[7] 386 Mass. at 137, 434 N.E.2d at 1013.

[8] *Id.*

[9] *See* Rosenbloom v. Kokofsky, 373 Mass. 778, 369 N.E.2d 1148 (1977).

[10] 386 Mass. at 137, 434 N.E.2d at 1013.

[11] *Id.* at 136, 434 N.E.2d at 1012.

[12] G.L. c. 215, § 13, as amended through Acts of 1975, c. 400, § 400, § 59, reads:

> A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all questions of law therein for consideration of the appeals court, and thereupon like proceedings shall be had as upon appeal. And if, upon making an interlocutory judgment, decree or order, he is of opinion that it so

after ordering direct review on its own initiative, ruled that the report to the Appeals Court was procedurally deficient because the probate court had made no judgment, decree or order and had not reported the entire case.[13] For this reason the report had to be discharged, but because the parties had raised and briefed the issues before the Supreme Judicial Court, the Court stated its views.[14]

In response to the argument of Muriel and her children that chapter 191, section 2 violated the equal protection and due process clauses of the federal and state constitutions, the Supreme Judicial Court reasoned that because the statute does not implicate a suspect class or a fundamental interest, it is constitutional if rationally related to a permissible legislative objective.[15] The Court found that the statute is reasonably related to two permissible objectives: 1) reducing the potential for perjury; and 2) protecting testators from overreaching by subscribing witnesses who, through their spouses, could benefit under the will.[16]

The second question was whether the voided bequest should pass by the will or by intestacy. The statute is silent as to where a voided bequest devolves.[17] The Court observed the general rule that a void residuary bequest to a legatee who is not a member of a donee class passes by the law of intestacy,[18] except where the testator has created a gift over.[19] Here the testator had left the residue of his estate to his daughters Muriel and Iris "and their issue by right of representation," clearly creating a gift over to Muriel's issue if Muriel did not survive the testator.[20] The question was whether the will demonstrated the testator's intention to create a

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affects the merits of the controversy that the matter ought, before further proceedings, to be determined by the appeals court, he may report the question for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties.

[13] 386 Mass. at 138, 434 N.E.2d at 1014. *See* Curran, petitioner, 314 Mass. 91, 94, 49 N.E.2d 432, 434 (1943): In the Matter of Jones, 379 Mass. 826, 828 n.2, 401 N.E.2d 351, 354 n.2 (1980).

[14] *See* In the Matter of Moe, 385 Mass. 555, 557 n.2, 432 N.E.2d 712, 716 n.2 (1982); *See also* In re Maldonado, 364 Mass. 359, 366, 304 N.E.2d 419, 424 (1973) (defective report under G.L. c. 231, § 111).

[15] See Weinberger v. Salfi, 422 U.S. 749, 768-69, 776-77 (1975); Dandridge v. Williams, 397 U.S. 471, 485 (1970); Pinnick v. Cleary, 360 Mass. 1, 14 n.8, 271 N.E.2d 592, 601 n.8 (1971); McQuade v. New York Cent. R.R., 320 Mass. 35, 38, 68 N.E.2d 185, 187 (1946).

[16] 386 Mass. at 139, 434 N.E.2d at 1014.

[17] *Id.* at 139, 434 N.E.2d at 1014.

[18] *See* Derby v. Derby, 252 Mass. 176, 147 N.E. 842 (1925); Lyman v. Coolidge, 176 Mass. 7, 56 N.E. 831 (1900); Powers v. Codwise, 172 Mass. 425, 52 N.E. 525 (1899); Sohier v. Inches, 78 Mass. (12 Gray) 385 (1859).

[19] *See* Gustafson v. Svenson, 373 Mass. 273, 366 N.E.2d 761 (1977); Leary v. Liberty Trust Co., 272 Mass. 1, 171 N.E. 828 (1930).

[20] G.L. c. 190, § 8, defines "right of representation" to include nonsurvival.

gift over to Muriel's issue if the gift to Muriel failed for another reason.[21] The Court concluded that although the testator did not contemplate failure of the bequest to Muriel if she survived him, the language of the residuary bequest demonstrated the testator's intention that Muriel's issue should be substituted for Muriel if she should be unable to take her bequest.[22] In support of its decision, the Court noted that by attempting to dispose of all his property under the will and codicil, the testator had evidenced an intent to avoid intestacy and that the decision was consistent with the principle that a construction of a will resulting in intestacy should be avoided unless plainly required.[23]

The Court in *Dorfman v. Allen* reached a sensible conclusion as to the proper devolution of a bequest under a will voided by chapter 191, section 2 in the face of legislative silence in the statute. As noted by the Court, the decision in *Dorfman* gives effect to the testator's intent to avoid intestacy while upholding the statute's policy of voiding bequests to interested witnesses to a will.

