

INTRODUCTION

2014 Developments

In the last year there have been two major cases that impact estate planning attorneys in Massachusetts:

- In *Morse v. Kraft*, 466 Mass. 92, 992 N.E.2d 1021 (2013), the Supreme Judicial Court of Massachusetts ruled for the first time in this state that the trustees of an irrevocable trust have the legal authority to decant (pour) the assets of one trust to another trust with different terms. This case and its planning ramifications are discussed in § 13.42.
- In *U.S. v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808, 57 Employee Benefits Cas. (BNA) 1577, 118 Fair Empl. Prac. Cas. (BNA) 1417, 2013-2 U.S. Tax Cas. (CCH) ¶50400, 111 A.F.T.R.2d 2013-2385 (2013), the United States Supreme Court struck down section 3 of the Defense of Marriage Act (DOMA) as unconstitutional. This means that same-sex married couples now have the same rights as other married couples to take advantage of the benefits that the federal laws and regulations afford. *Windsor* and its consequences are discussed in more detail in § 26.2.

Rev. Proc. 2013-35 (Nov. 18, 2013). In Rev. Proc. 2013-35, the Internal Revenue Service announced the annual inflation adjustments for 2014. The annual exclusion for gifts remains at \$14,000. The annual exclusion for gifts to a spouse who is not a United States citizen rises to \$145,000. The basic exclusion from federal gift, estate, and generation-skipping transfer tax rises to \$5.34 million. The amount used to reduce the net unearned income reported on a child's tax return subject to the "kiddie" tax remains at \$1,000.

2013 Developments

The American Taxpayer Relief Act of 2012

President Obama signed the American Taxpayer Relief Act of 2012 (ATRA 2012) on January 2, 2013. The provisions of ATRA 2012 are effective for tax years beginning after December 31, 2012. One of the most important features of ATRA 2012 for high net worth taxpayers is its treatment of the estate, gift, and generation-skipping tax rates and lifetime exemption amount. The rate was scheduled to increase to 55% on January 1, 2012, and the exemption was to decrease to \$1 million. Instead, the exemption will continue at \$5 million for the estate, gift, and generation-skipping taxes and the maximum tax rate will

increase to 40% from the 35% that was in effect for 2011 and 2012. The \$5 million amount is indexed for inflation after 2011 and is \$5.25 million for 2013. This exemption also remains portable between spouses so a surviving spouse can use that part of the exemption that was not used by the previously deceased spouse, subject to the same limitations that have been applicable for 2011 and 2012. The rates and lifetime exemption amount are now “permanent” in the sense that there is not a fixed date at which they automatically change.

Portability is one of the significant changes in the law that came into place with TRA 2010 and was maintained in ATRA 2012. The concept of portability is one that estate planning attorneys should continue to pay significant attention to.

The issue of whether to rely on portability, whether to rely on credit shelter trusts, or whether to rely on a combination of both through the use of a post-mortem disclaimer will be one of the most important planning issues going forward. In addition to evaluating these choices for new clients, it is important to review existing clients’ plans as, for example, they may have fully funded their credit shelter trusts which may no longer be the best course of action. In evaluating the choices, it is important to remember that the federal gift and estate tax exemptions are portable; the federal generation-skipping exemption is not portable. It is also important to remember that the Massachusetts estate tax exemption is not portable.

Portability has real benefits. It is simple. It is not necessary to retitle any assets. There is a stepped-up income tax basis of the assets at the death of the first spouse and a stepped-up income tax basis again when the surviving spouse dies. Portability could work very well for a client who has a significant retirement planning asset as retirement planning assets are cumbersome when distributed to a trust. Administration can be complex and expensive. Portability has its downsides too. It is not available for federal generation-skipping tax purposes, it is not certain that the law allowing portability will remain in effect, and the deceased spouse’s unused exclusion amount (DSUEA) is not indexed for inflation.

Funding the credit shelter trust (rather than relying on portability) has its own set of benefits. It removes the future appreciation of the assets from the surviving spouse’s taxable estate, provides a certain level of asset protection, and controls the disposition and distribution of the assets. If the client is concerned about a surviving spouse’s subsequent remarriage and ability to redirect the assets, the credit shelter trust provides much more certainty as to the direction of the assets. From a multi-generational planning point of view, the use of the credit shelter trust is superior to relying on portability as it allows for the

INTRODUCTION

utilization of each spouse's federal generation-skipping exemption. Since the Massachusetts estate tax exemption is not portable, the credit shelter trust allows each spouse to be able to fully utilize the Massachusetts estate tax exemption. Possible disadvantages of relying on the credit shelter trust include the ongoing administrative expenses and tax returns. In addition, the income tax basis is stepped up at the death of the first spouse, not twice—at the death of the first spouse and the death of the second spouse.

In evaluating the decision as to whether to favor portability, credit shelter trust, or both, it is also important to understand and monitor the titling and the positioning of the assets so that there is an ability to implement the plan along the planned course. It is as important to monitor these choices and the positioning and title of the assets as it is to establish the initial plan.

Rev. Proc. 2012-41 (Nov. 5, 2012). In Rev. Proc. 2012-41, the Internal Revenue Service announced the annual inflation adjustments for 2013. The annual exclusion for gifts rises to \$14,000. The annual exclusion for gifts to a spouse who is not a United States citizen is \$143,000. The amount used to reduce the net unearned income reported on a child's tax return subject to the "kiddie tax" is \$1,000.

