

## CHAPTER 3

# Trusts and Estates

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§3.1. **Revocable Trusts—Death of Settlor—Right of Creditors to Reach Assets after Death.** It has been the traditional rule in Massachusetts that a creditor, during his debtor's lifetime, could reach assets which had been placed in trust by the debtor for the debtor's own benefit, even if the terms of the trust purport to prevent voluntary or involuntary assignability.<sup>1</sup> Where the use of assets for the settlor's benefit is in the pure discretion of the trustee, creditors have been allowed to reach trust assets to the maximum extent the trustee could have made discretionary distributions.<sup>2</sup> Where a settlor has reserved only a limited interest in the trust, such as a life income interest, creditors have been able to reach the trust assets to the extent of the settlor's interest.<sup>3</sup>

Where the settlor has retained a life interest for his own exclusive benefit, and has also reserved to himself a general power of appointment over the assets, Massachusetts law has also allowed creditors to reach assets to their full extent during the settlor's lifetime on the theory that the settlor has effectively retained full benefit over those assets.<sup>4</sup> The *Restatement of Property* extends this right to the settlor's estate.<sup>5</sup> Authority has been ambiguous and scarce, however, as to whether the right of creditors to reach assets of a revocable trust survives the settlor's death where the power reserved was one to amend or revoke.<sup>6</sup> Such

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§3.1. <sup>1</sup> *E.g.*, *Merchants Nat'l Bank of New Bedford v. Morrissey*, 329 Mass. 601, 109 N.E.2d 821 (1953); SCOTT, *LAW OF TRUSTS* § 156 (3d ed. 1967) [hereinafter cited as SCOTT].

<sup>2</sup> RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1959).

<sup>3</sup> SCOTT, § 156, at 1191.

<sup>4</sup> See *Forbes v. Snow*, 245 Mass. 85, 140 N.E. 418 (1923).

<sup>5</sup> RESTATEMENT OF PROPERTY § 328 (1940).

<sup>6</sup> The only cases found apparently on point are *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, 21 N.E.2d 119 (1939), cited by the court (1979 Mass. App. Ct. Adv. Sh. at 1036, 389 N.E.2d at 770) but contrary to its holding, and *In re Granwell*, 20 N.Y.2d 91, 228 N.E.2d 779 (1967), which is in accord but on a different

powers of appointment are not sufficient where the beneficiary of the trust is a third person. Thus, when a settlor has placed property into a trust for the benefit of a third person and has reserved a power to revoke (or a general power of appointment), that power has not been viewed sufficient to subject those assets to claims of creditors.<sup>7</sup> Likewise where a third person has placed property in trust for the benefit of a decedent and the decedent had the right to, but did not exercise, a general power of appointment over the assets, those assets are not subject to the claims of creditors of the decedent or his estate.<sup>8</sup>

In a case, then, likely to have precedential value, the Appeals Court held during the *Survey* year in *State Street Bank & Trust Co. v. Reiser*<sup>9</sup> that where a settlor of an inter vivos trust has retained the power to amend and revoke or the power to direct disposition of principal and income, creditors of the settlor, following his death, may reach in satisfaction of the settlor's debts to them, to the extent not satisfied by the settlor's estate, those assets owned by the trust over which the settlor had such control at the time of his death as would have enabled the settlor to use trust assets for his own benefit.<sup>10</sup> In *Reiser*, the settlor had created an inter vivos trust, reserving the power to amend or revoke and the right during his lifetime to direct the disposition of principal and income.<sup>11</sup> He transferred to the trust the stock of five closely-held corporations.<sup>12</sup> Approximately thirteen months later, the settlor applied to a bank for a \$75,000 unsecured loan, which the bank granted after an examination of his personal financial statement.<sup>13</sup> The statement contained, as its most significant assets, real estate owned by the corporations.<sup>14</sup> The settlor advised the bank officers that he owned the con-

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theory, that of fraudulent conveyance. *United States v. Ritter*, 558 F.2d 1165 (4th Cir. 1977), cited by the court at 1039, 389 N.E.2d at 771, did not directly deal with the power of revocation. Rather the court seemed instead to view an apparent power to distribute the trust remainder by will as a general power of appointment and analyze only the general power authority. The RESTATEMENT OF PROPERTY, § 328 (1940), states that where a settlor has retained a life benefit and a general power of appointment with no other beneficial interests he cannot destroy by exercising the power, his creditors can reach trust assets after his death where probate assets are insufficient to satisfy their claims. See also cases and texts cited in *United States v. Ritter*, 558 F.2d at 1168.

<sup>7</sup> *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1941); SCOTT, § 370.12; RESTATEMENT (SECOND) OF TRUSTS § 330, Comment O (1959).

<sup>8</sup> *Shattuck v. Burrage*, 229 Mass. 448, 118 N.E. 889 (1918); *Crawford v. Langmaid*, 171 Mass. 309, 50 N.E. 606 (1898).

<sup>9</sup> 1979 Mass. App. Ct. Adv. Sh. 1032, 389 N.E.2d 768, further appellate review denied, 1979 Mass. Adv. Sh. 1611.

<sup>10</sup> *Id.* at 1039-40, 380 N.E.2d at 771-72.

<sup>11</sup> *Id.* at 1033, 380 N.E.2d at 769.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

trolling interest in the corporations.<sup>15</sup> The settlor died approximately four months later and his probate estate had insufficient assets to repay the bank loan.<sup>16</sup> The bank brought an action against the trustee for satisfaction of its claim from trust assets.

The court held in favor of the bank after initially rejecting two of its arguments. First, the court rejected the bank's claim that the facts created a possible case for fraud. The court noted that the trial court had found no intention on the part of the settlor to misrepresent his financial position by failing to call attention to the fact that the stock was actually owned by the trust and not the settlor.<sup>17</sup> Second, the court rejected the argument that a discretionary power in the trustees to pay debts and expenses of administration of a settlor's estate, combined with precatory language in the will expressing the decedent's wish that all of his just debts be fully paid, demonstrated an intention on the part of the settlor that the trustees in fact be required to pay such debts, reading into the trust the decedent's wishes as outlined in this will.<sup>18</sup> The court concluded that there was no manifestation of such an intent in the trust agreement, that the language of the trust demonstrated that the settlor knew the difference between discretionary and mandatory powers, and that the trustees, having been given absolute discretion, could even refuse unreasonably to pay such debts provided that there was no abuse of discretion.<sup>19</sup> There was no such abuse here, the court stated, since the trustees would have been justified in refusing to pay the debts for the sole reason of preserving the trust corpus for the benefit of the beneficiaries.<sup>20</sup>

The court decided the case directly on the issue of whether, as a matter of law, the assets which had been placed in such a trust by the settlor could be reached by his creditors upon his death. The court acknowledged that courts of the commonwealth have always given full effect to inter vivos trusts as separate entities from the probate estate.<sup>21</sup> It rejected, nonetheless, the argument that such separation of entities prohibited creditors of the settlor from reaching trust assets on the

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1033-34, 389 N.E.2d at 769.

<sup>18</sup> 1979 Mass. App. Ct. Adv. Sh. at 1034, 1035, 389 N.E.2d at 770. For another case dealing with the problem of reading a trust and will together to ascertain the intent of the decedent, see *First Nat'l Bank of Mount Dora v. Shawmut Bank of Boston, N.A.*, 1979 Mass. Adv. Sh. 1329, 389 N.E.2d 1002, discussed at § 3 *infra*.

<sup>19</sup> 1979 Mass. App. Ct. Adv. Sh. at 1035, 1036, 389 N.E.2d at 770.

<sup>20</sup> *Id.* at 1035-36, 389 N.E.2d at 770.

<sup>21</sup> *Id.* at 1037, 389 N.E.2d at 770, citing *National Shawmut Bank v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1941); *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945); and *Ascher v. Cohen*, 333 Mass. 397, 131 N.E.2d 198 (1956).

settlor's death.<sup>22</sup> In so doing, the court cited as authority cases which hold that creditors can reach trust assets over which an individual, who possessed a general power of appointment, has in fact exercised that power by testamentary or by inter vivos disposition.<sup>23</sup> The theory of those cases is that when an individual chooses to exercise dominion and control over property subject to the power, equity demands that he or his estate satisfy his just debts with the proceeds before benefitting others.<sup>24</sup> The court stated: "It taxes the imagination to invent reasons why the same analysis and policy should not apply to trust property over which the settlor retains dominion at least as great as a power of appointment."<sup>25</sup> Given the modern frequency of use of inter vivos trusts as basic estate planning instruments and the belief of many settlors, including apparently the settlor here, that property that they have placed in revocable trusts is their own property, the court said it would be "excessive obeisance" to form to prevent creditors from reaching the property at the death of the settlor merely because the property was technically held in revocable trust form rather than outright.<sup>26</sup>

Because the court chose to reason from cases involving the exercise of powers of appointment and to apply their reasoning to a case involving the retention of the power of revocation, the *Reiser* decision may cast doubt upon the continued vitality of cases which hold that the mere retention without exercise of such powers does not subject the property to claims of creditors.<sup>27</sup> On the other hand, if only the underlying policy of the cited authorities is considered, with the logical analogy limited to equating the power of revocation to the general power of appointment, the decision can be seen as simply adopting a rule closely analogous to that of the *Restatement of Property*. This rule states that reservation of a life interest and a general power of appointment subjects trust assets to the reach of creditors after death.<sup>28</sup> Extension of the analogy to cases involving the exercise of a general power of appointment without regard to the identity of the donor would open up a new avenue of

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<sup>22</sup> 1979 Mass. App. Ct. Adv. Sh. at 1037, 389 N.E.2d at 771.

<sup>23</sup> *E.g.*, *State Street Trust v. Kissel*, 302 Mass. 328, 19 N.E.2d 25 (1939); *Shattuck v. Burrage*, 229 Mass. 448, 118 N.E. 889 (1918). *See also* *Hill v. Treasurer and Receiver Gen.*, 227 Mass. 474, 116 N.E. 946 (1917).

<sup>24</sup> 302 Mass. at 333, 19 N.E.2d at 28.

<sup>25</sup> 1979 Mass. App. Ct. Adv. Sh. at 1038, 389 N.E.2d at 771. The court also compared the power of revocation directly with the general power of appointment dealt with in *RESTATEMENT OF PROPERTY* § 328, discussed at note 6 *supra*.

<sup>26</sup> 1979 Mass. App. Ct. Adv. Sh. at 1039, 389 N.E.2d at 771.

<sup>27</sup> *E.g.*, *Shattuck v. Burrage*, 229 Mass. 448, 118 N.E. 889 (1918); *Crawford v. Langmaid*, 171 Mass. 309, 50 N.E. 606 (1898). *But see* *RESTATEMENT OF PROPERTY* § 328 (1940).

<sup>28</sup> *RESTATEMENT OF PROPERTY* § 328 (1940). 1979 Mass. App. Ct. Adv. Sh. at 1038, 389 N.E.2d at 771.

attack on transfers in trust for the benefit of third persons. While the court's analogy can be defended logically on the theory that prior actual ownership of assets and their transfer to the revocable trust are, in effect, the equivalent of exercising a general power of appointment by deed, such an analogy pulls the third person donor cases away from their separate, equitable status into the more general rule governing possession of powers. The court might have avoided casting unintended suspicion on the other venerable doctrine by avoiding the exercise of power of appointment analogy altogether and simply declaring on public policy grounds that a decedent cannot, by use of a vehicle such as a revocable trust for his own benefit, remove his assets from the reach of creditors even upon the accident of his death, analogizing only to the *Restatement* rule, which is itself based on public policy.<sup>29</sup>

*Reiser* raises a number of areas of fertile inquiry. The first and most obvious question is the availability to creditors of assets which pour into a revocable trust upon the death of the settlor which were not owned outright by the settlor during his lifetime. The *Reiser* court's opinion stated:

Assets which pour over into such a trust as a consequence of the settlor's death or after the settlor's death, over which the settlor did not have control during his life, are not subject to the reach of creditors since, as to those assets, the equitable principles do not apply which place assets subject to creditors' disposal.<sup>30</sup>

Unfortunately, not all non-probate assets passing to a trust fit this description. Assets over which the settlor may have had a special power of appointment and exercised the same in favor of the beneficiaries of his revocable trust or assets owned by a surviving spouse which upon the spouse's death find their way into the revocable trust are the most clearly immune from the reach of the settlor's creditors under this language. Life insurance proceeds in Massachusetts are immune from the reach of creditors by statute.<sup>31</sup> The status of employee death benefits

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<sup>29</sup> See, e.g., SCOTT, § 156. In *re Granwell*, 20 N.Y.2d 91, 228 N.E.2d 779 (1967), used the novel theory of fraudulent conveyance, reasoning that since the decedent maintained control over his assets until the moment of death, the loss of control at his death was fraudulent as to creditors, regardless of intent.

