INTRODUCTION

2017 Developments

Inclusion or exclusion of trusts in marital proceedings.

In 2016 the Massachusetts there was significant attention in the courts to the inclusion or exclusion for trusts in a domestic relations proceeding. Significantly the Massachusetts Supreme Judicial Court reversed the Appeals Court decision in *Pfannensteihll*. The Supreme Judicial Court reversed the Appeals Court decision, *Pfannenstiehl v. Pfannenstiehll* (475 Mass. 105 2016) and held that the husband's interest in the discretionary spendthrift trust was too speculative to constitute more than an "expectancy" and therefore was "not assignable." The court focused on the fact that the husband was one of 11 permissible beneficiaries amount a class of beneficiaries that remains open as additional beneficiaries may be born. In reaching its decision the court noted that while the trustees are required to consider the needs of all beneficiaries the distributions are discretionary and the trustees are not required to make any distribution at all. The probate court cannot effectively compel a distribution from the trust to the wife when the husband cannot compel a distribution to himself. The court ruled that the "ascertainable standard does not render the husband's future acquisition of assets from the trust sufficiently certain that I may be included in the marital estate." The court remanded the case to the probate ct. noting that the trust "may be considered as an expectancy of future acquisition of capital assets and income in determining what disposition to make of property that is subject to division.

When drafting trusts the attorney should take into consideration that the issue of whether or not a trust created by the parents, grandparents or other family members should be taken into consideration in the beneficiary's divorce. These cases underscore that estate planning is more than document preparation. Estate planning has both an organizational component (how the documents are drafted) and an operational component (how trust is operated). When drafting careful consideration should go into who the trustees are (e.g. family members, independent, professional, and combination) and what the standards of distribution are (e.g. discretionary, ascertainable standard) and who the permissible classes of beneficiaries are. For a more complete discussion of the cases evolving in this area see Chapter 23 of these Volumes.

Importance of Maintaining Books and Records for Business Entities.

Many families have formed limited liability companies and family limited partnerships as part of their overall estate planning. In essence this means many families have become businesses and should adhere to the business formalities. However many families do not think of themselves as businesses and do not adhere to the same level of formality they would if the entities they established were with non-family members. Care should be taken. *In re Cameron Construction and Roofing, Co, Inc.* No. 14-13723-3NF U.S. Bankruptcy Ct D. Mass. (December 14, 2016) underscores the importance of proper recordkeeping and formality. In this case the lack of recordkeeping and formality led to a court decision of common ownership between L.L.C. and corporation, pierced corporate veil and assets became available to satisfy debts of other entity. See Chapter 24 of these Volumes for an additional discussion on this topic.

Homestead Exemption.

There were two interested cases involving the homestead exemption. The court held that a debtor had the right to homestead protection for the home she grew up in even though she did not live there. In another decision the court held that the debtor was entitled to homestead protection for her Florida home even though she had not moved there yet. See Chapter 28 of these Volumes for a more detailed discussion.

Revised Massachusetts Estate Tax Form (Form M-706) and related forms

The Massachusetts Department of Revenue has significantly revamped Form M-706 and the process to release the Massachusetts Estate Tax lien. See Chapter 9 of these volumes for a more detailed discussion.

Updated Probate Forms.

As estate planners we know that estate planning and probate go hand in hand and it is important to understand both when planning. There have been significant revisions to the Massachusetts probate court forms. Volumes 21 and 22 of the Massachusetts Practice Series should be referred to in light of these significant form revisions.

2016 Developments

The most significant Massachusetts 2015 case in trust and estates law is Pfannenstiehl v. Pfannensteihl, 88 Mass.App. Ct.

121 (2015) in which the Appeals Court affirmed a lower probate court ruling that a husband's interest in an irrevocable spendthrift trust which contained ascertainable standard language is included in the marital estate for property division purposes pursuant to M.G.L.A. chapter 208, Section 34, upon divorce. This case has significant consequences from an asset protection (spendthrift), domestic relations and trust administration (organizational and operational) point of view. The husband has filed for further review to the Supreme Judicial Court.

In *Pfannenstiehl*, the husband's father had established an irrevocable spendthrift trust for the class of beneficiaries consisting of the husband, the husband's twin brother, the husband's sister and their issue. There were two trustees: the husband's twin brother and the family lawyer. The trust assets consisted of family controlled business interests that operated for profit educational institutions. The wife had little or no source of financial support without the contribution from this trust.