The New Massachusetts Uniform Trust Code (MUTC)

Governor Deval Patrick signed the Massachusetts Uniform Trust Code (MUTC). The effective date of the MUTC was July 8, 2012, supplanting Article VII of the Massachusetts Uniform Probate Code which governed trusts. The MUTC was enacted as Chapter 203E of the Massachusetts General Laws. (See St. 2012, c. 140, § 56.) This law is modeled on the Uniform Trust Code (UTC). The Uniform Trust Code has been adopted in 23 states and the District of Columbia. Committee comments are available for each section of the MUTC.

The goal of the MUTC is to codify much of the existing law. This law applies to express trusts (charitable or non-charitable) of a donative nature and trusts that are created pursuant to a judgment or decree that requires the trust to be administered in the manner of an express trust. The distinction between inter vivos and testamentary trusts is eliminated. It creates new default rules for trusts. The MUTC is not intended to replace the common law of trusts in Massachusetts except where the MUTC modifies it.

Most of the provisions in the MUTC deal with the manner in which trusts are administered and not with how trusts are drafted. The MUTC provides for the concept of virtual represen-

tation by which persons may represent other persons if they have an identical interest in judicial actions and non-judicial settlement agreements. It is hoped that virtual representation will speed the time by which court decisions are reached.

The MUTC will provide support for non-judicial settlement agreements and it will allow the court to reform or terminate an irrevocable trust with the consent of the settlor and all beneficiaries, even where the action would alter substantive provisions or be inconsistent with the material purposes of the trust.

The MUTC will provide the court with considerable leeway to modify a trust for changed circumstances. The MUTC will give the trustees of a trust the power to divide and combine trusts for generation-skipping transfer tax purposes. The MUTC will give standing to the donors of charitable trusts to bring court proceedings to enforce the terms of the trust. It will provide limitations on beneficiaries' actions against trustees.

The MUTC allows for the creation of "purpose" trusts—that is trusts for specific non-charitable purposes rather than for specific non-charitable beneficiaries and for pet trusts.

Under the prior law, trusts were presumed to be irrevocable unless the trust stated otherwise; under the MUTC, trusts will be presumed to be revocable unless otherwise stated. Under the prior law, a trust that was silent on the issue presumed that actions of the trustees must be unanimous. Under the MUTC, when the trust is silent on the issue it is presumed the actions of the trustees may be by majority vote. These changes apply to trusts created after the MUTC effective date.

It allows for directed trusts in which certain powers may be granted to persons other than the trustees.

The MUTC contains a new rule that requires the power of an agent under a durable power of attorney to amend, revoke, or distribute trust property, or to update the terms of the trust, be expressly authorized in both the trust document and the durable power of attorney. This provision applies to all trusts established before and after the MUTC effective date.

The MUTC imposes a duty on the trustee to provide information to "qualified beneficiaries" and keep them "reasonably informed." The trustee must provide qualified beneficiaries with his or her name and address within 30 days of acceptance of the trust or when the trust becomes irrevocable, whichever is later. The trustee must also send an accounting of the trust to qualified beneficiaries who request it. The duty to inform applies to all trusts in existence before and after the effective date of the MUTC. From a practical point of view, this can be problematic because the settlor of the trust may not want the beneficiary to know about the trust. It is likely that the issue of what constitutes compliance with this provision will be the topic of discussion for years to come. These concepts are discussed in greater

INTRODUCTION

detail in Chapter 13, Trusts.

The MUTC provides that a trust with a spendthrift provision that restricts a beneficiary from assigning his or her interest must restrict both voluntary assignments as well as involuntary actions such as a creditor's attachment. This rule applies only to trusts created after the MUTC effective date and cannot be drafted around.

The MUTC and its ramifications are discussed in much greater detail in Chapter 13, Trusts.

2012 Developments

The New Massachusetts Uniform Probate Code

The new Massachusetts Uniform Probate Code (MUPC) brings in sweeping changes to the ways that guardianships, conservatorships, probate estates, and probate trusts will be administered. The provisions that pertain to guardianships and conservatorships were in effect as of July 1, 2009. The most significant development in 2012 is that the provisions that pertain to estates and trusts (which were originally supposed to be effective January 1, 2012) became effective on March 31, 2012. More details about the MUPC are found below in the section pertaining to 2009 Developments.

The MUPC applies to pre-existing governing instruments but it does not apply to the instruments that became irrevocable prior to the effective date. For the most part all trusts, including those irrevocable before the effective date, will be administered in accordance with the provisions of the MUPC. The MUPC will also apply to any court proceedings that are pending on, or commenced after its effective date, regardless of the date of death of the decedent unless the court finds that the former procedures should apply to a certain matter.

The forms in these volumes have been updated to take the new MUPC into account.

2011 Developments

Estate Planning Under the 2010 Tax Act:

Summary of Major Changes and Overview of Planning Opportunities

On December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (known as TRA 2010). TRA 2010 significantly changed the federal gift and estate tax. This impacts estate plan-

ning for many of our clients and presents significant estate planning opportunities. TRA 2010 is scheduled to remain in effect until December 2012.

Over the past 15 years there have been significant changes in the federal transfer tax system. The federal transfer tax system incorporates the federal gift tax, the federal estate tax, and the federal generation-skipping tax.

Prior to TRA 2010, the federal gift tax exemption was \$1 million per person and the federal estate and generation-skipping transfer exemptions were \$3.5 million per person. In essence, that meant that an individual could make taxable gifts totaling \$1 million during his or her lifetime and not pay any gift taxes. To the extent the \$1 million was used during his or her lifetime, it reduced the amount of the federal estate tax exemption that was available at death. In other words, if an individual made \$1 million in taxable gifts during his or her lifetime and fully used his or her federal gift tax exemption, then the remaining \$2.5 million federal estate tax exemption was available to be used at death. Prior to the act there was a maximum tax rate of 55%.