<sup>30</sup> 1979 Mass. App. Ct. Adv. Sh. at 1040, 389 N.E.2d at 771, 772.

<sup>31</sup> G.L. c. 175, §§ 125, 126, 132C, and 135. The quoted language in *Reiser*, however, may not fully immunize such proceeds in jurisdictions without such statutes. Life insurance policies on the decedent's life are includible in his gross estate for estate tax purposes so long as he retains "incidents of ownership" over such policies. I.R.C. § 2042(2). It might be argued that an incident of ownership is sufficient "control" over the policy to subject the proceeds payable to a revocable trust to the reach of creditors. On the other hand, the decedent does not, in the court's words, "have control during his life" over the actual proceeds of the policies but

is somewhat unclear. Employee death benefits may consist in large part of vested employee or employer contributions or other vested rights over which the employee might have some control prior to his death. *Reiser* could be read as allowing creditors to reach employee death benefits up to vested amounts.<sup>32</sup>

A second series of questions raised by *Reiser* concerns the administration of the trust following the death of the settlor. One of the historic arguments for the use of an inter vivos revocable trust is the ability of the trustees to make dispositions for the benefit of beneficiaries after the death of the settlor without waiting for the probate process. While a prudent trustee will generally maintain sufficient trust assets following the death of the settlor to assure that proper provisions have been made for death taxes, it would now appear that a trustee must be cautious as to the availability of probate assets for payment of debts. The trustee, according to Professor Casner, should not be liable for creditors' claims if distributions are made pursuant to the instructions of the trust before creditors have taken appropriate steps to reach the assets.<sup>33</sup> At the same time, the trustee may well have constructive or actual notice of claims and of the unavailability of probate assets to satisfy them, and such notice may give a trustee or a court some pause.

A related matter is the ability of creditors to reach such assets after the expiration of the statutory period for filing claims against the estate.<sup>34</sup> Those statutes on their face protect only executors and administrators, not trustees of revocable trusts.<sup>35</sup> It certainly ought to be the rule that a creditor has no greater rights to reach the assets of the revocable trust than he has with respect to the probate estate itself. A creditor should be required to file a claim against the estate in a timely fashion before he is allowed access to the assets in the revocable trust. Although this argument may be implicit in the court's language limiting its rule to situations where the debts are not satisfied by the settlor's

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only of the policies themselves, and it might better be argued that the proceeds, then, are still insulated. In a whole life policy, however, the decedent does in fact have control over the cash surrender value during his lifetime. If such policies were placed in or made payable to a revocable inter vivos trust, *Reiser* could easily be read as allowing creditors, absent a statute, to reach the proceeds at least up to their cash value.

<sup>32</sup> Professor Casner suggests that neither insurance nor employee death benefits should be reachable since the creditors could not have reached them during the settlor's lifetime. 1 A. CASNER, *ESTATE PLANNING* (4th ed. 1980) at 312.

<sup>33</sup> *Id.* at 327. No authorities are cited.

<sup>34</sup> G.L. c. 197, § 9, the so-called short statute of limitations. Cf. G. L. c. 197, § 10, which allows later filed claims if the Supreme Judicial Court finds that "justice" and "equity" require it and the creditor is not guilty of "culpable neglect" in not presenting the claim in timely fashion.

<sup>35</sup> G.L. c. 197, § 9.

estate,<sup>36</sup> there is no clear statutory protection to the trustee other than normal statutes of limitation applicable during the decedent's lifetime.<sup>37</sup>

Creditors of the estate of the settlor, as distinguished from creditors of the settlor himself, would seem not to be protected by the *Reiser* rule. The basis for the holding in *Reiser* is an equitable, public policy rule that it is unfair for a settlor to have put such assets out of the reach of his creditors while still enjoying them. Creditors of the estate have no such complaint; they are on notice that any property or services extended to an estate are extended to an entity having limited assets. They are in a position to protect themselves by making appropriate inquiries as to the extent of assets of the estate.

Finally, the question arises concerning the implication of *Reiser* for the rights of a surviving spouse. It is well settled in Massachusetts that the statutory shares of a surviving spouse or children respecting assets passing by intestacy<sup>38</sup> and the surviving spouse's statutory share available upon waiver of the terms of a will<sup>39</sup> do not extend to assets disposed of during a decedent's lifetime, whether by gift or otherwise.<sup>40</sup> Indeed, it is clear that a spouse can intentionally deprive a surviving spouse and children of a share of his estate by transferring assets to a revocable trust during his lifetime.<sup>41</sup> The cases so holding were implicitly approved by *Reiser*.<sup>42</sup> The theory of such cases is arguably different from that of the situation of a creditor of the decedent, however. The basis for the ability of a spouse to make an inter vivos disposition of his property even intentionally as against his surviving spouse is the policy that a surviving spouse, unlike a creditor, has no claim during the decedent spouse's lifetime over his property superior to the decedent's absolute right to dispose of his property as he deems fit without the knowledge or consent of his spouse.<sup>43</sup> It is unlikely that *Reiser*, which is based on a fairly narrow public policy governing protection of creditors, will be used successfully as a precedent for change in that theory. Such a change would seem to require a new definition of interspousal property

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<sup>36</sup> The short statute of limitations itself essentially makes probate assets unavailable to satisfy claims. Another interesting question is whether the immunity of a special administrator from suit by creditors, G.L. c. 193, § 15, could be viewed as an unavailability of assets allowing creditors to proceed directly against the revocable trust.

<sup>37</sup> Cf. G.L. c. 260, § 11, governing contracts made by the trustee.

<sup>38</sup> G.L. c. 190, § 1.

<sup>39</sup> G.L. c. 191, § 15.

<sup>40</sup> *Kerwin v. Donaghy*, 317 Mass. 559, 571, 59 N.E.2d 299, 306 (1945); *Dana v. Dana*, 226 Mass. 297, 299, 115 N.E. 418 (1917); G. NEWHALL, *SETTLEMENT OF ESTATES, AND FIDUCIARY LAW IN MASSACHUSETTS* § 211 (4th ed. 1958).

<sup>41</sup> 317 Mass. at 571, 59 N.E.2d at 306.

<sup>42</sup> 1979 Mass. App. Ct. Adv. Sh. at 1037, 389 N.E.2d at 770.

<sup>43</sup> 317 Mass. at 571, 59 N.E.2d at 306.

rights. It is more likely that the courts will await statutory developments.<sup>44</sup>

**§3.2. Short Statute of Limitations—Claim of Commonwealth.** In *Department of Public Welfare v. Anderson*,<sup>1</sup> the Supreme Judicial Court held that the so-called short statute of limitations for claims against an estate, section 9 of chapter 197 of the General Laws,<sup>2</sup> applied to the commonwealth's claim for reimbursement for medical assistance provided the decedent, and, as a result, the claim was barred.<sup>3</sup> The Court analyzed the limitations period in section 9, found it to be in the nature of a "nonclaim" statute, and adopted the majority rule that such a statute does apply to state claims unless the statute creating the claim provides otherwise.<sup>4</sup>

In *Anderson*, the Department of Public Welfare had filed a notice of claim against an estate with the executor and with the probate court ten months after the executor gave his bond.<sup>5</sup> The claim was for reimbursement for medical assistance rendered to the decedent under section 16 of chapter 118E of the General Laws.<sup>6</sup> The Department also commenced suit on the same day in the Municipal Court for the City of Boston. The suit was subsequently removed to the superior court.<sup>7</sup> The executor refused the claim on the ground that the nine month statutory period for filing claims had expired, and the commonwealth's claim was thus barred.<sup>8</sup> After paying other debts and expenses and distributing the assets, the executor moved for the allowance of his final account.<sup>9</sup> The account was allowed, notwithstanding the objections of the Department.<sup>10</sup>

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<sup>44</sup> The widow's allowance, G.L. c. 196, § 2, presents slightly a different problem in an estate with few probate assets and a funded revocable trust for the benefit of others. The allowance for necessities is superior to debts, *id.*, but is not really a debt of the settlor during his lifetime. It would be ironic to require debts of the settlor to be paid by the revocable trust and not allow senior claims equivalent treatment. It might be that the courts, if confronted with the question, would view the widow's allowance as equivalent to a debt of the settlor, akin to a requirement of support, and apply the *Reiser* rule anyway.

§3.2. <sup>1</sup> 1979 Mass. Adv. Sh. 31, 384 N.E.2d 628.

<sup>2</sup> The short statute of limitations applicable at the time was the section as appearing in Acts of 1972, c. 246. It has been substantially revised by the Acts of 1976, c. 515, § 15, as amended by the Acts of 1979, c. 546, § 5. The issue raised in this case, however, would be equally applicable under the new version of § 9 of G.L. c. 197.

<sup>3</sup> 1979 Mass. Adv. Sh. at 46, 384 N.E.2d at 636.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 33, 384 N.E.2d at 630.

<sup>6</sup> *Id.* at 31, 384 N.E.2d at 629.

<sup>7</sup> *Id.* at 33, 384 N.E.2d at 630.

<sup>8</sup> *Id.* at 33-34, 384 N.E.2d at 630.

<sup>9</sup> *Id.* at 33-34, 384 N.E.2d at 630-31.

<sup>10</sup> *Id.* at 34, 384 N.E.2d at 631.



The Department appealed the judgment and applied for direct appellate review.<sup>11</sup> The superior court, in the Department's own action, also reported several questions of law.<sup>12</sup> The appeal and report were consolidated for hearing before the Supreme Judicial Court.<sup>13</sup>

The Court disposed of the case by ruling that the Department's claim was barred by section 9 of chapter 197.<sup>14</sup> In so doing, the Court employed a two-step analysis. It looked first to the nature of the debt to determine whether it belonged to the decedent or to the estate.<sup>15</sup> Once deciding it was the decedent's debt and thus, absent some immunity applicable to the commonwealth, subject to the provisions of section 9 of chapter 197, the Court analyzed the nature of the limitation provisions of that section.<sup>16</sup>

The determination that the debt was that of the decedent hinged upon an analysis of the language of section 16 of chapter 118E.<sup>17</sup> Under that section the Department of Public Welfare may recover from a decedent's estate funds for medical assistance rendered to the decedent during his lifetime.<sup>18</sup> The recovery may be made only after the death of the surviving spouse, if any, and at such time that the recipient has no surviving child who is under the age of twenty-one or who is blind or permanently and totally disabled.<sup>19</sup> The Court construed the statute narrowly by noting that recovery against an estate is seen as an exception to an assistance program,<sup>20</sup> that the medical assistance was rendered during the decedent's lifetime,<sup>21</sup> and that language of section 16 and its structure

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<sup>11</sup> *Id.* at 31-32, 384 N.E.2d at 630.

<sup>12</sup> *Id.* at 34-35, 384 N.E.2d at 631.

<sup>13</sup> *Id.* at 32, 384 N.E.2d at 630. The Department requested relief for the first time before the full Court under G.L. c. 197, § 10, permitting the Supreme Judicial Court, upon a bill filed in equity, to allow a creditor's claim if the creditor failed to prosecute it under c. 197, § 9, if "justice and equity require it." Because such a request must be heard in the first instance by a single justice, the Court held that the § 10 request was not properly before it and it would neither allow nor disallow the request. *Id.* at 35 n.2, 384 N.E.2d at 631 n.2.

<sup>14</sup> *Id.* at 35, 384 N.E.2d at 631.