§ 13.5. Apportionment of Estate Taxes — Fractional Share Gifts. In *First National Bank of Boston v. Judge Baker Guidance Center,*[1] the Massachusetts Appeals Court examined the issue of estate tax apportionment when the testator's will is silent with respect to the estate taxes payable by each devisee and legatee of the decedent's estate.[2] In addition, the Appeals Court considered whether a gift phrased as "one-third (1/3) of the trust property held by . . . [the trustee] on the day of the Donor's decease" is a fractional share gift thereby participating in fluctuations in the value of the trust property after the donor's death.[3] With respect to the estate tax apportionment issue, the Appeals Court concluded that General Laws, chapter 65A, section 5, as in effect in 1976 for decedents dying on or after January 1, 1976,[4] requires qualified charities which are residuary legatees "to contribute to the payment of estate taxes owing on account of the pre-residuary and residuary taxable shares of the probate estate and trusts even though the share received by the charities is not subject to tax."[5] With respect to the second issue, the Appeals Court

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[21] 386 Mass. at 140, 434 N.E.2d at 1015.

[22] *Id.*

[23] *See* Lyman v. Sohier, 266 Mass. 4, 8, 164 N.E. 460, 462 (1929).

§ 13.5. [1] 13 Mass. App. Ct. 144, 431 N.E.2d 243 (1982).

[2] *Id.* at 150, 431 N.E.2d at 247.

[3] *Id.* at 145, 431 N.E.2d at 244.

[4] G.L. c. 65A, § 5 was amended by Acts of 1976, c. 415, § 88 and Acts of 1976, c. 515, § 1. These amendments, however, did not affect the issue involved in this case.

[5] 13 Mass. App. Ct. at 145, 431 N.E.2d at 244.

concluded that the phrase in question does constitute a fractional share gift which participates in fluctuations in value of the estate after the decedent's death.[6]

The decedent died on December 30, 1976. Her gross estate for estate tax purposes included the assets of two inter vivos trusts established by her and property over which she exercised a testamentary power of appointment.[7] The major portion of the decedent's probate estate passed by the residuary clause of her will. According to the terms of this clause, the decedent's second cousin received one-third of the residue and three charities shared equally in two-thirds of the residue.[8]

One inter vivos trust provided that after certain specific legacies, the trust property passed one-third in trust for the decedent's adopted daughter, one-third to the decedent's second cousin and the remaining portion in equal shares to the same three charities.[9] The other inter vivos trust provided for certain specific legacies, including one in trust for the decedent's adopted daughter, and directed distribution of one-third of the remaining trust property to the second cousin and two-thirds of the remaining trust property in equal shares to the three charities.[10]

The power of appointment which the decedent exercised had been created by a codicil to the will of the decedent's mother and applied to property held in trust for the benefit of the decedent for her lifetime.[11] The decedent exercised her general power of appointment and directed disposition of the trust property as a part of the residue of her estate. Thus, the decedent's second cousin shared in one-third of this property and the three charities shared equally in the remaining two-thirds.[12]

A. ESTATE TAX APPORTIONMENT

The decedent's will directed that "any inheritance and federal estate taxes due upon property passing under the provisions of this will . . . shall be paid from the residue of my estate."[13] Each trust provided for estate tax payment by instructing that the trustee "shall pay that proportion of

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[6] *Id.*

[7] *Id.* at 145, 431 N.E.2d at 244-45.

[8] *Id.* at 146, 431 N.E.2d at 245.

[9] *Id.* at 147, 431 N.E.2d at 245.

[10] *Id.*

[11] *Id.* at 145-146, 431 N.E.2d at 245. For reasons not discussed in the Appeals Court's opinion, the parties entered into a stipulation receiving probate court approval that sixty percent of the property subject to the power of appointment was disposed of as if the decedent possessed a general power of appointment. *Id.* at 146, n.4, 431 N.E.2d at 245 n.4. This portion is the power of appointment property discussed in the Appeals Court opinion.

[12] *Id.* at 146, 431 N.E.2d at 245.