TRA 2010 makes a major change in the law and creates the most significant ability for an individual to make gifts since the gift tax was enacted in 1932. Essentially, under the Act, the exemption for all transfer taxes—federal gift, estate, and generation-skipping transfer taxes—increases to \$5 million (Pub. L. No. 111-312, § 302(a)(1)). In addition, the maximum tax rate drops from 55% to 35%—the lowest transfer tax bracket in eight decades. (Pub. L. No. 111-312, § 302(a)(2)) It is important to remember that this is taxable gifts—in addition to taxable gifts, an individual still has the opportunity to make the annual exclusion gifts (under current law \$13,000 per donee) and to make educational and medical payments as long as those payments are made directly to the provider. This increased exemption for transfer taxes is in effect for 2011 and 2012 and under the current law will expire on December 31, 2012. When it expires, the prior estate tax schedule, with a 55% maximum estate tax rate and a \$1 million applicable exclusion amount, will be reinstated at that time.

TRA 2010 also brings a brand new concept to the federal gift and estate tax. It provides for “portability” between spouses of the estate tax applicable exclusion amount for estates of those dying in 2011 and 2012, if both spouses die before 2013 (Pub. L. No. 111-312, § 303). This allows surviving spouses to elect to take advantage of the unused portion of the estate tax applicable exclusion amount (but not any unused GST tax exemption) of their predeceased spouses, thereby providing surviving spouses with a larger exclusion amount. Special limits apply to decedents with multiple predeceased spouses. Since the exemption is now

INTRODUCTION

“portable,” a question that clients may ask is whether or not there is still a need for the traditional bypass trusts. It is prudent to keep those trusts in place (and make sure that if they need to be updated they are). This is because the law may change during the surviving spouse’s lifetime and portability may not remain. Also, if the client continues to be domiciled in Massachusetts (or a state with a state estate tax) the traditional bypass trust keeps the state exemption amount (and what it appreciates to between the death of the first and second spouse) out of the surviving spouse’s taxable estate. It is very important to review the dispositive provisions of the bypass trust. With such as significant estate tax exemption, a conservative drafting approach would be to have the surviving spouse as the sole permissible beneficiary of the bypass trust during his or her lifetime—not doing so could put the surviving spouse on equal footing with children and more remote descendants for a significant part of the surviving spouse’s wealth. In addition to any tax benefits from the bypass trust, the non-tax benefits include ensuring that at the death of the surviving spouse the assets in that trust pass to where the first spouse to die intended. It also provides asset protection from any creditor of the surviving spouse.

To preserve the first deceased spouse’s unused applicable exclusion amount, the executor for such spouse must file an estate tax return and make an election on such return, even if such an estate tax return would otherwise not be required.

Planning Opportunities and Pitfalls Under the Act

With such a significant increase in the federal gift exemption (\$5 million per person—a total of \$10 million per married couple) and a short window of time (December 31, 2012) during which to make a decision on whether or not to utilize it, estate planning lawyers dealing with clients with significant net worth should make sure that they accomplish three things: (1) notify the client of this change; (2) ask permission to review the client’s current estate planning documents to determine if revisions or updates should be made (and remember to obtain an updated client questionnaire that includes the value of all assets and how they are titled as part of that review); and (3) explore with the client whether or not additional gifts should be made during this short window of time. When reviewing the gifting issue it is important to address the tax and non tax implications of the gift. Ultimately it is the client’s decision as to whether or not the gift should be made—it is the estate planning attorney’s obligation to bring sufficient information about the pros and cons to the client’s attention so that when the decision is made it is an informed one.

Issues the Client Should Consider When Deciding

Whether or Not to Make the Gift

The Act has prompted spirited discussions between the high net worth client and his or her advisor: “Well, now that I can really give that much, should I? and What are the non-tax risks to making those gifts?”

Factors to consider when discussing with your high net worth client whether to gift or not to gift include:

(1) How much is enough?

This question is always worth discussing. Some well known individuals have answered, “Leave your children enough money so they can do anything, but not enough that they don’t have to do anything. In the author’s experience, the answer depends upon the individual, often changes over the lifetime of the donor, and has to do with his or her children and the economic times.

(2) What strings do I want on the gift?

Whatever the amount, the client must decide how much control there is over the gift. Is it to be given outright? In trust? Who is the trustee? How long should the trust extend? What are the terms of distribution? Who are the permissible beneficiaries?

(3) Should I leverage the gift?

In addition to the strings that the client may want to impose on the gift, the client should also address leverage. If the client makes a gift that is eligible for a minority or marketability discount, that increases the value of the gift by at least 20%. If the client funds an irrevocable trust and anticipates that the trustee will use the funds to make annual life insurance premium payments, then significantly more may be added to the trust through leverage than if the gift were to be invested along more traditional methods. In addition, when considering leverage it is important for any significant gift to look at jurisdictions outside Massachusetts—for example establishing a dynasty trust in a jurisdiction (such as Delaware or Alaska) that does not have a Rule Against Perpetuity and making the gift to that entity could protect those assets from any federal gift or estate taxes forever.

(4) Am I willing to assume the risk that the gift, once given, is gone?

INTRODUCTION

What if the donee becomes divorced or has creditor issues during the donor's lifetime, and the gift is jeopardized? Can the client live with that consequence? The cascading effects from a gift can have far reaching consequences. For example, if the donor parent gifts 20% of the stock in his or her closely held business to his or her children, and one of the children becomes divorced, it is not just that the child's interest in the business may be vulnerable. Even if it is not vulnerable, the divorce court also has the right to order the valuation of the child's interest in that business. To do that means valuing the business in its entirety; and having that asset valued in a hostile environment—where the ex-in-law's lawyer will try to value that as high as possible—will in all likelihood be in direct opposition to the donor parent's valuation and appraisals for estate planning and transfer tax purposes. In addition, if the donee child is ordered to pay alimony or child support, then the income from the gifted asset will be taken into account when the court establishes the dollar amount. If the income is phantom income, which the child donee does not actually receive, that can present additional complications and litigation.