<sup>15</sup> If the debt is the decedent's, then § 9 applies unless a clear statement to the contrary appears in the statute giving rise to the relief; if, however, the debt is the estate's, § 9 does not apply unless a clear statement appears in the enabling statute. *Id.* at 38, 384 N.E.2d at 632. In the latter case, a longer period of limitation applies. G.L. c. 260, § 11.

<sup>16</sup> 1979 Mass. Adv. Sh. at 42, 384 N.E.2d at 634.

<sup>17</sup> *Id.* at 39-42, 384 N.E.2d at 632-34.

<sup>18</sup> The recipient must be 65 years of age or older at the time of assistance and there must be written approval of the Department. The Court discussed whether the Department met the requirement for written approval prior to the commencement of a claim. *Id.* at 36 n.3, 384 N.E.2d at 631 n.3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 39, 384 N.E.2d at 633.

did not suggest that the legislature intended the Department to have the status of a creditor of an estate.<sup>22</sup> It distinguished section 16 from an earlier recovery statute for relieved property taxes interpreted in *Milford v. Casamassa*.<sup>23</sup>

The decision concerning whether the commonwealth or its department was immune from application of section 9 of chapter 197 depended on whether this section was in the nature of a statute of limitations or a "nonclaim statute."<sup>24</sup> A statute of limitations is merely a limitation of remedies; it does not go to a creation of rights. It is an affirmative defense which, if not pleaded, is considered waived.<sup>25</sup> Neither the federal government nor a state is subject to a statute of limitations unless it expresses its consent to be so bound.<sup>26</sup> A nonclaim statute, on the other hand, imposes a condition precedent to a right of recovery. Failure to meet the condition voids a claim, and such failure cannot be waived. Although inapplicable to claims of the federal government because of the supremacy clause,<sup>27</sup> a nonclaim statute bars state claims even though there is no expression by a state legislature to be bound by it.<sup>28</sup>

The Court did not thoroughly review its reasons for concluding that section 9 was a non-claim statute and for adopting the majority rule<sup>29</sup> that such a statute bars state claims. It did note, however, that the requirements of section 9 are absolute and cannot be waived, which is one notable feature of a non-claim statute.<sup>30</sup> By agreeing with the reasoning of other jurisdictions,<sup>31</sup> the Court apparently also viewed the

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<sup>22</sup> *Id.* at 42, 384 N.E.2d at 633.

<sup>23</sup> 339 Mass. 702, 162 N.E.2d 284 (1959). 1979 Mass. Adv. Sh. at 42, 384 N.E.2d at 633.

<sup>24</sup> *Id.* at 42-46, 384 N.E.2d at 634-36.

<sup>25</sup> *Id.* at 45, 384 N.E.2d at 635.

<sup>26</sup> *Boston v. Nielsen*, 305 Mass. 429, 430, 26 N.E.2d 366 (1940).

<sup>27</sup> *Taylor v. United States*, 324 Mass. 639, 642, 88 N.E.2d 121 (1949), *cert. denied*, 338 U.S. 948 (1950).

<sup>28</sup> 1979 Mass. Adv. Sh. at 45, 384 N.E.2d at 635.

<sup>29</sup> Those jurisdictions adopting the majority rule either have been persuaded by the short statute of limitations' character as a non-claim statute, *e.g.*, *Reith v. County of Mountrail*, 104 N.W. 2d 667 (N.D. 1960); *Donnelly v. Montgomery Welfare Bd.*, 200 Md. 534, 92 A.2d 354 (1952); *Bahr v. Zahm*, 219 Ind. 297, 37 N.E.2d 942 (1941), or by the fact that the purpose of such a statute is to expedite the settlement of estates, *e.g.*, *State ex. rel. Cent. State Griffin Mem. Hosp. v. Reed*, 493 P.2d 815 (Okla. 1972); *State v. Drake*, 64 Ohio L. Abs. 177, 106 N.E.2d 91 (1952). Some states base their decision on both reasons. *E.g.*, *State v. Goldfarb*, 160 Conn. 320, 278 A.2d 818 (1971); *State v. Estate of Crocker*, 38 Ala. App. 306, 83 So. 2d 261 (1955).

<sup>30</sup> 1979 Mass. Adv. Sh. at 46, 384 N.E.2d at 635. The requirements of G.L. c. 197, § 9, are absolute and cannot be waived. See *Nochemson v. Aronson*, 279 Mass. 278, 282, 181 N.E. 188, 190 (1932); *but cf. Kofinke v. Maranhas*, 1978 Mass. Adv. Sh. 1165, 375 N.E.2d 711.

<sup>31</sup> 1979 Mass. Adv. Sh. at 46, 384 N.E.2d at 635.

requirements of section 9 as bespeaking a condition precedent to recovery against an estate. It pointed out that such an application furthered the purpose of section 9, which is to "expedite the settlement of estates and thereby protect the substantial interests of creditors as well as distributees."<sup>32</sup> Application of the statute to the commonwealth<sup>33</sup> in the context of the reimbursement scheme for medical assistance would satisfy these purposes without working an unnecessary hardship upon the Department of Public Welfare.<sup>34</sup>

*Anderson* raises one interesting practical problem. The Department of Public Welfare had argued that it had regularly brought actions against estates more than nine months after the approval of the bond,<sup>35</sup> relying on a Boston Municipal Court<sup>36</sup> decision holding that section 9 did not apply to the commonwealth. There may well be some accounts now pending or not yet prepared of executors who allowed such a claim, and this situation raises the question of whether such action would be a grounds for surcharge.<sup>37</sup> As a result of this case, the legislature may now wish to provide expressly in statutes authorizing state claims against an estate whether section 9 is applicable to the commonwealth. It would be foolhardy to rely on the Court's interpretation that a particular statute makes the commonwealth a creditor of the estate as opposed to a creditor of the decedent, because once it finds the latter, section 9 will apply to the claim.

One question of note raised by the superior court was left unanswered in the Court's decision. The Department had not agreed to have its claim for reimbursement determined by the probate court pursuant to

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<sup>32</sup> *Id.* at 37, 384 N.E.2d at 632. See *Stow v. Commissioner of Corp. & Tax'n*, 336 Mass. 337, 341, 145 N.E.2d 720, 722 (1957); *Stebbins v. Scott*, 172 Mass. 356, 362, 52 N.E. 535, 538 (1899).

<sup>33</sup> The Department of Public Welfare is an agency of the commonwealth. G.L. c. 18, §1. The term "creditor" has been broadly defined. See *New England Trust Co. v. Spaulding*, 310 Mass. 424, 430, 38 N.E.2d 672, 676 (1941).

<sup>34</sup> The Court may have been influenced by the fact that in this particular case the Department had initiated administrative review before the executor had given bond. 1979 Mass. Adv. Sh. at 46, 384 N.E.2d at 636. The commonwealth could also have sought relief pursuant to § 10 of chapter 197, see note 13 *supra*, or if the right to recover did not accrue until after the time limit in § 9 of chapter 197 lapsed, then under § 13 of chapter 197.

<sup>35</sup> Appellant's Application for Direct Appellate Review, App. Ct. No. 78-399, Suffolk Sup. Ct. No. 683084, at 14.

<sup>36</sup> *Commonwealth v. Falzone*, Adm., App. Div., B.M.C. Docket No. 352967 (1975).

<sup>37</sup> If an account is allowed for the period in which the payment was made, a beneficiary will likely not be able to reopen the account. Cf. *National Academy of Sciences v. Cambridge Trust Co.*, 3 Mass. App. 314, 329 N.E.2d 144 (1975), *aff'd*, 370 Mass. 303, 346 N.E.2d 879 (1976).

its "disputed claim" provisions.<sup>38</sup> Its claim in the superior court was pending when the probate court entered a judgment allowing the executor's final account. Because the Department had notice, objected, and lost in the probate court, the superior court had asked whether the allowance of the account was *res judicata* of the issues in the civil action.<sup>39</sup> The law appears to be that the allowance of the *Anderson* account was indeed *res judicata* in the civil action brought by the Department.<sup>40</sup>

**§3.3. Wills and Trusts—Interpretation—Payment of Death Taxes—Apportionment.** If the death tax burden among probate and non-probate assets is not adequately set out in a decedent's will or by the governing instrument of other dispositive vehicles against which the tax is assessed, most states, including Massachusetts, by statute equitably apportion the tax burden among beneficiaries or entities subject to tax.<sup>1</sup> Often, however, a decedent's will requires that all taxes on probate and non-probate assets be paid out of the probate estate. In such situations, Massachusetts law has scrupulously refused to impose any different allocation of the tax burden among beneficiaries of probate and non-probate assets, regardless of apparently anomalous results.<sup>2</sup>

Where the will is that of a decedent of a foreign state, the situation is even more difficult, because Massachusetts refuses to grant extraterritorial effect either to a foreign will provision or to a foreign apportionment statute which attempts to charge taxes against trust property located solely within the commonwealth.<sup>3</sup> The reasoning is that the trustee is governed by, and the trust beneficiaries are the creatures of, Massachusetts trust law, which is not dictated by the law of other states or by wills of their decedents. Thus, where the provisions of a Massachusetts trust do not require contribution to the taxes owed by an estate, the

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<sup>38</sup> Under § 2 of c. 197 a creditor may assent to have its claim heard in probate court, but absent that, in allowing an account, a probate court in effect passes on the validity of a claim. See G. NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS § 183 (4th ed. 1958).

<sup>39</sup> 1979 Mass. Adv. Sh. at 35, 384 N.E.2d at 631.

<sup>40</sup> See *Old Colony Trust Co. v. Mabbett*, 334 Mass. 412, 416, 135 N.E.2d 914, 917 (1956).

§3.3. <sup>1</sup> E.g., G.L. c. 65A, § 5. Federal law yields to state law in apportionment matters. *Riggs v. Del Drago*, 317 U.S. 95 (1942). Typically such laws apportion pro rata to value of the entity. See G.L. c. 65A, § 5. See also UNIFORM PROBATE CODE § 3-916 (1969); UNIFORM ESTATE TAX APPORTIONMENT ACT § 2 (1958); UNIFORM ESTATE TAX APPORTIONMENT ACT § 2 (1964). All such statutes allow the decedent to change the disposition by will.

<sup>2</sup> E.g., *Whitbeck v. Aldrich*, 341 Mass. 326, 169 N.E.2d 882 (1960); *Martin v. New England Deaconess Hosp.*, 328 Mass. 259, 103 N.E.2d 240 (1952).

<sup>3</sup> *Warfield v. Merchants Nat'l Bank of Boston*, 337 Mass. 14, 147 N.E.2d 809 (1958); *Isaacson v. Boston Safe Deposit & Trust Co.*, 325 Mass. 469, 91 N.E.2d 334 (1950).

executor or administrator of an out-of-state decedent will be unsuccessful in coming to Massachusetts to enforce contribution regardless of the terms of the will or the law of the foreign jurisdiction.<sup>4</sup> It should follow, *a fortiori*, that where a will of a foreign decedent directs that taxes on probate and non-probate assets be paid out of probate assets, the executor could not seek contribution from trust assets having a situs in Massachusetts. A problem arises, however, if the Massachusetts trust also provides that all such taxes be paid out of trust property.

This bizarre situation was faced by the Supreme Judicial Court in *First National Bank of Mount Dora v. Shawmut Bank of Boston, N.A.*<sup>5</sup> *Mount Dora* concerned the interpretation of an estate plan of a Florida decedent. The estate plan consisted of a funded Massachusetts revocable trust<sup>6</sup> and a will subsequently executed in Connecticut.<sup>7</sup> The trust directed that the trustees pay all estate and inheritance taxes imposed by reason of the death of the decedent.<sup>8</sup> The will, admitted to probate in Florida, on the other hand, directed the executor to pay the same taxes from the residue of the estate, without apportionment or charge against "the respective devisees, legatees, beneficiaries, transferees or other recipients" or against any property passing to any of them.<sup>9</sup> The Florida executor

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<sup>4</sup> *Id.*

<sup>5</sup> 1979 Mass. Adv. Sh. 1329, 389 N.E.2d 1002.

<sup>6</sup> The trust was created in Massachusetts and trustees were a Massachusetts trust company and a Massachusetts resident.