The trust document itself had a spendthrift clause. It also had a clause which permitted distributions from the trust: "The Trustee shall pay to, or apply for the benefit of, a class composed of any one or more of the Donor's then living issue such amounts of income and principal as the Trustee, in its sole discretion, may deem advisable. . .to provide for the comfortable support, health, maintenance, welfare and education" of all of the beneficiaries.

During the course of the marriage the Trustees made significant distributions to the husband, his brother and his sister. These distributions to the husband were cut off close to the time of the filing of the divorce. The husband and his wife had two children—both of whom had special needs. The family was able to live an upper middle class lifestyle because of the trust distributions. When the distributions to the husband were cut off, the distributions to his brother and his sister continued. The Appeals court found that this change in the pattern of distributions to the husband "was a deliberate manipulation of the husband's annual income and to silence his interest in the trust—for a convenient time while the divorce was ongoing." It is interesting that the Appeals Court ignored the spendthrift clause in the trust, concluding that even if that clause is there it can still be a marital asset that is subject to division for divorce purposes but the Appeals Court did not order the trust to distribute the trust assets to the husband for this purpose.

The court focused carefully on the word "shall" in the ascertainable language provision and stated that "it is clear that the 2004 trust has an ascertainable standard pursuant to which

the trustees, as fiduciaries, were obligated to, and actually did, distribute the trust assets to the beneficiaries, including the husband for such things as comfortable support, health, maintenance, welfare and education."

The Appeals Court did not consider the co-Trustee (family lawyer) as independent. Relying on his testimony they found he was acting in accord with the family and not true fiduciary responsibilities.

Massachusetts courts had held that trusts that are purely discretionary (and not subject to an ascertainable standard) are excluded from the marital estate under M.G.L.C 208, Section 34 (D.L. v. G.L., 61 Mass.App.Ct. 488 (2004). When the administration of the trust depends on language that is not purely discretionary, but rather subject to an ascertainable standard there is strong Massachusetts case law that there is a judicially enforceable right of the beneficiary to the trust even if the trustee has the broad power to interest how to apply the ascertainable standard. (Marsman v. Nasca, 30 Mass.App.Ct 789 (1991); Dana v. Gring, 374 Mass. 109 (1977); Woodberry v. Butler 359 Mass. 239 (1971); Briggs v. Crowley, 352 Mass. 194 (1967)).

Based on this the Appeals court divided the trust corpus among the 11 beneficiaries who could currently be considered trust beneficiaries and allocated a $1/11^{th}$ share to the husband. The Court then awarded 60% of this amount to the wife and ordered the husband to pay this sum in 24 monthly payments. It is interesting to note that the Court did not take into account the fact that there could be many more beneficiaries during the course of the administration of the trust.

The Appeals Court opinion includes a strong dissent that the husband's interest in the trust was "too speculative and remote for inclusion in the divisible estate." The dissent also noted that the husband's interest was "too dependent on trustee discretion and too elusive of valuation to have been included in the marital estate." The dissent also noted that not only does the trust instrument clearly state that the class of beneficiaries remained open, it allowed for distributions to be made in equal or unequal shares and in consideration of other sources of funds a beneficiary may have. The dissent also made it clear that although the majority relied on the machinations concerning distributions ceasing on the eve of divorce, the "primary focus of the instant inquiry should be on the terms of the trust instrument itself, not how those terms may be or have been manipulated."

From a planning and drafting point of view this case highlights choices the client and drafter should consider when establishing an irrevocable trust (or a revocable trust that someday will become irrevocable at the death of the donor) if the

desire is to the best extent possible, to remove it from a beneficiary's marital estate. When drafting it may be better for this purpose to have a totally discretionary standard of distribution, rather than one that is tied to an ascertainable standard. It should be remembered however that from an estate tax point of view, having an ascertainable standard will keep the trust corpus out of the trustee-beneficiary's estate and a fully discretionary standard of distribution will pull it totally into the trustee- beneficiary's taxable estate. If the ascertainable standard is chosen as the distribution method it is advisable to use the word "may", not "shall". The trustees should remember and understand that they have a fiduciary duty to the trust beneficiaries who now exist and in the future and should keep that first in their mind when administering the trust. The inclusion of a trust protector should be considered to modify the trust. It may be advisable for the trust to contain a special power of appointment which would allow a beneficiary's interest to be divested. The spendthrift clause should include language that the trust assets cannot be pledged or alienated in favor of the beneficiary's spouse.