(5) Am I willing to give up the “fruit as well as the tree”?

In most cases, the fruit and the tree—meaning the income and the principal—go hand in hand. For example, is the client ready to give away 20% of the underlying asset, knowing that the corresponding 20% of the income which is attributable to that asset will also no longer be available to the donor/client?

(6) Have I considered gift splitting?

Gift splitting—where one spouse makes the gift, and the other gives consent to that gift—is a very effective estate planning technique for the second marriage couple. Frequently, in that case, one spouse is wealthier than the other. If the less wealthy spouse does not have \$5 million of assets in his or her own right, then using the less wealthy spouse's \$5 million exemption in full or gift splitting, with the wealthier spouse giving his or her assets to his or her own children can be a very creative technique. In effect, it doubles the amount that can be gifted. When considering this technique, especially if there is a prenuptial agreement or postnuptial agreement in place, care should be taken to protect the estate of the less wealthy spouse who consented to this gift or allowed the use of his or her \$5 million exemption. The possibility that the

exemption could decrease later, resulting in additional estate taxes in his or her estate to his or her beneficiaries, should be thought through and discussed.

(7) Should I gift more than the \$5 million/\$10 million exemption and incur the 40% gift tax?

For many very wealthy clients, this is a question to consider seriously. The gift/estate tax rate has not been this low in eight decades. The difference between a tax exclusive gift and a tax inclusive bequest is significant at the higher dollar levels, and exploring this (especially if the underlying assets have significant growth potential or discount opportunities) should be an option.

(8) Am I willing to forego the stepped up income tax basis in the asset?

Under the current law (with the complicated exception of decedents who died in 2010), if the asset is included in the decedent's taxable estate (whether or not there is a federal estate tax due), the income tax basis in that asset receives a fresh start and resets at the date of death value. If the asset is gifted during lifetime instead of at death, then the donee of the gift inherits the donor's income tax basis. This tax is not incurred until the asset is sold—however the consequences may be significant, especially if the asset is one that has been depreciated and would be eligible for future depreciation. In other words, if the individual's net worth was less than \$5 million and if the law holds, then there may be a disadvantage to making a significant gift now because the donee of the gift will inherit the asset at the donor's basis and incur the capital gain when it is sold. If instead the individual receives the asset at death and there is no federal estate tax because the net worth is less than \$5 million dollars, then the asset would receive its fresh start basis and in addition to no estate tax, the income tax basis for any subsequent sale would have as its base the date of death value.

(9) Does this gift jeopardize the ability to defer any estate taxes under I.R.C. § 6166?

If client has a significant business interest the decision as to what assets are gifted is critical. For an estate to take advantage of I.R.C. § 6166 and defer the payment of estate taxes under the current law, the business interest at the death of the decedent must be at least 35% of the adjusted gross estate level. If gifting of that business interest will drop the percentage below that 35% threshold then the ability for

INTRODUCTION

the estate to take advantage of I.R.C. § 6166 is jeopardized.

(10) Considerations for Same Sex Marriage.

Under the current law, there is no federal marital deduction available for transfers between same sex spouses. The increased \$5 million federal gift exemption would make shifting assets between the spouses free of federal gift or estate tax as there is no restriction for that purpose as to who the donee of the gift is.

State Estate Taxes

Many states, including Massachusetts, have separate estate tax regimes with lower applicable exclusion amounts than the federal estate tax laws, making it critically important to coordinate the state gift and estate taxes and how they affect the estate plan. In Massachusetts, there is no gift tax, and the estate tax exemption remains at \$1 million. Also, if your client owns real estate in more than one state, or is domiciled in a state other than Massachusetts, it is essential that you coordinate the multiple state gift and estate taxes.

For estate tax purposes, temporary relief does not extend to non-U.S. citizens who are not U.S. residents. The Act reinstates federal estate taxes on U.S.-situs property of non-U.S. citizens who are not residents, so the increased applicable exclusion of \$5 million per person does not apply to those individuals. U.S.-situs property exceeding \$60,000 in value is again currently subject to U.S. estate taxes at graduated marginal rates beginning at 18%. Accordingly, it is critically important to exercise vigilance in structuring the acquisition of U.S. assets such as real property, so as to avoid the imposition of U.S. estate taxes at pre-2010 levels.

As always, clients should review their estate plans periodically and/or whenever a significant life event occurs (e.g., birth of a child, death of a spouse, purchase of new home, etc.). For clients with substantial amounts of wealth and with closely held businesses, the author highly recommends that attorneys consider using lifetime gifts to take advantage of the current \$5 million lifetime gift tax applicable exclusion amount, which will expire at the end of 2012, absent further Congressional action.

Estate planning attorneys should keep on top of developments in the law as it is clear that there will be another significant change in federal estate tax law before the end of 2012.

Amended Homestead Act Offers New Protections for Massachusetts Homeowners

On December 16, 2010, Governor Deval Patrick signed important new amendments to the Homestead Act (St. 2010, c. 395, amending M.G.L.A. c. 188). These changes took effect on March 16, 2011. These changes are explained in Chapter 28. Estate planning attorneys should pay particular attention to the key provisions. Under the new law, a homeowner is entitled to an automatic \$125,000 of homestead protection. If the homeowner files the homestead form with the Registry of Deeds the exemption is \$500,000, a significant increase above the automatic \$125,000. The new law provides that property held in trust can now be protected. Many individuals own their homes in trust for estate planning purposes and the estate planning attorney should advise those clients of the change in law and the new ability to receive homestead protection and keep the title to the home in the trust.