<sup>7</sup> 1979 Mass. Adv. Sh. 1329, 389 N.E.2d 1002. The will was executed in Connecticut when the decedent was domiciled there.

<sup>8</sup> As soon as practicable after the death of the donor, the trustees shall determine . . . all estate, transfer, inheritance, legacy and succession taxes . . . on or with respect to any property includible under any such law in the gross estate of the donor, or any property (or the transmitting or receiving thereof) passing under the will of the donor or any codicil thereto, or otherwise payable by reason of the death of the donor on or with respect to any transfer or other disposition of property at any time made by her . . . . The trustees shall, out of the principal of the trust property, pay the whole of said aggregate as follows: (i) to the donor's executors or administrators to such (if any) extent and on such terms as the trustees shall in their reasonable discretion see fit, and (ii) to the extent not paid to such executors or administrators, to the respective creditor or public officer who is entitled to receive any portion thereof and empowered to give a valid receipt therefor.

1979 Mass. Adv. Sh. at 1329-30 n.2, 389 N.E.2d at 1003 n.2.

<sup>9</sup> I further direct that all legacy, succession, inheritance, transfer, and estate taxes, levied or assessed upon or with respect to any property which is included as part of my gross estate for the purpose of any such tax, shall be paid by my executor out of my estate in the same manner as an expense of administration and shall not be prorated or apportioned among or charged against the respective devisees, legatees, beneficiaries, transferees, or other recipients nor charged against any property passing or which may have passed to any of them, and that my executor shall not be entitled to reimbursement for any such tax or any portion thereof from any such person.

*Id.* at 1330-31 n.3, 389 N.E.2d at 1003-04 n.3.

brought an action in Massachusetts probate court seeking a judgment requiring the trustees to carry out the directions of the trust instrument and pay all of the decedent's estate and inheritance taxes. The trustees objected to payment on the grounds that the will was controlling, and it placed the entire burden of estate and inheritance taxes on the residue of the estate.<sup>10</sup>

The probate court ruled that where a conflict existed between the "clear" terms of the will and a prior executed trust, the will was the final expression of the decedent's intent, and the estate must bear the burden of the tax unless the will indicates a contrary intent or there is a statute in aid of the executor's contention.<sup>11</sup> The probate court excluded evidence offered by the plaintiff concerning the value of assets included in the gross estate for tax purposes and also excluded testimony from the draftsman of the will. The probate court then entered judgment against the executor, who appealed, and the Supreme Judicial Court granted direct appellate review.<sup>12</sup> The Court reversed,<sup>13</sup> holding that the trial court should have admitted not only evidence of the nature and value of the assets included in the estate<sup>14</sup> but also evidence from the draftsman as well.

The Court noted that there was no apparent statutory solution to the dilemma because, if the will were to be read as directing no apportionment of estate and inheritance taxes to non-probate assets, the Florida apportionment statute would not likely overrule that direction. The Court implied that, in any event, the Florida statute would not be binding on Massachusetts trustees.<sup>15</sup> Moreover, neither the Massachusetts apportionment law which applies only to Massachusetts decedents,<sup>16</sup> nor federal law which yields to state law on such matters,<sup>17</sup> applied to resolve the conflict.

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A similar conflict existed with respect to the payment of debts and certain expenses, but at trial the trustee conceded liability for indemnification for such items, apparently because the no reimbursement language in the will did not specifically refer to these items. 1979 Mass. Adv. Sh. at 1331, 389 N.E.2d at 1004.

<sup>10</sup> *Id.* at 1330, 389 N.E.2d at 1004.

<sup>11</sup> *Id.* at 1331, 389 N.E.2d at 1004.

<sup>12</sup> *Id.* The trustees cross-appealed arguing that the trust should not have been admitted. *Id.* at 1331 n.4, 389 N.E.2d at 1004 n.4.

<sup>13</sup> *Id.* at 1331-32, 389 N.E.2d at 1004.

<sup>14</sup> The decedent's gross estate was approximately \$2,285,000 of which only \$385,000 was attributable to the Florida probate estate and \$1,100,000 was in the trust. The balance was apparently situated in New Jersey. The federal estate tax was \$437,000 which exceeded the entire probate estate. *Id.* at 1332, 1333, 389 N.E.2d at 1005.

<sup>15</sup> *Id.* at 1335, 389 N.E.2d at 1006, citing *Warfield v. Merchants Nat'l. Bank of Boston*, 337 Mass. 14, 147 N.E.2d 809 (1958), and *Isaacson v. Boston Safe Deposit & Trust Co.*, 325 Mass. 469, 91 N.E.2d at 334 (1950).

<sup>16</sup> G.L. c. 65A, § 5.

<sup>17</sup> *Riggs v. Del Drago*, 317 U.S. 95 (1942).

The Court thus determined that the conflict with respect to the trustees' obligation to contribute or the executors' obligation to pay without contribution must be resolved on the basis of the intent of the decedent-settlor. Such intent, however, was not necessarily to be determined solely by the language of the will:

[W]e see no reason why the provisions of a will must be given precedence over those conflicting provisions of an inter vivos trust which are to become operative at the settlor's death, particularly when the administration of nonprobate assets is involved. In today's estate planning, it is not reasonable to conclude that a will is always of greater significance than an instrument creating an inter vivos trust.<sup>18</sup>

Since the two instruments were, according to the Court, of equal significance, and since extrinsic evidence would be admissible to resolve a conflict if the two conflicting provisions appeared in a single document, such evidence should also be admitted where conflict appears in these two instruments of equal weight.<sup>19</sup> Here, the Court reasoned, evidence of the circumstances known to the decedent-settlor could be particularly instructive in achieving the ultimate goal of recognizing and carrying out her intentions, especially when an illogical result would occur if the circumstances were not considered.<sup>20</sup>

The Court also observed that extrinsic evidence could be helpful in ascertaining which jurisdiction's law might ultimately be used in resolving the conflict. Given prior case law<sup>21</sup> and the fact that the trust itself specified interpretation by Massachusetts internal law,<sup>22</sup> it would seem on the surface that Massachusetts law would apply. Nevertheless, the Court found that a "significant choice of law question" existed.<sup>23</sup> It noted recent criticism of the refusal by situs jurisdictions, such as Massachusetts, to apply the law of the domicile of the decedent and cited several jurisdictions which now apply the law of the domicile.<sup>24</sup> The Court suggested that it may be appropriate to determine and apply the law of the jurisdiction with which the decedent had the greatest contact at significant times, such as her domicile (Connecticut) at the execution

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<sup>18</sup> 1979 Mass. Adv. Sh. at 1336, 389 N.E.2d at 1006. *But see* G.L. c. 191, § 1A(2).

<sup>19</sup> *Id.* at 1336-37, 389 N.E.2d at 1006.

<sup>20</sup> *Id.* at 1337, 389 N.E.2d at 1006.

<sup>21</sup> *See* cases cited in note 3 *supra*. The Court also cites several decisions from other jurisdictions which also apply the law of the situs of the trust. 1979 Mass. Adv. Sh. at 1338, 389 N.E.2d at 1007.

<sup>22</sup> *Id.* at 1341, 389 N.E.2d at 1008.

<sup>23</sup> *Id.* at 1338, 389 N.E.2d at 1007.

<sup>24</sup> *See id.* at 1339, 389 N.E.2d at 1007, 1008.

of both instruments or perhaps the law of the jurisdiction which the decedent expected to be applied.<sup>25</sup> While it declined to speculate on which rule it would adopt if the issue were fully developed and presented, it clearly opened the door to a reconsideration of its position.<sup>26</sup>

The Court's acceptance of evidence of the testatrix' knowledge of facts and circumstances at the execution of the will is consistent in theory with prior law applied in ambiguity cases.<sup>27</sup> In this instance, however, the admission of the conflicting document<sup>28</sup> itself seems to create an ambiguity in the otherwise clear language of the instrument. This result is an apparent departure from traditional rulings.<sup>29</sup> The Court, therefore, ostensibly has recognized and approved such a departure<sup>30</sup> when there are two or more instruments in the same estate plan, even if not simultaneously executed, even though traditional parol evidence principles would at least limit such a departure to contemporaneous documents. The import of the decision appears to extend beyond evidentiary issues, however. The Court seems to have explicitly attributed to the revocable trust the same significance given the will in an estate plan, at least for purposes of interpretation. In practice, the trust has possessed this equivalent status for planning purposes for some time. In formalizing this status, however, the Court may have superseded a statutory rule of con-

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<sup>25</sup> *Id.* at 1341, 389 N.E.2d at 1008. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 268(2)(b) (1971).

<sup>26</sup> The choice of law issue in the *Mount Dora* situation could be crucial. There is no apparent Massachusetts precedent dealing with a direct conflict between a will and a trust. The Court cites two Florida lower court cases which appear to interpret Florida law as giving precedence to the will, 1979 Mass. Adv. Sh. at 1339-40 n.9, 389 N.E.2d at 1008 n.9, although the Court seems unimpressed. *Id.* Connecticut appears to favor the will as well. See *Union and New Haven Trust Co. v. Sullivan*, 116 A.2d 908, 142 Conn. 685 (1955). Given the additional formalities of a will and, at least in this instance the fact that the will is the later document, it seems likely that the Massachusetts court would rule, even under Massachusetts law, that the provisions of the will take precedence in the event of a conflict unresolved by proof of intent. See G.L. c. 191, § 1A(2).

<sup>27</sup> See Smith, *The Admissibility of Extrinsic Evidence in Will Interpretation Cases*, 64 MASS. L. REV. 123, 123-25 (1979), and citations therein.

<sup>28</sup> The posture of the evidentiary issues in *Mount Dora* is curious. The trustees objected to the admission into evidence of the trust on the ground that the will was clear. The executor apparently introduced the will itself. It would seem more likely for the executor to put the trust in evidence and then object to an attempt by the trustee to admit the will in defense on the grounds that the terms of the trust were clear on their face.

<sup>29</sup> *E.g. Gustafson v. Svenson*, 373 Mass. 273, 366 N.E.2d 761 (1977).

<sup>30</sup> The Court suggested one possible resolution of the conflict which might be found after evidence was taken—interpreting the term “transferees, or other recipients” (see note 9 *supra*) in the will provision denying contribution as perhaps not including an inter vivos trust. 1979 Mass. Adv. Sh. at 1337-38 n.8, 389 N.E.2d 1006-07 n.8. In doing so it may have identified an ambiguity in the will which it can use to distinguish this case from future attempts to open up the evidentiary rules to allow admission of evidence designed to create ambiguities.



struction in section 1A(2) of chapter 191 of the General Laws. This rule provides that the intention of a testator "as expressed in his will" shall control the legal effect of his dispositions . . . ." <sup>31</sup> In addition, the Court's interpretation brings into question the continued policy of the law to require different formalities in execution of both.

§3.4. **Trust—Settlor's Intent—Funding.** During the *Survey* year the Appeals Court decided another case involving interpretation of a settlor's intent. In *Bourgeois v. Hurley*,<sup>1</sup> the Appeals Court was required to interpret two simultaneously executed documents in order to ascertain first, whether a settlor intended to transfer certain securities to a revocable trust and second, whether his intent was effectuated. The decedent had executed a Declaration of Trust which stated that the settlor "is about to transfer and deliver certain of his property to himself . . . and his wife . . . as [t]rustees."<sup>2</sup> Appended to that trust was a typewritten document entitled "Schedule A" itemizing certain securities, each page of which was initialed and which was signed on the final page.<sup>3</sup> Schedule A was not mentioned in the body of the trust instrument, nor did Schedule A refer to the trust.<sup>4</sup> On the same day that the trust and Schedule A were signed, the settlor executed a will which made reference to the trust and designated the trustees as beneficiaries of the residue of the estate.<sup>5</sup>

At the settlor's death, the executor found the securities itemized on Schedule A in the decedent's safe deposit box. The securities were still registered in the decedent-settlor's name as an individual, never having been endorsed either to the trustees or in blank.<sup>6</sup> The court inferred that no related powers of attorney had been executed.<sup>7</sup> The executor claimed that the securities had never been transferred to the trustees and therefore remained part of the probate estate. The parties initiated an action in the Supreme Judicial Court to ascertain the ownership of the securities, and the Court transferred the case to the Appeals Court.<sup>8</sup> The Appeals Court held for the trustees.<sup>9</sup>

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<sup>31</sup> G.L. c. 191, § 1A(2).