Having said all of this, a stronger defense to the inclusion of irrevocable spendthrift trusts in a marital proceeding is to strongly encourage that all beneficiaries execute a prenuptial or post nuptial agreement that is fair and reasonable and which removes gifted and inherited assets (outright and in trust)from the beneficiary's marital proceeding. This is particularly important since it is the state in which the divorcing couple is domiciled in that will control this question.

Health Care Proxy—Disputes

The Probate and Family Court promulgated forms and guidelines to be used when bringing an action relative to certain disputes involving health care proxies to be resolved by the court. The Petition for Special Proceeding in re: a Health Care Proxy Pursuant to M.G.L.c. 201D–Form MPC 405 is to be used in order to affirm a health care proxy; remove a health care proxy; override a health care agent's decision; and determine the validity of a health care proxy. For all other disputes or requests a General Probate Petition–Form MPC 200 will continue to be used. Also, a dispute involving a health care proxy may be raised in a pending guardianship without filing a petition. A Statement of Attending Physician filed with Petition for Special Proceeding in re: a Health Care Proxy–Form MPC 406 must be filed with the Petition. Since it will contain confidential information it will be impounded by the court and not kept in the file which the public has access. Following a court hearing the court may or that the health care proxy is valid or that it is invalid; that the health care proxy is affirmed; or that the health care agent is

removed. The court may also override an agent's decision if it finds that it was made in bad faith or not in accordance with the statute. The court will issue a Decree on Special Proceeding in re: a Health Care Proxy–Form MPC 793. If the court affirms the health care proxy, the guidelines provide that the Decree will indicate a decision to affirm the health care proxy continues until the principal's attending physician determines the principal has regained capacity to make or communicate health care decisions. These forms are thorough and should be reviewed in appropriate situations.

Same Sex Marriage

The United States Supreme Court made a significant ruling in Obergefell v. Hodges, 135 S.Ct. 2071 (2015). The Supreme Court held Fourteenth Amendment protects the rights of two persons of the same sex to marry and therefore no state should refuse to allow such a marriage or to recognize a marriage performed elsewhere.

2016 Federal Inflation Adjustments

IRS Rev. Proc. 2015-53 (IR-2015-119). In Rev. Proc. 2015–53, the Internal Revenue Service announced the annual inflation adjustments for 2016. The annual gift tax exclusion remains at $14,000. The annual exclusion for gifts to spouses who are not U.S. citizens rises to $148,000. The basic exclusion from federal gift, estate and generation skipping transfer taxes rises to $5,450,000. The amount used to reduce the net unearned income on a child's tax return "kiddie" tax remains at $1,050.00.

Revisions to Professional Responsibility Rules on Trust Accounting

The Massachusetts Rules of Professional Conduct, specifically Mass.R.Prof. C.1.15 has been substantially revised, effective July 1, 2015. Significant changes were made to Rule 1.15 which addresses trust accounting. Rule 1.15 (b) was amended to require that advance for fees and expenses received from clients must now be deposited and held in an IOLTA account or other trust account, to be withdrawn only after fees are earned or expenses incurred.

Rule 1.15 was revised by adding Comment 6 (A) pertaining to lawyers who act as fiduciaries. Lawyers who represent themselves in a fiduciary capacity (as an example as personal representatives, executors, administrators, guardians or trustees) must create a bill or accounting to justify payment prior to, or contemporaneous with any withdrawal of fees from estate accounts or other accounts held by them as fiduciaries. The accountings may be "itemized time records, formal written bills or other contemporaneous accountings that show the services rendered and method for calculating the fees.

Rule 1.15(e) was revised to add a requirement that attorneys must provide written notice to a bank when opening any trust

account regardless of whether it is an IOLTA account or a private trust account. The lawyer must keep a copy of this notice executed by the bank and the lawyer. The financial institution must notify the Board of Bar Overseers of any dishonored check.