[13] *Id.* at 147, 431 N.E.2d at 245-46.

any inheritance and federal estate taxes levied on the Donor's gross estate determined for federal estate tax purposes which the property passing under this indenture of trust bears to the total amount of the Donor's gross estate."[14] Because the decedent's will and both trusts provided that each was responsible for a pro rata share of the total estate tax, the issue before the Appeals Court was not the manner in which the total tax bill was to be apportioned among them. Rather, the issue was which of the beneficiaries under each instrument must bear the burden of that share of the total tax.[15]

The Appeals Court concluded that General Laws, chapter 65A, section 5 requires the non-taxable charitable residuary shares of the probate estate and of the two inter vivos trusts to contribute to payment of the estate taxes due on account of the taxable pre-residuary and residuary shares of these portions of the decedent's estate.[16] In practical terms, this result means that "the residues of the probate estate and of the inter vivos trusts are to be charged with the payment of the taxes which must be calculated before the residue is divided."[17] In addition, the court found that the charitable and non-charitable beneficiaries of the residue of the probate estate were the recipients of the property subject to the decedent's exercised power of appointment and, as such, each must bear a *pro rata* share of the tax attributable to the power of appointment property.[18]

In reaching these conclusions, the Appeals Court agreed with the non-charitable beneficiaries that chapter 65A, section 5 is a limited equitable apportionment statute. In other words, "it only apportions the burden of the total tax among the probate and nonprobate portions of an estate to avoid placing the entire tax obligation on the residue of the probate estate."[19] The Appeals Court rejected the contention of the charities in this case that section 5 provides for total equitable apportionment. The court would not interpret section 5 to require that assets which do not generate any estate tax do not bear any portion of the estate tax.[20]

The Appeals Court analyzed the language of section 5 and, in particular, the effect of a 1948 amendment to the statute.[21] Prior to the 1948 amendment, the method of apportionment directed by the statute took into account exemptions and deductions from the estate tax.[22]The amendment directs that the proportionate share of the total tax generated

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[14] *Id.* at 147, 431 N.E.2d at 246.
[15] *Id.* at 149-150, 431 N.E.2d at 247.
[16] *Id.* at 155, 431 N.E.2d at 250.
[17] *Id.*
[18] *Id.* at 154-55, 431 N.E.2d at 249-50.
[19] *Id.* at 150, 431 N.E.2d at 247.
[20] *Id.* at 150-51, 431 N.E.2d at 247.
[21] Acts of 1948, c. 605, § 1.
[22] 13 Mass. App. Ct. at 151, 431 N.E.2d at 248.

by the probate estate shall "be charged to and paid from the general funds of the estate."[23] The Appeals Court relied on the decision in *Weingartner v. North Wales*[24] to determine the effect of the 1948 amendment. The *Weingartner* Court found that after the 1948 amendment, "there is to be no statutory apportionment of the Federal estate tax on property passing by will. The executor is to make the payment, and is to make it from the residue."[25] The Appeals Court also looked to the decision of the United States Supreme Court in *YMCA v. Davis*[26] for the proposition that a charity as the residuary beneficiary of an estate does not defeat the payment of estate taxes from the estate residue.[27] The Appeals Court found no public policy in Massachusetts which mandates otherwise.[28]

The Appeals Court also contrasted section 5(3) with section 5(1) in connection with the decedent's probate estate[29] and with section 5(2) in connection with the property passing by the inter vivos trusts[30] and the exercise of the power of appointment.[31] With respect to property passing by the inter vivos trusts, the Appeals Court found that the language of section 5(2)[32] treats the apportionment of taxes on trust property the sames as property passing by will.[33] In doing so, the Appeals Court noted that "[i]n today's estate planning, it is not reasonable to conclude that a will is always of greater significance than an instrument creating an inter vivos trust."[34] The apportionment of taxes with respect to the property passing by the exercised power of appointment is also governed by section 5(2).[35] Section 5(3), in contrast to sections 5(1) and 5(2), expressly provides for equitable apportionment with respect to property passing otherwise than under a will or by virtue of an inter vivos trust or by the exercise or nonexercise of a power of appointment. Section 5(3)

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[23] *Id.* at 151, 431 N.E.2d at 248. The present language in G.L. c. 65A, § 5(1) is the same as the language inserted by the 1948 amendment.

[24] 327 Mass. 731, 101 N.E.2d 132 (1951).

[25] *Id.* at 734-35, 101 N.E.2d at 134, *quoted in* 13 Mass. App. Ct. at 151-52, 431 N.E.2d at 248. This was the common law in Massachusetts prior to enactment of the apportionment statute in 1943. *See Weingartner v. North Wales*, 327 Mass. 731, 734, 101 N.E.2d 132, 134 (1951).

[26] 264 U.S. 47 (1924).

[27] 13 Mass. App. Ct. at 152, 431 N.E.2d at 248.