§3.4. <sup>1</sup> 1979 Mass. App. Ct. Adv. Sh. 1635, 392 N.E.2d 1061.

<sup>2</sup> *Id.* at 1636, 392 N.E.2d at 1063.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1636-37, 392 N.E.2d at 1063.

<sup>5</sup> *Id.* at 1637, 392 N.E.2d at 1063.

<sup>6</sup> *Id.* at 1637, 392 N.E.2d at 1064.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1635, 392 N.E.2d at 1063. There were apparently extrinsic tax considerations involved which prompted the parties to secure judicial resolution of the question.

<sup>9</sup> *Id.* at 1643, 392 N.E.2d at 1066.

The court found that the settlor, by his statement in the trust and by the listing of securities in Schedule A, had adequately expressed his intention to make the transfer of the listed securities to the trust.<sup>10</sup> According to the court, the settlor clearly intended to give Schedule A legal effect, since it had been initialed, signed, and dated at the same time as the trust and appended to the document declaring the trust.<sup>11</sup> The settlor's intent was further shown by evidence that the settlor and his spouse had treated the securities as property held in trust, by depositing all dividends and interest in a trust checking account and by filing corresponding fiduciary income tax returns.<sup>12</sup>

The court rejected the executor's argument that, even if the settlor had intended to transfer those securities, he was required to take the additional step of endorsing over the securities, or executing a power of attorney, or take some further act of "transfer and delivery," in order effectively to complete the transfer to the trust.<sup>13</sup> The court acknowledged that the executor's contention might have merit if one were to look solely to the Declaration of Trust, which merely stated that the settlor was about to transfer the securities.<sup>14</sup> The court found, however, that the simultaneous execution of the Declaration and the appended Schedule A indicated that the settlor intended both documents to be read together as a single legal instrument.<sup>15</sup> It also found that the settlor intended, by executing Schedule A and appending it to the trust, to effect the transfer without further formalities.<sup>16</sup> Stating that the law has historically allowed a trust of securities to be created by a simple declaration to that effect,<sup>17</sup> the court held that the combined declaration of intent in the trust instrument and the identification of the assets to be so held on Schedule A, where intended to be sufficient, was in fact adequate to effect the necessary delivery for trust purposes.<sup>18</sup>

In at least two respects, reliance on the *Bourgeois* holding may be misplaced. First, where the settlor is not a trustee, it would evidently be

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<sup>10</sup> *Id.* at 1641, 392 N.E.2d at 1065.

<sup>11</sup> *Id.* at 1640, 392 N.E.2d at 1065.

<sup>12</sup> *Id.* at 1638, 392 N.E.2d at 1064. Authority for subsequent actions tending to show intention was found in *Rizzo v. Cunningham*, 303 Mass. 16, 21, 20 N.E.2d 471, 474 (1939).

<sup>13</sup> 1979 Mass. App. Ct. Adv. Sh. at 1639-40, 392 N.E.2d at 1064-65.

<sup>14</sup> *Id.* at 1640, 392 N.E.2d at 1065.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1641-42, 392 N.E.2d at 1065.

<sup>17</sup> *Id.* at 1641, 392 N.E.2d at 1065, citing *Barnette v. McNulty*, 21 Ariz. App. 127, 516 P.2d 583 (1973); *Rock v. Rock*, 309 Mass. 44, 33 N.E.2d 973 (1941); *Locke v. Farmers' Loan & Trust Co.*, 140 N.Y. 135, 35 N.E. 578 (1893); *BOGERT, TRUSTS & TRUSTEES* § 142(b) (2d ed. 1979); and the *RESTATEMENT SECOND OF TRUSTS* § 17(a), Comment (a) (1959). It should be noted that these authorities are limited to cases where the settlor is also the trustee.

<sup>18</sup> 1979 Mass. App. Ct. Adv. Sh. at 1641, 1642, 392 N.E.2d at 1065.

highly imprudent to fund a trust by relying on the mere identification of assets in or attached to a trust as was done in *Bourgeois*. Such reliance would be counter to the authority governing oral declarations of trust, relied upon in part by the court, which applies only to cases where the settlor transfers property to himself as trustee.<sup>19</sup> Second, because of the practical problem of proving intent, it would likewise be imprudent to rely on *Bourgeois* even where the settlor is trustee, especially where it is essential to establish the time or fact of funding.<sup>20</sup> To avoid any such questions, prudent draftsmen should at the very least do the following: (1) use language in their trusts stating that the settlor has transferred or is about to transfer to the trustee the property listed on the appended schedule, (2) assure that the execution of the trust is accompanied either by physical delivery to the trustee of the assets in form legally sufficient to transfer title or by the delivery of legally sufficient deeds or assignments of property not physically delivered, and (3) have the trustee acknowledge receipt by a dated statement in the trust, on the schedule or separately.

**§3.5. Trustees Powers—Funding Marital Deduction Distributions in Kind—Valuation.** In the *Survey* year, the Supreme Judicial Court rendered another in a series of decisions interpreting terms of a trust or will so as to preserve an estate tax marital deduction.<sup>1</sup> In *Pastan v. Pastan*,<sup>2</sup> the issue was whether powers in a will purporting to give the executors discretion to choose and to value property to be distributed in the funding of a formula marital deduction trust created a non-deductible terminable interest.<sup>3</sup> The Court interpreted the powers so as to be consistent with the Internal Revenue Service rules governing “in kind” funding of marital gifts and the valuation of assets used.

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<sup>19</sup> See note 17 *supra*.

<sup>20</sup> One obvious example is the timing of funding of a Clifford trust, requiring, for effectively shifting income tax liability, a transfer for at least ten years. I.R.C. § 673.

§3.5. <sup>1</sup> *Mazzola v. Myers*, 363 Mass. 625, 296 N.E.2d 481 (1973) (interpreting a trustee's power to retain non-income producing assets); *Putnam v. Putnam*, 366 Mass. 261 (1974), 316 N.E.2d 729 (interpreting a trustee's power to settle future interests). Both are discussed in Slizewski, *Trusts and Estates*, 1975 ANN. SURV. MASS. LAW § 5.4, at 81-86; *First Nat'l Bank of Boston v. First Nat'l Bank of Boston*, 1978 Mass. Adv. Sh. 1099, 375 N.E.2d 1185 (interpreting intent to qualify for marital deduction as precluding apportionment of taxes to marital trust); *Boston Safe Deposit & Trust Co. v. The Children's Hosp.*, 370 Mass. 719, 351 N.E.2d 848 (1976) (apportionment of inheritance taxes). See also *Babson v. Babson*, 1977 Mass. Adv. Sh. 2759, 371 N.E.2d 430, where the Court inferred the intent of the testator to take the maximum marital deduction.

<sup>2</sup> 1979 Mass. Adv. Sh. 1342, 390 N.E.2d 253.

<sup>3</sup> *Id.* I.R.C. § 2056(b) denies the marital deduction where the interest passing to the surviving spouse is terminable and where upon the termination or failure of the terminable interest the interest passes to or for the benefit of a person other than the spouse.

In Rev. Proc. 64-19<sup>4</sup> the Internal Revenue Service prescribed the conditions under which the estate tax marital deduction would be allowed in cases where, under the terms of the governing instrument or local law, a fiduciary is empowered to satisfy a pecuniary bequest or transfer in trust to or for the benefit of a decedent's surviving spouse with assets other than cash. The problem addressed was that of funding a marital deduction pecuniary gift using assets valued at their federal estate tax value, even though the assets used may have significantly depreciated in value by the time the gift was funded. The concern was that if a fiduciary had the discretion to fund the marital bequest with property at estate tax values even though in fact the property had depreciated substantially, in effect the fiduciary had the discretion to allow the surviving spouse the actual benefit of only a portion of the marital deduction amount. Such discretion to deprive the spouse of some of the property qualifying for the marital deduction creates, in the Service's view, a disqualifying terminable interest.<sup>5</sup> On a practical level, funding the bequest with property at estate tax values could produce a windfall for the taxpayers by diverting to a non-marital trust property value which had received the benefit of a marital deduction. This technique would allow taxation on that diverted property value to be eliminated both at the death of the decedent and at the death of the surviving spouse, while still providing the surviving spouse with an income tax basis for property actually received equal to the full federal estate tax value.<sup>6</sup>

In Rev. Proc. 64-19 the Service ruled that it would allow a pecuniary marital deduction in the full amount when funded with property in kind only under two circumstances. The governing instrument or local law must require either: (1) that the fiduciary satisfy the pecuniary

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<sup>4</sup> 1964-1 C.B. 682.

<sup>5</sup> Suppose, for example, that the decedent's estate after debts and expenses amounts, at estate tax values, to \$500,000, \$250,000 in appreciating securities and \$250,000 in depreciating securities. Use of the maximum marital deduction would require a gift of \$250,000 to the spouse. If at time of distribution the depreciating securities declined in value to \$150,000 and the appreciating securities increased in value to \$300,000, the executor, absent the rules of Rev. Proc. 64-19 could, if the will or local law permitted, fund the marital deduction using only the depreciating securities valued at estate tax values and thereby satisfy the gift with property worth only \$150,000 at the time of distribution. Thus the spouse would never have control of \$100,000 of property qualifying for marital deduction. While it is true that the same result would have occurred had the same securities been distributed immediately and had the spouse retained them, at least the spouse would have had the option to dispose of them before their depreciation.

<sup>6</sup> The excess inchoate gain in the property passing to the non-marital trust could then be eliminated, if the trust provides for discretionary payments of income, by distributing the low basis securities in kind as income to beneficiaries in lieu of cash. Since the value of such securities is included in ordinary income to the beneficiaries, the beneficiaries' basis is increased to fair market value at date of distribution. See Treas. Reg. § 1.661(a)-2(f) (1956).

gift with cash or property having an aggregate fair market value as of the date or dates of distribution amounting to no less than the amount of the pecuniary bequest as finally determined for federal estate tax purposes; or (2) that the fiduciary distribute assets in satisfaction of the pecuniary bequest fairly representative of appreciation or depreciation in the value of all property thus available for distribution in the satisfaction of such pecuniary bequest or transfer.<sup>7</sup> This latter approach is often referred to as "ratable sharing" of appreciation or depreciation among beneficiaries.

In *Pastan*, the will in question required that the decedent's property, after payment of funeral and administrative expenses, be divided into two shares.<sup>8</sup> The first share was to be an amount equal to fifty percent of the decedent's adjusted gross estate as determined for estate tax purposes and was to be distributed to a standard, otherwise qualified, marital deduction trust for the benefit of the surviving spouse.<sup>9</sup> The balance of the property, after deduction of a cash legacy for a son, went to a non-marital trust with income for life to the surviving spouse and discretionary use by the trustees of principal for her or for the decedent's children and grandchildren.<sup>10</sup> The will gave the executors the power "to make any division or distribution required under the terms of this will in kind or in money" and to "allot to any part or share such stock, securities or other property, real or personal, as to them seems proper in their absolute judgment, and their judgment as to the value of such stock, securities, or other property so allocated shall be conclusive on all parties."<sup>11</sup> The Internal Revenue Service disallowed the marital deduction in part, apparently reasoning that the granted powers constituted the power to distribute assets in kind to fund the marital trust at federal estate tax values, despite a depreciation in value at the time of distribution or perhaps at some other arbitrary value.<sup>12</sup> It found that such a power created a disqualifying terminable feature since it violated the standards of Rev. Proc. 64-19.<sup>13</sup> The executors brought a petition

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<sup>7</sup> Rev. Proc. 64-19, § 2.02, 1964-1 C.B. 682. Thus, in the hypothetical at note 5 *supra*, the fiduciary would have been required either to choose a combination of assets worth \$250,000 at the time of distribution, leaving non-marital gifts worth \$200,000 less taxes, or to select assets for both trusts which shared ratably the depreciation and appreciation.