2015 Developments

In 2014, various courts handed down decisions that will have an impact on estate planning attorneys in Massachusetts. Those cases include the following:

- *O'Connell v. Houser*, 470 Mass. 1004, 18 N.E.3d 344 (2014). In a significant new development, the Massachusetts Supreme Judicial Court in *O'Connell v. Houser* has decided to let trust reformation be decided at the Probate and Family Court level, not the Supreme Judicial Court level, as a matter of course. The opinion states that the cases will be heard and decided at the Probate and Family Court level so long as they "involve no novel or unsettled issue of Massachusetts law, require only the application of settled Massachusetts legal principles to a particular set of facts, and have no particular significance beyond the specific parties and the specific facts involved." For a more complete discussion of the case law which has evolved at the Supreme Judicial Court level on trust reformation, see §§ 6.1 et seq. and § 13.40.
- *Clark v. Rameker*, 134 S. Ct. 2242, 189 L. Ed. 2d 157, 59 Bankr. Ct. Dec. (CRR) 159, 71 Collier Bankr. Cas. 2d (MB) 865, Bankr. L. Rep. (CCH) ¶ 82641, 2014-1 U.S. Tax Cas. (CCH) ¶ 50317, 113 A.F.T.R.2d 2014-2308 (2014). The United States Supreme Court handed down a significant decision that impacts estate planning. In *Clark v. Rameker*, the Court held that amounts in an inherited IRA are not retirement funds within the meaning of 11 U.S.C.A. § 522(b)(3)(C) and therefore are not excluded from a bankrupt estate. It should be noted that this means that the federal exemption does not apply to an inherited IRA. There may be a state law exemption however that depends on the domicile of the debtor at the time of the filing of the bankruptcy petition—not the domicile of the decedent.
- *Spinnato v. Goldman*, 2014 WL 7236343 (D. Mass. 2014). In *Spinnato v. Goldman*, the United States District Court (District of Massachusetts) held that an estate planning attorney could be personally liable for allegedly false assurances he made to the purported heir of an estate over the validity of an estate plan. It is an unusual case. The attorney had prepared estate planning documents and non-probate transfer documents for an elderly woman that left her assets to the plaintiff. The plaintiff claimed that while the testatrix was living the attorney assured him that the plan was valid but that once the testator died the attorney encouraged the testatrix's disinherited relatives

to sue the plaintiff for undue influence. The attorney argued that he did not owe a duty of care to the plaintiff. The court, distinguishing this case from *Miller v. Mooney*, 431 Mass. 57, 725 N.E.2d 545 (2000) disagreed, noting that in *Miller* the Massachusetts Supreme Judicial Court found that the beneficiaries of an estate could not sue the decedent's attorney for negligent misrepresentations made during the decedent's life because the attorney did not owe the beneficiaries a duty of care and that this was different from the case at bar. Spinnato did not allege negligence, but claimed that the defendant committed the intentional tort of fraudulent misrepresentation. The judge noted that, although the law is unsettled in this area, no case law indicates that a prospective beneficiary cannot assert a claim for fraudulent misrepresentation against a decedent's attorney. The judge refused to dismiss the plaintiff's claim that certain actions that the defendant attorney took after the testatrix's death violated a fiduciary duty toward him as co-executor of the estate. The judge did dismiss the plaintiff's claim that the defendant breached a fiduciary duty toward him as an heir by making fraudulent representations while the testator was alive.

Rev. Proc. 2014-61 (Nov. 17, 2014). In Rev. Proc. 2014-61, the Internal Revenue Service announced the annual inflation adjustments for 2015. 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 $147,000. The basic exclusion from federal gift, estate, and generation-skipping transfer tax rises to $5.43 million. The amount used to reduce the net unearned income reported on a child's tax return subject to the "kiddie" tax was increased $1,050.

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 for federal estate and gift tax purposes, but not for generation-skipping transfer tax purposes, 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 in 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 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 representation 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 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 planning 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 "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—as adjusted annually for inflation) 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?

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 (as adjusted annually for inflation) in his or her own right, then using the less wealthy spouse's $5 million exemption (as adjusted annually for inflation) 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 (as adjusted annually for inflation). 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 (as adjusted annually for inflation) 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 (as adjusted annually for inflation) 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 (as adjusted annually for inflation), 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 the estate to take advantage of I.R.C. § 6166 is jeopardized.

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 (as adjusted annually for inflation) 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 (as adjusted annually for inflation).

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 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 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.