2010 Developments

As part of the 2001 tax act, Congress increased the amount that persons could give away tax-free at death, with the increases phased in over a ten-year period of time. This amount, known as the Exemption Amount, increased over the years and reached \$3.5 million in 2009. In 2010, it is unlimited and is equal to the entire value of the estate. However, because the votes of 60 United States Senators could not be obtained in 2001, the tax law changes were limited to a duration of 10 years. This meant that in 2011 the estate tax would be reinstated with an Exemption Amount of only \$1 million and a rate of tax equal to 55%, the exemption and rate of tax that were in effect before the 2001 tax was passed. Certain larger estates would be subject to an extra 5% surtax that was repealed altogether in 2001, but which would also be reinstated in 2011.

There are other changes that have taken place for the 2010 tax year. Under the now-repealed estate tax laws, property passing from a decedent used a step-up in cost basis equal to the property's fair market value as of the decedent's date of death. That tax benefit has been eliminated for persons who die in 2010, and instead, the basis in the property acquired from a decedent will be the lesser of the decedent's adjusted basis or the property's fair market value on the date of the decedent's death. Under this rule, it is possible that the cost basis of the property will be stepped down. These new carryover basis rules not only cause the imposition of capital gains taxes that previously were avoided following a person's death, but the beneficiaries who inherit from an estate now need to know what the cost basis was in the properties they receive. Clients should organize their records so that

INTRODUCTION

cost basis information is preserved and maintained. For many beneficiaries who inherit property in 2010, records will not exist or will be incomplete, and this will make it difficult or impossible for them to determine the cost basis. There are two important exceptions to this rule. A decedent's Executor is allowed to allocate up to \$1.3 million to various assets owned by a decedent, thereby increasing the cost basis of those assets. Also, an additional \$3 million of basis increase can be allocated to properties that pass to a spouse or to a special "qualified terminable interest property" trust. Under the tax laws in 2010, just like the laws which existed prior to estate tax repeal, any person may give an unlimited amount of property to his or her qualified terminable interest or marital trust without generating any gift or estate taxes.

The federal gift tax has not been repealed but now has a lower 35% rate of tax which is down from the 45% rate in 2009. Under the current law, each person may give away during his lifetime as much as \$1 million in cash or property without generating any gift taxes. Any gifts which exceed this amount will be taxed at 35%. However, the gift tax will not apply to most of the gifts people make because each person can, as of this year, gift \$13,000 each year to any other person, without reducing the \$1 million gift tax exemption. This annual gift tax exclusion amount still exists.

The federal generation skipping transfer tax has also been repealed for 2010. Under the old law which existed prior to repeal, each person could give away during lifetime or at death up to \$3.5 million—the generation skipping tax exemption without the imposition of the generation skipping transfer tax. Any gifts to grandchildren or great-grandchildren (and to certain other persons two or more generations younger than the person making the gift) in excess of the generation skipping transfer tax exemption would have been subject to the generation skipping transfer tax, which was equal to the highest marginal tax bracket (45% in 2009). Although the generation skipping tax has been eliminated for 2010, it will be reinstated in 2011 and the available generation skipping tax exemption will be reduced to its former level of only \$1 million (although this amount will be indexed for inflation) and with a 55% rate of tax.

2009 Developments

In January 2009, Massachusetts adopted the Uniform Probate Code and added new chapter 190B, the Massachusetts Uniform Probate Code, (St. 2008, c. 521) to the Massachusetts General Laws. The new law repeals M.G.L.A. c.65A, §§ 5, 5A; M.G.L.A. c. 184, §§ 33A, 33B; M.G.L.A. c. 184A, §§ 1 to 4, 6 to 11; M.G.L.A. c.

186, § 1; M.G.L.A. c. 189, 190, and 190A of the Massachusetts General Laws. The purposes of this law are to: (1) simplify and clarify the laws concerning the affairs of decedents and missing persons; (2) discover and make effective the intent of the decedent in distribution of the decedent's property; (3) promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors; (4) facilitate use and enforcement of certain trusts; and (5) make uniform the law among the various jurisdictions.

This new law brings significant changes to the law and will require revisions to update estate planning documents.

Durable Power of Attorney: A durable power of attorney should now specify that it is not affected by the lapse of time. The preferred guardian and conservator must be named in the durable power of attorney. The durable power of attorney form can specify that sureties on the bond of a conservator or guardian can be waived.

Intestacy: When a decedent dies intestate, the spousal share is increased.

If the decedent was married, has no living descendants and no living parents, the surviving spouse takes the entire probate estate.

If the decedent was married, has no living descendants and has living parents then the surviving spouse receives the first \$200,000 and three-fourths of the intestate estate and the parents receive one-fourth of the intestate estate.

If the decedent was married and has living descendants (whether the descendants are from a prior marriage or of the marriage with the surviving spouse) the surviving spouse's share of the intestate estate is set according to a sliding scale. The surviving spouse will receive the first \$100,000 and one-half of the balance of the remaining estate if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more descendants who are not descendants of the decedent. The surviving spouse will receive the first \$100,000 and half of the balance of the remaining estate if one or more of the descendants are not descendants of the surviving spouse.

Spousal Elective Share: The Uniform Probate Code provisions that pertain to the elective share, or the share a surviving spouse is entitled to take if the surviving spouse elects against the decedent's will have not been adopted in Massachusetts.