<sup>8</sup> 1979 Mass. Adv. Sh. at 1343, 390 N.E.2d at 254.

<sup>9</sup> *Id.* at 1344, 390 N.E.2d at 255. The income was to be paid monthly to the spouse during her lifetime with power in the trustees to distribute principal to her in their discretion, and the spouse had a general testamentary power of appointment. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1348, 390 N.E.2d at 256.

<sup>12</sup> *Id.* at 1342-43, 390 N.E.2d at 254.

<sup>13</sup> 1964-1 C.B. 682.

in the probate court for construction of the pertinent clauses of the will so as to obtain a ruling of construction under Massachusetts law which would be binding upon the Internal Revenue Service.<sup>14</sup> The probate court reported the questions to the Appeals Court and the Supreme Judicial Court granted direct appellate review.<sup>15</sup>

The Supreme Judicial Court at the outset analyzed the executors' powers under two rules of construction. The first was the doctrine of *Boston Safe Deposit & Trust Co. v. Stone*,<sup>16</sup> which adopted the general textbook rule for valuation of assets used to fund distributions absent specific instructions in the instrument: "A trustee in distributing the trust property in kind . . . must make the division in accordance with the fair market value of the property at the time of distribution."<sup>17</sup> Absent any other guidance, then, this rule would require executors to use date of distribution values in funding the marital gifts. The second rule employed was the general rule that, despite wording which on its face might give a fiduciary a broad, even arbitrary, power in making valuations for distributions, a fiduciary in funding distributions must value property by exercising "an honest, objective judgment, which in practice will mean a reasonable judgment corresponding to reality, and in the case of traded-in properties will doubtless mean a judgment in terms of market values."<sup>18</sup>

The Court proceeded to point to some additional language in the trust instrument which demonstrated the apparent intent on the part of the testator that all fiduciary powers be construed so as to assure qualification for the estate tax marital deduction.<sup>19</sup> The will required all taxes to be paid out of the non-marital share.<sup>20</sup> Moreover, the will contained a specific direction that "[i]n no event shall any property or interest be allocated to this [marital] bequest of the residue of my estate which is a 'terminable interest' . . ." and also seemed specifically to subordinate the power to value property to this limitation.<sup>21</sup> The Court

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<sup>14</sup> 1979 Mass. Adv. Sh. at 1343, 390 N.E.2d at 254. The petition was brought under the doctrine of *Commissioner v. Estate of Bosch*, 387 U.S. 456, (1967). See *Babson v. Babson*, 1977 Mass. Adv. Sh. 2759, 371 N.E.2d 430, for a discussion of the authority to decide such issues in a quasi-adversary proceeding. As is typically the case, the Internal Revenue Service was notified of the proceedings and declined to participate.

<sup>15</sup> 1979 Mass. Adv. Sh. at 1343, 390 N.E.2d at 254.

<sup>16</sup> 348 Mass. 345, 203 N.E.2d 547 (1965).

<sup>17</sup> *Id.* at 352, 203 N.E.2d at 551. See also SCOTT, LAW OF TRUSTS § 347.6 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 347, Comment h (1959).

<sup>18</sup> 1979 Mass. Adv. Sh. at 1348-49, 390 N.E.2d at 256-57, and cases and texts cited therein.

<sup>19</sup> *Id.* at 1349, 390 N.E.2d at 256.

<sup>20</sup> *Id.* at 1345, 390 N.E.2d at 255.

<sup>21</sup> *Id.* at 1349, 390 N.E.2d at 257.

concluded that “[a]lthough these quoted clauses are not artful, they do bespeak an intent to avoid any interpretation that would jeopardize the marital deduction.”<sup>22</sup>

By interjecting the tax objectives of the testator into its interpretation, the Court confronted the possible interpretation that the executors could use the “ratable sharing” approach in choosing assets to fund the trust rather than date of death valuation, since that interpretation would also meet the tax objectives.<sup>23</sup> The Court resolved this possibly self-created issue by looking to the language of the marital gift which, the Court said, was a statement of a pecuniary amount.<sup>24</sup> Such a statement itself indicated an election of the date of distribution valuation approach, since the ratable sharing approach would tend to convert an apparent pecuniary gift into a fractional share gift.<sup>25</sup> The Court then stated that absent such an indication of a specific, defined amount for the marital trust, equity might suggest a ratable sharing of appreciation and depreciation among the beneficiaries.<sup>26</sup>

In construing the will so as to save the marital deduction, the Court followed a consistent pattern established in previous cases.<sup>27</sup> Draftsmen in Massachusetts can continue to take some comfort that the vagaries of Internal Revenue Service interpretations of powers in instruments will not be fatal for estate tax purposes where the instrument contains an expressed intention that the settlor or testator intends to qualify fully for the estate tax benefit involved. The decision seems to reinforce the desirability of “bootstrap” saving clauses for marital deduction gifts and other tax sensitive provisions. The very existence of continued Internal Revenue Service attack on imprecisely drafted or inappropriate technical provisions, however, reaffirms the need for attention to choice of language and careful scrutiny of “boilerplate” provisions and their suitability to important tax oriented dispositions or powers.

While the result of *Pastan* seems to be correct, it remains difficult to justify that portion of the holding distinguishing the permissible valuation methods based upon the concept of a testator’s intent. On technical matters such as whether a distribution should be made at estate tax

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<sup>22</sup> *Id.*

<sup>23</sup> Rev. Proc. 64-19, § 2.02, 1964-1 C.B. 682.

<sup>24</sup> 1979 Mass. Adv. Sh. at 1343-44, 390 N.E.2d at 254 (50% of the adjusted gross estate).

<sup>25</sup> *Id.* at 1350, 390 N.E.2d at 257.

<sup>26</sup> *Id.* at 1350-51, 390 N.E.2d at 258. The Court felt that the surviving spouse’s status as a beneficiary of both trusts assisted its conclusion, as otherwise the ratable sharing approach might have more equitable appeal. *Id.* at 1350 n.15, 390 N.E.2d at 257-58 n.15.

<sup>27</sup> See note 1 *supra*.

values or at market values current at time of distribution or by choosing property fairly representative of appreciation and depreciation, it seems intellectually dishonest to suggest that testators are sophisticated enough to know which approach they would prefer and indeed that even most draftsmen are both conscious of the choice and careful to explain the alternatives to the testator. While tax objectives in general are an appropriate consideration in defining or delineating fiduciary powers, a testator in a situation like *Pastan* cannot realistically be expected to intend anything more precise than full qualification for the estate tax marital deduction rules.

The analysis could have been simplified. The Court could have pointed out that the power of the trustee to value the property for purposes of distribution can only be exercised in a fiduciary capacity. That capacity would be restricted by the confines of traditional and regular fiduciary principles to further the purposes of the trust for the benefit of the beneficiaries, which, in this instance, means using reasoned opinions of value as of the valuation date. It could then have stated that the proper valuation date, since no date was specified, was the date of distribution under the general common law rule. Such a straightforward holding under ordinary rules of construction would have saved the taxpayer's position without interjecting into the case the ratable sharing problem. Since, for federal tax purposes, no administrative provisions in a will can be viewed more broadly than state law views them for administration purposes,<sup>28</sup> the Internal Revenue Service would be required to interpret the will as providing for valuation of property distributed to the marital trust as of time of distribution. Such a valuation approach meets the requirements of Rev. Proc. 64-19, and the discretion in valuation at that date given to the executor is clearly within the Internal Revenue Service rules governing reasonable discretions as they relate to the marital deduction.<sup>29</sup>

The Court seems to have felt compelled by language in earlier cases to go beyond rules of construction and delve into the issue of ratable sharing. These cases, which dealt with trustees' discretion as to valuations, suggest that a fiduciary cannot make valuation decisions so as to favor one beneficiary at the expense of another.<sup>30</sup> Such language read in its broadest light could suggest that, absent a contrary intent, a ratable sharing of depreciation or appreciation might be called for in

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<sup>28</sup> *Old Colony Trust Co. v. United States*, 423 F.2d 601 (1st Cir. 1970).

<sup>29</sup> Rev. Rul. 69-56, 1969-1 C.B. 224.

<sup>30</sup> See *Old Colony Trust Co. v. Silliman*, 352 Mass. 6, 10, 223 N.E.2d 504, 507 (1967); *Boston Safe Deposit & Trust Co. v. Stone*, 348 Mass. 345, 350, 203 N.E.2d 547, 552 (1965).



all distributions. To resolve this potential ambiguity in the law, the Court looked for and found a contrary intent in the statement of the fixed pecuniary amount. The cases cited by the Court, however, do not overrule the general date of distribution rule; indeed one of them is *Stone* itself. Their language merely reinforces the fiduciary limits on valuation that the Court has identified. The problem of opening up the ratable sharing possibility is that it still leaves the door open for the Internal Revenue Service to argue in an even less precisely drafted instrument, especially in a case where the spouse does not benefit from the non-marital share,<sup>31</sup> that the executor might be able to choose either the date of distribution or the ratable sharing approach. Placing that choice with the fiduciary would itself disqualify the marital deduction.<sup>32</sup>

What is clear from *Pastan*, however, is that a precisely worded pecuniary amount gift will require date of distribution valuation absent a contrary specification in the instrument. Given the usual periods of administration and the post-death income tax advantages which can be had by extending periods of administration and timing of the funding of the marital trust or marital gifts, often over a period of years, it behooves draftsmen, in the face of *Pastan*, to consider at the drafting stage whether date of distribution valuations or ratable sharing is more appropriate. This choice is particularly important where the identities of beneficiaries or the kinds of assets, such as non-marketable securities or small business holdings, might make a ratable sharing approach preferable or at least more consistent with the testator's notions of fairness.

**§3.6. Charitable Corporation—Public Charity—Churches—Dissolution—Jurisdiction.** The Supreme Judicial Court was called upon during the *Survey* year to decide whether an incorporated church functioning in the usual way was a "public charity." In the case of *Congregational Church of Chicopee Falls v. Attorney General*,<sup>1</sup> a financially depressed church had filed a petition for voluntary dissolution in the superior court, citing section 11 of chapter 180 of the General Laws as authority for its petition.<sup>2</sup> The Attorney General accepted service and assented to the petition and the plan for dissolution.<sup>3</sup> Before the final judgment was entered on the docket, the church discovered that an interest in a trust had vested for its benefit two weeks prior to the final order of

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<sup>31</sup> See note 26 *supra*.

<sup>32</sup> See Rev. Proc. 64-19, § 2.02, 1964-1 C.B. 682, which requires that the will or local law require either date of distribution valuation or ratable sharing. It does not allow the fiduciary to choose between the two.

§3.6. <sup>1</sup> 1978 Mass. Adv. Sh. 2760, 381 N.E.2d 1305.

<sup>2</sup> *Id.* at 2760, 381 N.E.2d at 1306.

<sup>3</sup> *Id.*

dissolution.<sup>4</sup> The court granted the church's motion for relief from judgment and the trustee's motion to intervene and prepared its memorandum of decision concerning the plan for the distribution of the trust fund.<sup>5</sup> The trustee then moved to dismiss the action for want of jurisdiction in the superior court, urging that dissolution of the church fell under section 11A of chapter 180, requiring that a petition be brought only in the Supreme Judicial Court.<sup>6</sup> The judge denied the motion and entered the judgment for dissolution.<sup>7</sup> The trustee appealed, and the Supreme Judicial Court granted the joint application of the trustee and the Attorney General for direct appellate review.<sup>8</sup> The trustee then brought as a separate action a complaint for instructions in the Supreme Judicial Court for Suffolk County regarding the proper disposition of the trust fund.<sup>9</sup>

Section 11A applies to "[a] charitable corporation constituting a public charity organized under the provisions of general or special law"<sup>10</sup> and constitutes, by its terms, the "sole method" for the voluntary dissolution<sup>11</sup> of a public charity. Its mechanism is a petition to the Supreme Judicial Court requesting the Court to authorize the administration of its funds for such "similar public charitable purposes" as the Court may determine.<sup>12</sup> Section 11, on the other hand, provides the procedure for voluntary dissolution of charitable corporations which do not constitute public charities and to which the doctrine of *cy pres* is inapplicable.<sup>13</sup> Section 11 was added during the revamping of chap-

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<sup>4</sup> *Id.* at 2761, 381 N.E.2d at 1306.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2762, 381 N.E.2d at 1306.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* The Attorney General, in his brief on appeal, argued that the Superior Court did not have jurisdiction to dissolve the church, even though he had assented to the petition filed in the Superior Court pursuant to G.L. c. 180, § 11. Undoubtedly he made the argument because his plan for distribution of the trust fund was not followed by the Superior Court judge. Brief of the Attorney General, S.J.C. Doc. No. SJC-1313, 2-4.