[28] *Id.*

[29] *Id.* at 151-52, 431 N.E.2d at 248.

[30] *Id.* at 152-53, 431 N.E.2d at 248.

[31] *Id.* at 154, 431 N.E.2d at 249.

[32] G.L. c. 65A, § 5(2) provides that the estate tax attributable to property passing by inter vivos trust shall be "charged to and paid from the corpus of the trust property."

[33] 13 Mass. App. Ct. at 152, 431 N.E.2d at 248.

[34] *Id.* (quoting *First National Bank v. Shawmut Bank*, 378 Mass. 137, 143, 389 N.E.2d 1002, 1006 (1979)).

[35] *Id.* at 154, 431 N.E.2d at 249.

further provides that any apportionment made under it shall be in accordance with federal apportionment laws.[36] The Appeals Court relied on the specific reference to equitable apportionment in section 5(3) to conclude that the Massachusetts Legislature, by omitting such a reference, specifically intended not to provide for equitable apportionment in sections 5(1) and 5(2).[37] In addition, the Appeals Court noted that where the testator's instruments are silent, the federal estate tax has always been charged against the residue.[38]

In conclusion, the Appeals Court stated that it was not necessary to ascertain the decedent's intent regarding the apportionment of taxes among the beneficiaries of each portion of her estate. The silence in her instruments as to this factor did not "create an ambiguity or conflict of terms where none otherwise exists."[39] The Appeals Court, therefore, was not willing to presume that the decedent could not have intended the result reached by the court's decision, namely, an increase in the amount of the taxes on her estate.[40]

In *First National Bank* the Appeals Court mentioned two practical pointers for estate planners. First, the court observed that the Massachusetts estate tax apportionment statute only applies where the testator's intruments are silent.[41] Thus, if statutory apportionment is not desired, the draftsperson can, and should, specifically direct the desired objective in the will and other instruments.[42] Second, the Appeals Court noted that the problems created by a gift to charity as part of the residue such as the need for circular computations to determine the total estate tax, and the reduction, or even elimination, of the residue designated all or in part for charity where the residue bears the burden of estate taxes, may be avoided when charitable gifts are expressed as specific or general gifts in the instrument.[43] The points made by the Appeals Court should remind practitioners to focus on the apportionment of estate taxes when drafting to avoid unintended results.

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[36] G.L. c. 65A, § 5(3) provides in part that estate taxes not apportioned in accordance with sections 5(1) and 5(2) shall "be equitably apportioned among and charged to and paid by the recipients and beneficiaries of property or interests included in the measure of such tax and passing or arising otherwise than under the will of the decedent or by virtue of such trust [an inter vivos trust] or by the exercise or nonexercise of any such power of appointment in the proportion that the net amount of such property or interests bears to the amount of the net estate. . . ."

[37] 13 Mass. App. Ct. at 153, 431 N.E.2d at 249.

[38] *Id.*

[39] *Id.* at 153-54, 431 N.E.2d at 249.

[40] *Id.* at 154, 431 N.E.2d at 249.

[41] *Id.* at 155, 431 N.E.2d at 249-50.

[42] *Id.* at 155, 431 N.E.2d at 250. The Appeals Court referred to 2 W. NOSSAMON & J. WYATT, TRUST ADMINISTRATION AND TAXATION § 39.13 (rev. 2d ed. 1980). *Id.*

[43] 13 Mass. App. Ct. at 154, 431 N.E.2d at 249. Again, the Appeals Court referred to W. NOSSAMON & J. WYATT, *supra* note 42, at § 39.13.

B. FRACTIONAL SHARE GIFTS

One inter vivos trust, after providing for certain specific gifts, directed the trustee to "set aside one-third (1/3) of the trust property held by it *on the day of the Donor's decease*" in trust for the decedent's adopted daughter, to "distribute one-third (1/3) of the trust property held by it *on the day of the Donor's decease*" to the decedent's second cousin and to "distribute the rest, residue, and remainder of the trust property held by it *on the day of the Donor's decease*" to the three charities in equal shares.[44] The decedent's adopted daughter focused on the language "on the day of the Donor's decease" in the description of her share to support her contention that her share must be valued as of the date of the decedent's death. She argued, therefore, that despite the downward fluctuation in value of the entire trust property since the date of the decedent's death, she is entitled to one-third of the value of the trust on that date.[45] The charities argued that the legacies to the decedent's adopted daughter and to the decedent's second cousin are fractional share gifts and therefore participate in fluctuations in value of the trust property occurring since the date of the decedent's death.[46]