Disposition of Items of Tangible Personal Property in Will: A testator's reference in the will to a list which disposes of items of tangible personal property (other than money) is binding whether the list was created and/or modified after the execution of the will even if the will does not specify that any such list is

INTRODUCTION

incorporated by reference into the will.

New Self-Proving Affidavit: The statute provides a new form of self proving affidavit.

Provision Dealing with Unsupervised Administration of Will: If the will specifies unsupervised administration, the probate court can only order supervised administration if it is necessary to protect interested persons or if it is necessary under the circumstances. Any will that does not include that language should be revised.

Support for Surviving Spouse and Minor Children During Administration of Estate: Unless the will provides otherwise, the surviving spouse (or descendants if no spouse is living) can receive \$10,000 of exempt property (household furniture, automobiles, furnishings, appliances and personal effects) from the estate. The surviving spouse (and minor children whom the decedent was obligated to support and children who were in fact being supported) may receive a reasonable allowance during the administration of the estate. This may be paid in a lump sum or periodically, is not chargeable against any benefit passing to the surviving spouse or children and has priority over all unsecured debts of the estate. In addition, the surviving spouse may remain in the decedent's home for not more than six months rent-free.

Trusts: The new Massachusetts Uniform Probate Code seeks to eliminate procedural distinctions between testamentary and inter vivos trusts and streamlines jurisdiction and procedural issues. It eliminates routinely required court accountings and substitutes clear remedies and statutory duties to inform beneficiaries.

Trustee Powers: Trustees of irrevocable trusts and trustees of revocable trusts that will become irrevocable now have additional statutory duties that cannot be waived.

Effective Date: The provisions which deal with guardianship are effective as of July 1, 2009. The remaining provisions that pertain to estates and trusts (which were originally supposed to be effective January 1, 2012) became effective on March 31, 2012.



WestlawNext™

THE NEXT GENERATION OF ONLINE RESEARCH

WestlawNext is the world's most advanced legal research system. By leveraging more than a century of information and legal analysis from Westlaw, this easy-to-use system not only helps you find the information you need quickly, but offers time-saving tools to organize and annotate your research online. As with Westlaw.com, WestlawNext includes the editorial enhancements (e.g., case headnotes, topics, key numbers) that make it a perfect complement to West print resources.

- FIND ANYTHING by entering citations, descriptive terms, or Boolean terms and connectors into the WestSearch™ box at the top of every page.
- USE KEYCITE® to determine whether a case, statute, regulation, or administrative decision is good law.
- BROWSE DATABASES right from the home page.
- SAVE DOCUMENTS to folders and add notes and highlighting online.

SIGN ON: next.westlaw.com

LEARN MORE: store.westlaw.com/westlawnext

FOR HELP: 1-800-WESTLAW (1-800-937-8529)

RELATED PRODUCTS

STATUTES AND COURT RULES

Massachusetts General Laws Annotated
Massachusetts Court Rules—State, Local and Federal
United States Code Annotated

CASE LAW, REPORTERS, DIGESTS, ATTORNEY GENERAL OPINIONS

Massachusetts Digest
Massachusetts Law Finder
Northeastern Reporter

GENERAL LEGAL REFERENCES

Corpus Juris Secundum

MASSACHUSETTS DATABASES ON WESTLAW

Cases, General & Topical
Statutes and Index
Legislative Service
Legislative History & Bill Tracking
Administrative & Executive Materials
Court Rules
Jury Instructions & Jury Verdicts
Trial Court Filings
BNA Corporate Practice Portfolios
Workers' Compensation Materials Combined
Westlaw State Bulletins
West Legal Directory
Massachusetts Practice Series

CD-ROM

Massachusetts General Laws Annotated
Massachusetts Decisions
Massachusetts Digest CD-ROM Edition
Massachusetts Practice Series Premise CD-ROM
United States Code Annotated
West's Supreme Court Reporter
Federal Reporter, 1st, 2d, and 3d Series
Federal Supplement
Federal Rules Decisions
Wright & Miller, Federal Practice and Procedure

Topical CD-ROM Libraries

PRACTICE AND PROCEDURE

Talty, Talty and Braunstein, Methods of Practice with Forms

Smith and Zobel, Rules Practice

Nolan and Henry, Civil Practice

Perlin and Blum, Procedural Forms Annotated

Randall and Franklin, Municipal Law and Practice

Savery, Corso and Harrington, Federal Civil Practice

Lauriat, McChesney, Gordon and Rainer, Discovery

Alperin, Summary of Basic Law

Bishop, Prima Facie Case—Proof and Defense

Finley and Scheffler, Massachusetts Motions in Limine

Carlson, Massachusetts Summary Judgment and Related Termination Motions

CRIMINAL LAW AND PRACTICE

Smith, Criminal Practice and Procedure

Nolan and Sartorio, Criminal Law

Nadel and Witkin, Criminal Defense Motions

Lauriat, McChesney, Gordon and Rainer, Discovery

Bishop, Prima Facie Case—Proof and Defense

TRIAL AND APPELLATE PRACTICE

Nolan, Appellate Procedure

Flanagan, Trial Practice

DAMAGES AND REMEDIES

Nolan and Sartorio, Equitable Remedies

Merritt, Consumer Law

Shapiro, Perlin and Connors, Collection Law,
Debtor/Creditor Practice, Procedure, Remedies

ADMINISTRATIVE LAW

Cella, Administrative Law and Practice

MUNICIPAL LAW

Randall and Franklin, Municipal Law and Practice

DOMESTIC RELATIONS

Kindregan, McBrien, and Kindregan, Family Law and Practice with Forms

Kindregan and Inker, Massachusetts Domestic Relations Rules and Statutes Annotated