<sup>9</sup> 1978 Mass. Adv. Sh. at 2765, 381 N.E.2d at 1306.

<sup>10</sup> G.L. c. 180, § 11A. G.L. c. 180 applies, under § 1, to "all corporations whenever established" and "corporation" is defined in c. 180, § 2, as a "domestic corporation (i) heretofore established by either general or special law . . ."

<sup>11</sup> G.L. c. 180, § 11B, provides for the involuntary dissolution of a corporation constituting a public charity.

<sup>12</sup> G.L. c. 180, § 11A. The statutory scheme set forth in §§ 11A and 11B of c. 180 is a specific application of the general common law doctrine of *cy pres*. In the Matter of Troy, 364 Mass. 15, 57, 306 N.E.2d 203, 227 (1973).

<sup>13</sup> G.L. c. 180, § 11. There are many types of charitable corporations which are not considered public charities. See, e.g., In the Matter of Troy, 364 Mass. 15, 306 N.E.2d 203 (1973) (social club); Assessors of Boston v. Boston Pilots' Relief Society, 311 Mass. 232, 40 N.E.2d 889 (1942) (relief society); Moran v. Plymouth Rubber Co. Mut. Benefit Ass'n, 307 Mass. 444, 30 N.E.2d 238 (1940) (mutual benefit association).

ter 180 in 1971<sup>14</sup> and requires that a petition be filed either in the Supreme Judicial Court or in the superior court.<sup>15</sup>

The Court admitted that on a "superficial view" an incorporated church was a "charitable corporation" and a "public charity."<sup>16</sup> Since, however, there were no relevant statutory definitions of the terms, further analysis was required.<sup>17</sup> It noted that the church had always operated as a church,<sup>18</sup> that the church was incorporated under the General Laws (chapter 67) as a religious corporation, and that chapter 67 makes no provisions for dissolution of religious corporations.<sup>19</sup> The Court also noted that the enumeration of "civic, education, charitable, benevolent or religious" as the purposes for which a chapter 180 corporation might be formed did not mean a "religious" corporation was, for these purposes, in a category separate from that of a "charitable" corporation.<sup>20</sup> Finally, the Court rejected the contention that, because a church benefited only a limited number of beneficiaries, it was not a public charity.<sup>21</sup>

Early cases in the commonwealth had held that a church was not a public charity.<sup>22</sup> This view was based in part upon the proprietary nature of the membership.<sup>23</sup> There has even been some discussion of

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<sup>14</sup> Acts of 1971, c. 819. 1978 Mass. Adv. Sh. at 2763 n.3, 381 N.E.2d at 1307 n.3. See PEAIRS, 13 MASSACHUSETTS PRACTICE, BUSINESS CORPORATIONS § 165 (1971 with 1979 pocket part).

<sup>15</sup> G.L. c. 213, § 1A, provides that the Superior Court shall have original jurisdiction concurrently with the Supreme Judicial Court "[u]nless otherwise specifically provided." The special grant to the Supreme Judicial Court in § 11A of c. 180 of jurisdiction over dissolution of public charities falls within this phrase.

<sup>16</sup> 1978 Mass. Adv. Sh. at 2763, 381 N.E.2d at 1307.

<sup>17</sup> *Id.* No definition of "public charity" appears in G.L. c. 12, §§ 8E and F, which requires registration and annual reports of all public charities with the Department of the Attorney General or in c. 180, §§ 1 and 2, which defines the scope of c. 180.

<sup>18</sup> 1978 Mass. Adv. Sh. at 2763 n.4, 381 N.E.2d at 1307 n.4. A determination of whether a charitable corporation is a "public charity" may be made by a consideration of the language in its charter or articles of organization, the constitution and by-laws, the declared purposes, and the actual work performed. See *Carroll v. Commissioner of Corps. & Tax'n*, 343 Mass. 409, 410, 179 N.E.2d 260, 261 (1961). The actual activities of the charitable corporation are of the utmost importance. In the *Matter of Troy*, 364 Mass. 15, 58, 306 N.E.2d 203, 227-28 (1973).

<sup>19</sup> 1978 Mass. Adv. Sh. at 2764, 381 N.E.2d at 1307. In fact, c. 67, § 51, provides that religious corporations incorporated under c. 67 shall perform the "same duties and with the same legal effect" as in the case of corporations organized under c. 180, lending support to the view that dissolution of a c. 67 religious society is possible only under c. 180.

<sup>20</sup> *Id.* See In the *Matter of Troy*, 364 Mass. 15, 57-58, 306 N.E.2d 203, 227-28 (1973).

<sup>21</sup> 1978 Mass. Adv. Sh. at 2764-65, 381 N.E.2d at 1307.

<sup>22</sup> See, e.g., *Attorney General v. Federal St. Meeting House*, 69 Mass. (3 Gray) 1 (1854).

<sup>23</sup> 1978 Mass. Adv. Sh. at 2764 n.5, 381 N.E.2d at 1308 n.5.

whether a non-Christian church is a charity.<sup>24</sup> There is now overwhelming authority, however, for the proposition that a church is a charity.<sup>25</sup> On a practical level, *Congregational Church of Chicopee Falls* now makes it clear that a church is a public charity. Such a holding goes beyond the issue in this case and likely applies for all technical statutory purposes, including, presumably, registration and filing requirements applicable to public charities.<sup>26</sup>

§3.7. Guardianships—Probate Court—Source and Scope of Powers. The Appeals Court in *Guardianship of Bassett*<sup>1</sup> took a substantial step in defining the source and scope of the probate court's authority<sup>2</sup> to create and structure guardianships of mentally retarded persons. By the combined use of the probate court's specific statutory powers and general equity powers over guardianship matters, it is now clear that the probate court can tailor a guardianship to meet the particular needs of a mentally retarded ward and can do so in a single proceeding. *Bassett* is also important because it is the first reported decision in which the guardian of a person is a corporate fiduciary acting through a committee.<sup>3</sup>

In *Bassett*, a petition was duly brought for the appointment of a guardian of the person and property of Lawrence Allen Bassett, a moderately retarded person.<sup>4</sup> After the hearing, the probate court found Bassett competent to handle "some but not all of his personal and financial affairs," found that failure to act would create an unreasonable risk to Bassett,<sup>5</sup> and appointed as guardian the Belchertown State School Friends Association, Inc.<sup>6</sup> The guardian intended to handle matters

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<sup>24</sup> See *Glaser v. Congregation Kehillath Israel*, 263 Mass. 435, 437, 161 N.E. 619, 620 (1928). RESTATEMENT (SECOND) OF TRUSTS § 371d (1959); 4 SCOTT, TRUSTS § 371 (3d ed. 1967).

<sup>25</sup> See, e.g., *Chase v. Dickey*, 212 Mass. 555, 99 N.E. 410 (1912). But see RESTATEMENT (SECOND) OF TRUSTS § 371f (1959).

<sup>26</sup> G.L. c. 12, §§ 8E and 8F.

§3.7. <sup>1</sup> 1979 Mass. App. Ct. Adv. Sh. 186, 385 N.E.2d 1024.

<sup>2</sup> The Supreme Judicial Court during the *Survey* year also interpreted the probate court's equity powers in *Feinberg v. Diamant*, 1979 Mass. Adv. Sh. 1321, 389 N.E.2d 998. It held that a divorced parent can be compelled, under the probate court's general equity powers as to guardianship matters, to contribute to the support of an adult incapacitated child. For a discussion of *Feinberg*, see §5.6 *infra*.

<sup>3</sup> 1978 Mass. App. Ct. Adv. Sh. at 190, 385 N.E.2d at 1027.

<sup>4</sup> *Id.* at 186, 385 N.E.2d at 1026.

<sup>5</sup> *Id.* at 191, 385 N.E.2d at 1028. The court again avoided the issue of the burden of proof necessary to sustain the appointment of a guardian. See *Doe v. Doe*, 1979 Mass. Adv. Sh. 343, 385 N.E.2d 995, discussed § 8 *infra*; *Fazio v. Fazio*, 1978 Mass. Adv. Sh. 1539, 378 N.E.2d 951.

<sup>6</sup> 1979 Mass. App. Ct. Adv. Sh. at 191, 385 N.E.2d at 1028. The corporation is nonprofit and sought to support the rights of mentally retarded persons and to

pertaining to the ward's person through a committee of three.<sup>7</sup> The probate court judge ordered that a "guardianship plan" be filed with the court outlining the ward's circumstances and a specific plan of action for his development.<sup>8</sup> The court entered a judgment formalizing its orders, but, troubled by the scope of its authority, it reported questions of law to the Appeals Court.<sup>9</sup> These questions involved both the court's authority to appoint a guardian for a mentally retarded person to handle some but not all of his affairs and to appoint a corporate guardian acting through a committee.<sup>10</sup> The court also sought direction concerning the correct procedures for doing either.<sup>11</sup>

The Appeals Court analyzed the general powers of the probate court over guardianship matters in chapter 201.<sup>12</sup> Section 6A of the chapter grants broad powers to the guardian and authorizes him to utilize whatever support services the guardian deems to be in the best interests of the mentally retarded ward.<sup>13</sup> The court viewed section 6A as giving the probate court "what it needs to serve the problems of retarded persons as completely as possible."<sup>14</sup> No "great strain"<sup>15</sup> was placed on section 6A by interpreting it to permit appointment of guardians for mentally retarded persons who lack decision-making capability as to some but not all of their personal affairs. There was some further support for the view that section 6A encompasses "limited" guardianships. Retarded persons like Bassett who possess limited decision-making powers would not be able to obtain court assistance if section 6A were applied

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give them assistance. G.L. c. 201, § 6A, allows the appointment of a "nonprofit corporation organized under the laws of the commonwealth whose corporate charter authorizes the corporation to act as guardian of a mentally retarded person."

<sup>7</sup> *Id.* at 190, 385 N.E.2d at 1027. The proposal submitted to the probate court named three persons to serve on the Committee and stipulated that one of the three would be available at all times to assist the ward. *Id.*

<sup>8</sup> *Id.* at 191, 385 N.E.2d at 1028. The guardianship plan was to include, among other things, a statement of the particular needs, disabilities, and development potential of the ward and a program of specific action to assure the protection of the ward's health, welfare, and property by securing for the ward all necessary and desirable social, rehabilitation, and other services. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 196, 385 N.E.2d at 1030.

<sup>12</sup> *Id.* at 198, 385 N.E.2d at 1028-29. The general statutory grant of equity jurisdiction over guardianship matters is found in G.L. c. 215, § 3. It should be noted, however, that powers over guardianship matters are limited to only those that are granted by statute. G. NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS § 370.1 (4th ed. 1958).

<sup>13</sup> The court noted that the Legislature in 1974 had supplemented the probate court's jurisdiction with respect to persons with social disabilities by adding a new § 6A dealing with mentally retarded persons. Acts of 1974, c. 845, § 4. 1979 Mass. App. Ct. Adv. Sh. at 193-94, 385 N.E.2d at 1028-29.

<sup>14</sup> *Id.* at 194, 385 N.E.2d at 1029.