The Appeals Court agreed with the charities on this issue and found that the phrase in question was not contrary to the decedent's intention, manifest from the instrument itself, to make fractional share gifts of the trust property.[47] In support of its decision, the Appeals Court noted that if the phrase "on the day of the Donor's decease" was deemed determinative, the residue as well as the gifts to the decedent's adopted daughter and second cousin would require valuation as of that date. If this were the case, no share would be affected by the fluctuations in the trust's value occurring since the date of death because the description of all shares used this phrase. In the words of the Appeals Court, this interpretation "produces an impossible result."[48]

§ 13.6. Undue Influence. In *Erb v. Lee*,[1] the Massachusetts Appeals Court upheld a probate court decree disallowing a petition for the probate of a will. The probate court judge found that the decedent testatrix was without testamentary capacity when the will was executed and that the will was not the free act of the decedent but the result of her house-

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[44] 13 Mass. App. Ct. at 155-56, 431 N.E.2d at 250 (emphasis added).
[45] *Id.* at 156, 431 N.E.2d at 250.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 157, 431 N.E.2d at 251.

§ 13.6. [1] 13 Mass. App. Ct. 120, 430 N.E.2d 869 (1982).

keeper's undue influence.[2] The Appeals Court held that there was sufficient evidence to support the probate judge's finding of undue influence, but did not address the issue of testamentary capacity.[3]

In *Erb*, the grandson of Mary Buzzell, the decedent, opposed the allowance of the petition for the probate of the decedent's last will. The will provided that most of Buzzell's property would pass to her housekeeper, Florence Bates, with the remainder passing to her church.[4] Buzzell had hired Bates in late 1969 or early 1970 when the decedent was approximately eighty-five years old.[5] Buzzell was mentally alert at that time, but her physical condition was deteriorating and she required help to maintain her independence at home.

As time went on, the relationship between Buzzell and Bates became strained. In the summer of 1973 Bates began to harass Buzzell for money, furniture and personal things.[6] In addition, Bates discussed with the rector of Buzzell's church a cash gift made by Buzzell and stated that the church should not have received the money.[7] Eventually Buzzell dismissed Bates and hired a replacement for her. After her dismissal, Bates made frightening phone calls to Buzzell at all hours of the day and night to harass her about money Bates claimed was due her.[8]

Approximately five months after her dismissal, Bates resumed her duties as Buzzell's housekeeper.[9] In August of 1974, Buzzell executed a new will which named Bates as its principal beneficiary.[10] At the time of execution, Buzzell was asked if Bates discussed the will with her and she answered, "No. . .she [Bates] stated that she didn't want a cent from me."[11] Her lawyer asked whether Bates had asked her to make this will, and she responded in the negative.[12] When asked if Bates had ever asked to be left any of her money in a will, the decedent replied, "No, she will be surprised by this. I think that this will surprise her very much."[13] There was no indication after the will was executed that any trouble existed between Buzzell and Bates or between Buzzell and her grandson. Buzzell was admitted to a nursing home in the summer of 1975. She died on November 26, 1978.[14]

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[2] *Id.* at 120, 430 N.E.2d at 870.
[3] *Id.* at 126, 430 N.E.2d at 872.
[4] *Id.* at 120, 430 N.E.2d at 870.
[5] *Id.* at 121, 430 N.E.2d at 870.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 122, 430 N.E.2d at 870.
[10] *Id.* at 123, 430 N.E.2d at 871.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 124, 430 N.E.2d at 871.

The Appeals Court held that the evidence presented and the permissible inferences therefrom supported the probate judge's finding of undue influence.[15] The court noted that it could reverse a judge's finding based on evidence only when it is plainly wrong, in other words, when the evidence, with every reasonable inference which can be drawn from it, is insufficient to warrant the findings.[16] The court reasoned that in determining whether the Buzzell was subject and susceptible to Bates's influence the judge could have considered Buzzell's weakened mental condition, especially in light of the intimate relationship that existed between Bates and Buzzell.[17] The court pointed out that evidence of the mere opportunity to exert undue influence over the decedent would not alone be sufficient, but whereas in the case before it there was other evidence presented, the finding of undue influence was warranted. The court cited as significant Bates' domineering personality and her harassing requests for money and property.[18] The court concluded that these events, followed by the drastic change in the will after Bates brought herself back into Buzzell's employ, supported a finding that the will's execution was the result of Bates' undue influence over the decedent.[19]

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[15] *Id.* at 124, 430 N.E.2d at 872.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 126, 430 N.E.2d at 872.
[19] *Id.*