PERSONAL INJURY

Nolan and Sartorio, Tort Law

HEALTH LAW

Minehan and Kantrowitz, Mental Health Law

PROBATE AND JUVENILE LAW

Dunphy, Probate Law and Practice with Forms

RELATED PRODUCTS FROM WEST

Annino, Estate Planning with Forms

Ireland, Juvenile Law

Bloom and Margolis, Elder Law

BUSINESS ORGANIZATIONS

Polubinski, Business Corporations with Forms

Lemelman, Manual on Uniform Commercial Code

Lemelman, Uniform Commercial Code Forms Annotated

Shapiro, Perlin and Connors, Collection Law,
Debtor/Creditor Practice, Procedure, Remedies

Gilleran, The Law of Chapter 93A

EVIDENCE

Young, Pollets and Poreda, Evidence

Young, Pollets and Poreda, Evidentiary Standards

REAL ESTATE

Eno and Hovey, Real Estate Law with Forms

Daher and Chopp, Landlord and Tenant Law with Forms

LEGAL FORMS

West's Legal Forms, 2d

Hovey and Koenig, Legal Forms

Perlin and Blum, Procedural Forms Annotated

MOTOR VEHICLES

Kenny and Farris, Motor Vehicle Law and Practice
with Forms

Jones, Drunk Driving Defense

TAXATION

Van Dorn and Allen, Taxation

EMPLOYMENT AND LABOR LAW

Moriearty, Adkins, Rubin and Jackson, Employment Law

Adkins, Rodriques and Rubin,
Employment Law Statutes and Regulations

Nason, Koziol and Wall, Workers' Compensation

Finn and Seich, Mediation and Arbitration

CONSUMER LAW

Merritt, Consumer Law

Gilleran, The Law of Chapter 93A

PROFESSIONAL MALPRACTICE

Jacobs and Laurence, Professional Malpractice

Thomson Reuters® thanks you for subscribing to this product. Should you have any questions regarding this product please contact Customer Service at 1-800-328-4880 or by fax at 1-800-340-9378. If you would like to inquire about related publications or place an order, please contact us at 1-800-344-5009.



THOMSON REUTERS™

Thomson Reuters
610 Opperman Drive
Eagan, MN 55123

legalsolutions.thomsonreuters.com

Table of Contents

CHAPTER 1. FINANCIAL AND FAMILY INFORMATION AND OBJECTIVES

- § 1.5 Estate planning information booklet—Questions frequently asked[Ⓢ]
- § 1.12 Ethics

CHAPTER 3. THE DURABLE POWER OF ATTORNEY

- § 3.1 Introduction
- § 3.2 Creating the power of attorney
- § 3.3 The “durable” power of attorney
- § 3.6 Effect of protective proceedings on power of attorney
- § 3.7 Defining the authority of the attorney in fact
- § 3.8 Considerations in choosing the attorney in fact
- § 3.9 Designation of guardian or conservator in the durable power of attorney
- § 3.10 Termination of durable power of attorney
- § 3.13 Sample general durable power of attorney[Ⓢ]
- § 3.15 Practical considerations of the durable power of attorney
- § 3.16 Combination of the durable power of attorney and the living trust

CHAPTER 4. THE MASSACHUSETTS HEALTH CARE PROXY AND THE LIVING WILL

- § 4.1 Overview of the Massachusetts Health Care Proxy statute, M.G.L.A. c. 201D and the living will
- § 4.2 The Massachusetts Health Care Proxy—Form[Ⓢ]
- § 4.5 Overview of the standby guardianship statute, M.G.L.A. c. 201 §§ 2A to 2H
- § 4.7 Introduction to the Uniform Anatomical Gift Act *[New]*
- § 4.8 Sample form for a living donor to make an anatomical gift[Ⓢ] *[New]*
- § 4.9 Form for anatomical gift by next of kin or other authorized person[Ⓢ] *[New]*
- § 4.10 Anatomical gift clause for will *[New]*

CHAPTER 5. ESTATE AND GIFT TAXATION

- § 5.1 The nature of the transfer taxes
- § 5.2 Introduction to the federal estate tax
- § 5.3 Introduction to the federal gift tax

- § 5.4 Introduction to the federal generation-skipping tax
- § 5.5 Introduction to the Massachusetts estate tax

CHAPTER 6. THE FEDERAL ESTATE TAX

- § 6.1 Determination of the federal estate tax
- § 6.8 The impact of state law on federal law
- § 6.9 The estate tax and its relationship to income tax basis
- § 6.26 Decisions regarding marital bequest and new concept of portability [*Retitled*]
- § 6.30 Estate tax return

CHAPTER 7. THE FEDERAL GIFT TAX

- § 7.1 Introduction to the federal gift tax
- § 7.10 Gifts to a non-citizen spouse

CHAPTER 8. THE GENERATION SKIPPING TAX

- § 8.1 Introduction
- § 8.2 The generation skipping tax

CHAPTER 10. DISCLAIMERS

- § 10.1 Introduction
- § 10.3 Use of disclaimers

CHAPTER 11. WILLS

- § 11.1 The limited function of the will
- § 11.2 The case against intestacy
- § 11.3 Competence to make a will, fraud and undue influence
- § 11.4 Will made in contemplation of marriage
- § 11.5 Wills made pursuant to a separation agreement or a prenuptial agreement
- § 11.6 Effect of divorce on will
- § 11.7 Formal requisites—Writing[⊗]
- § 11.8 Formal requisites—Signature of testator
- § 11.9 Formal requisites—Attestation and subscription of witnesses
- § 11.10 Appointment of executor
- § 11.11 Appointment of temporary executor
- § 11.12 Bond of the executor
- § 11.13 Compensation of the executor
- § 11.14 Nomination of guardian in the will
- § 11.16 Powers of the executor
- § 11.17 Omission of children from will
- § 11.18 Omission of spouse from will
- § 11.19 The pour over will
- § 11.20 Revocation of a will
- § 11.23 Definitions
- § 11.24 Sample will[⊗]
- § 11.25 Guardianship of the person and property of a minor child—Sample clauses[⊗]

TABLE OF CONTENTS

- § 11.27 Disposition of tangible personal property by memorandum—
Sample clause[⊗]
- § 11.28 Environmental hazards—Sample clause[⊗]
- § 11.30 Disposition of real property
- § 11.33 Disposition of real property—Devise of real property subject
to/free and clear of mortgages and liens—Sample clause[⊗]
- § 11.34 Disposition of real property—Life estate—Sample clause[⊗]
- § 11.39 Ademption—Sample clauses[⊗]
- § 11.40 Specific charitable gifts—Sample clauses[⊗]
- § 11.42 Adopted persons, illegitimate persons and after borne
persons—Sample clauses
- § 11.43 Advancements—Sample clauses[⊗]
- § 11.46 The Statute of Wills
- § 11.48 Lapsed gifts and the Massachusetts anti-lapse statute
- § 11.49 Direction regarding bodily remains *[New]*
- § 11.50 Unsupervised Administration *[New]*
- § 11.51 Negative wills *[New]*

CHAPTER 12. CODICILS

- § 12.2 Sample codicil[⊗]

CHAPTER 13. TRUSTS

- § 13.0.10 The Massachusetts Uniform Trust Code (MUTC) *[New]*
- § 13.0.20 The Massachusetts Uniform Trust Code (MUTC)—Defini-
tions *[New]*
- § 13.0.30 The Massachusetts Uniform Trust Code (MUTC)—Other
introductory provisions *[New]*
- § 13.0.40 The Massachusetts Uniform Trust Code (MUTC)—Quali-
fied beneficiaries and duty to reasonably inform *[New]*
- § 13.0.50 The Massachusetts Uniform Trust Code (MUTC)—Spend-
thrift provisions *[New]*
- § 13.0.60 The Massachusetts Uniform Trust Code (MUTC)—New
presumption: revocable trusts *[New]*
- § 13.1 Introduction
- § 13.2 Types of trusts
- § 13.5 Requirements essential to establishment of express trust
- § 13.9 Requirements essential to establishment of express trust—
Definition of a class of beneficiaries
- § 13.10 Requirements essential to establishment of express trust—
Trust purpose
- § 13.14 Requirements essential to establishment of express trust—
Termination of trusts
- § 13.15 Requirements essential to establishment of express trust—
Uniform Custodial Trust Act
- § 13.17 The trustee—Nomination and appointment of the trustee
- § 13.18 The trustee—Compensation
- § 13.19 The trustee—Trustee powers
- § 13.20 The trustee—Trustee powers—Power of sale or contract
- § 13.23 The trustee—Trustee powers—Power to invade principal
- § 13.23.10 The trustee—Trustee powers—Power to direct *[New]*
- § 13.23.20 The trustee—Trustee powers—Discretionary powers and
tax savings *[New]*

- § 13.24 The duties of the trustee
- § 13.25 The duties of the trustee—Duty of loyalty and good faith
- § 13.26 The duties of the trustee—Duty to account[⊗]
- § 13.27 The duties of the trustee—Duty to make property productive
- § 13.28 The duties of the trustee—Duty to use reasonable care and skill
- § 13.29 The duties of the trustee—Duty to collect, preserve, and segregate trust property
- § 13.30 The duties of the trustee—Duty to distribute
- § 13.31 Trustee's liability to third parties[⊗]
- § 13.34 The income and estate tax consequences of the trustee/beneficiary—Estate tax consequence of beneficiary serving as trustee
- § 13.36 The income and estate tax consequences of the trustee/beneficiary—Tax consequences of removal of trustee
- § 13.40 Trust reformation
- § 13.41 Trusts for the care of animals *[New]*
- § 13.42 Trust decanting *[New]*

CHAPTER 14. TAX CLAUSES

- § 14.1 Introduction[⊗]
- § 14.6 Taxes to be cognizant of when drafting an estate plan—Tax on appointive property
- § 14.9 Taxes to be cognizant of when drafting an estate plan—Tax clause and the marital deduction

CHAPTER 15. SIMPLE WILLS AND TESTAMENTARY TRUSTS

- § 15.3 Guardianship of the person of a minor child and conservatorship of the property of a minor child *[Retitled]*
- § 15.4 Reciprocal wills for spouses with children—All to spouse with contingent bequest to children (or UTMA custodianship for a minor beneficiary)[⊗]
- § 15.8 Reciprocal wills for spouses with children—All to spouse with contingent bequest to children (or all to spouse with contingent bequest to sprinkling trust for any underage children)[⊗]

CHAPTER 16. REVOCABLE LIVING TRUST WITH POUR-OVER WILL FOR PERSONS WHO DO NOT HAVE TAXABLE ESTATES

- § 16.3 Pour-over will for living trust agreement[⊗]
- § 16.4 Living trust with will of surviving spouse (or single grantor) funds[⊗]

TABLE OF CONTENTS

**CHAPTER 17. REVOCABLE LIVING TRUSTS
WITH POUR OVER WILLS FOR
SPOUSES WITH TAXABLE ESTATES**

§ 17.1 Introduction

§ 17.10 RMTA for married person with children[Ⓢ]

§ 17.11 Pour-over will for revocable management trust[Ⓢ]

Table of Laws and Rules

Table of Cases