<sup>15</sup> *Id.*

only to those retarded persons who lacked total decision-making capacities.<sup>16</sup> The court noted, for instance, that in *Lane v. Candura*<sup>17</sup> it had contemplated situations in which a patient who was competent in other respects might need a guardian because of incompetency to make a specific medical decision.<sup>18</sup>

The Appeals Court held that once the probate court determines the propriety of appointing a guardian pursuant to chapter 201, it also has the power under its general equity jurisdiction<sup>19</sup> to define how much authority is to be vested in the guardian. The court found that the grant of the probate court's equity powers is "plenary and complements, on matters of guardianship, the powers conferred in G.L. c. 201, §6A."<sup>20</sup> Once the protective jurisdiction of the probate court attaches to a person properly before it, the court's powers must be broad and flexible enough to structure the necessary relief<sup>21</sup> to act in the best interests of the ward.<sup>22</sup> Specifically, the court ruled that the combination of powers allowed the appointment of a committee to carry out the services of the corporation as guardian and the requirement that the committee file and follow a plan for the ward's development.<sup>23</sup>

The court then addressed the procedural concerns of the probate court, elevating the substance of the proceeding over the procedural technicalities arising from the traditional separation of the strictly probate and equity functions of the probate courts.<sup>24</sup> The petition for the appointment of the guardian had been brought under section 6A of chap-

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<sup>16</sup> *Id.* at 195, 385 N.E.2d at 1029.

<sup>17</sup> 1978 Mass. App. Ct. Adv. Sh. 588, 376 N.E.2d 1232.

<sup>18</sup> 1979 Mass. App. Ct. Adv. Sh. at 195 n.9, 385 N.E.2d at 1029 n.9. The court also found support for such authority in G.L. c. 201, § 45, dealing with approval of certain waiver and election decisions a ward is allegedly incompetent to make. Further support may be found in section 16B of chapter 201 governing appointments of conservators of mentally retarded persons. This section recognizes that a retarded person might have the ability to handle some of his finances.

<sup>19</sup> G.L. c. 215, § 6.

<sup>20</sup> 1979 Mass. App. Ct. Adv. Sh. at 194, 385 N.E.2d at 1029.

<sup>21</sup> *Id.* at 195-96, 385 N.E.2d at 1029-30. See *Feinberg v. Diamant*, 1979 Mass. Adv. Sh. 1321, 389 N.E.2d 998; *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 755-56, 370 N.E.2d 417, 433 (1977). See also LOMBARD, PROBATE LAW AND PRACTICE § 902 (1980 supp.).

<sup>22</sup> 1979 Mass. App. Ct. Adv. Sh. at 194, 385 N.E.2d at 1029. The "polestar" of any guardianship is the "best interests" of the ward. *Id.* For an interpretation of a ward's "best interests" in the context of a commitment to a mental health facility, see discussion of *Doe v. Doe*, 1979 Mass. Adv. Sh. 343, 385 N.E.2d 995, § 8 *infra*, and in the context of adoption proceedings see *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 328 N.E.2d 854 (1975).

<sup>23</sup> 1979 Mass. App. Ct. Adv. Sh. at 196, 385 N.E.2d at 1028.

<sup>24</sup> The Department of Public Welfare in its brief noted that the administrative concerns of the probate court register in dealing with two separate dockets for one proceeding may indeed have precipitated the case being reported. Brief of the Petitioner-Appellant 13 n.4.

ter 201, a citation had issued, and notice had been given pursuant to section 7 of that chapter.<sup>25</sup> The probate court judge had been uncertain whether it was necessary also to bring an equity complaint under section 6 of chapter 215 in order to invoke the equity powers of the court over guardianship matters.<sup>26</sup> Since equitable proceedings in the probate courts are now governed by the Rules of Civil Procedure,<sup>27</sup> a chapter 215, section 6, complaint would, on the face of the statute, have to be filed and a summons issued and served.<sup>28</sup> The court stated that the Rules are to be interpreted to facilitate the administration of justice and that a dual proceeding "might cause some injustice" by way of delay to an individual.<sup>29</sup> The "clear and obvious way" to commence a proceeding was under sections 6A and 7 of chapter 201, the court ruled, and the petition and notice were to be treated for purposes of invoking equity powers as functional equivalents of a complaint and summons under section 6 of chapter 215.<sup>30</sup> A second proceeding was therefore unnecessary.<sup>31</sup>

In addition to these specific and novel holdings, the court once again indicated the need for close scrutiny by the probate court of guardianship matters.<sup>32</sup> It in effect interpreted the probate court's powers as giving it a wide range of tools to carry out its responsibilities over guardianships. While it would be unfortunate if *Bassett* were read as requiring the preparation of formal "guardianship plans" in every case, probate courts plainly should feel pressure now to review fully each ward's particular circumstances and to structure guardianships to meet the ward's "best interests," at least with regard to a mentally retarded ward.<sup>33</sup> At a minimum, *Bassett* presents another alternative to a guardianship in a traditional form.<sup>34</sup> It remains to be seen whether that

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<sup>25</sup> 1979 Mass. App. Ct. Adv. Sh. at 197-98, 385 N.E.2d at 1028.

<sup>26</sup> *Id.* at 197, 385 N.E.2d at 1025.

<sup>27</sup> Mass. R. Civ. P., 1.

<sup>28</sup> Mass. R. Civ. P., 3 and 4.

<sup>29</sup> 1979 Mass. App. Ct. Adv. Sh. 198-99, 385 N.E.2d at 1031.

<sup>30</sup> *Id.* at 198, 385 N.E.2d at 1030.

<sup>31</sup> *Id.* at 199, 385 N.E.2d at 1031.

<sup>32</sup> See, e.g., *Doe v. Doe*, 1979 Mass. Adv. Sh. 343, 385 N.E.2d 995, discussed § 8 *infra*; *Lane v. Candura*, 1978 Mass. App. Ct. Adv. Sh. 588, 376 N.E.2d 1232; *Fazio v. Fazio*, 1978 Mass. Adv. Sh. 1539, 378 N.E.2d 951; *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

<sup>33</sup> *Bassett's* rule as to limited guardianship probably is not applicable to guardianship of mentally ill wards. G.L. c. 201, § 6. It appears to be a contradiction in terms to allow a guardian for some but not all purposes in a case where the statutory standard for guardianship requires that the ward be "incapable of taking care of himself by reason of mental illness." G.L. c. 201, § 6. See *Fazio v. Fazio*, 1978 Mass. Adv. Sh. 1539, 378 N.E.2d 951.

<sup>34</sup> Some suggested alternatives included trusts, representative payees under the Social Security and Veterans' Administrations, joint bank accounts, bank accounts

portion of *Bassett* dealing with invoking equity powers through probate rather than equity procedures becomes a more general view.

**§3.8. Guardianship—Appointment of Guardian—Commitment of Mentally Ill.** Continuing concern over procedural<sup>1</sup> and substantive safeguards in commitment proceedings in guardianships was evidenced during the *Survey* year. In a likely precedential decision, *Doe v. Doe*,<sup>2</sup> the Supreme Judicial Court set forth the standard and burden of proof necessary to authorize a guardian<sup>3</sup> to cause to “admit or commit”<sup>4</sup> a ward to a mental health or retardation facility pursuant to section 6 of chapter 201 of the General Laws.

In *Doe*, the probate court had found the ward mentally ill and incapable of taking care of himself and had appointed an “emergency temporary guardian”<sup>5</sup> with authority to authorize treatment<sup>6</sup> and to commit him to a mental health facility. Counsel was later appointed

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with permanent withdrawal orders and direct deposit of assistance checks, powers of attorney, guardianships of the person only, and conservatorships. See MASS. ASS’N FOR RETARDED CITIZENS AND MENTAL HEALTH LEGAL ADVISORS COMMITTEE, A HANDBOOK ON GUARDIANSHIP, CONSERVATIONSHIP AND OTHER OPTIONS: (February, 1978).

3.8. <sup>1</sup> In a rescript decision, *Laurenza v. Laurenza*, 1979 Mass. App. Ct. Adv. Sh. 753, 388 N.E.2d 704, the Appeals Court summarily vacated orders empowering a guardian to authorize commitment of a minor ward to a mental health or retardation facility on the grounds that the guardian was invalidly appointed because no notice had been given to the ward. The Appeals Court could not determine from the papers before it under which section of chapter 201 the guardianship was sought. In any of the statutory provisions governing petitions for the appointment of a guardian for a minor 14 years of age or older or a mentally ill or mentally retarded person, G.L. c. 201, §§ 2, 6, 6A, and 7, seven days prior notice must be given to the ward. Although notice may be dispensed with in a temporary guardianship proceeding, the proceeding had not been for the appointment of a temporary guardian. *Id.* G.L. c. 201, § 14.

<sup>2</sup> 1979 Mass. Adv. Sh. 343, 385 N.E.2d 995.

<sup>3</sup> Court initiated commitments have already been held to require similar standards. See text at note 16 *infra*.

<sup>4</sup> Both *Laurenza* and *Doe* use the word “commit” interchangeably with the word “admit”. See, e.g., 1979 Mass. App. Ct. Adv. Sh. at 753, 388 N.E.2d at 704; 1979 Mass. Adv. Sh. at 348, 352, 354, 385 N.E. at 1001. G.L. c. 201 also uses both terms interchangeably. See G.L. c. 201, §§ 6, 6A, and 14. Entering into mental health and retardation facilities under the authority of a guardian, however, is deemed to be a “voluntary admission” under c. 123, § 10. “Commitment” is made pursuant to the order of a physician, police, or the court. See G.L. c. 123, §§ 7, 8, and 12.

<sup>5</sup> 1979 Mass. Adv. Sh. at 344, 385 N.E.2d at 997. Although c. 201 makes no provision for an “emergency temporary guardian,” presumably the probate court judge intended to appoint a “temporary guardian” pursuant to the emergency provisions of § 14 of c. 201.

<sup>6</sup> Only when there is an emergency situation requiring the appointment of a temporary guardian is there any provision for the “treatment” of a ward. Cf. G.L. c. 201, § 14, with c. 201, §§ 6 and 6A. The courts nevertheless apparently grant authority to “treat” under the provisions for permanent guardians of mentally ill, mentally retarded persons, and temporary guardians in non-emergency situations.



for the ward.<sup>7</sup> Although the ward had stated that he did not want to stay in the hospital,<sup>8</sup> the judge found "by a preponderance of the evidence" that it was in the ward's "best interests" to remain in the hospital.<sup>9</sup> The ward's father was appointed guardian with authority to authorize treatment and to admit the ward to a mental health hospital.<sup>10</sup> The judge reported questions of law to the Appeals Court and the Supreme Judicial Court granted the ward's application for direct appellate review.<sup>11</sup>

The Supreme Judicial Court held that section 6 requires a finding, beyond a reasonable doubt,<sup>12</sup> that failure to commit would create a "likelihood of serious harm" as defined in section 1 of chapter 123, which governs involuntary civil commitments.<sup>13</sup> By construing the statute in that fashion, the Court found that it was not unconstitutional.<sup>14</sup> The Court expressly recognized that a commitment of an incompetent per-

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<sup>7</sup> 1979 Mass. Adv. Sh. at 344, 385 N.E.2d at 997.

<sup>8</sup> *Id.* at 346, 385 N.E.2d at 997.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 344, 385 N.E.2d at 997.

<sup>11</sup> *Id.*

<sup>12</sup> Two months after *Doe* was decided, the United States Supreme Court held, in *Addington v. Texas*, 99 S. Ct. 1804 (1979), that a reasonable doubt standard was not required under the United States Constitution in civil commitment proceedings. The Court held that due process demands required that the burden be "equal to or greater than" a "clear and convincing" evidence standard. It reasoned that the reasonable doubt standard was inappropriate because, given the uncertainties of psychiatric diagnosis, the standard might impose a burden a state could not meet and thereby erect an "unreasonable barrier" to needed medical treatment. *Id.* at 1812-13. The Supreme Judicial Court has historically viewed United States Constitutional precedents as requiring a reasonable doubt standard. See *Superintendent of Worcester State Hosp. v. Hagberg*, 1978 Mass. Adv. Sh. 187, 372 N.E.2d 242 (civil commitment); *Andrews, petitioner*, 368 Mass. 468, 334 N.E.2d 15 (1975) (commitment of sexually dangerous persons). It has not specifically used the Massachusetts Constitution as its basis. Absent a holding that the Massachusetts Constitution is to be read to require a stricter standard than the United States Constitution, it cannot be said with any certainty that, after *Addington*, the Supreme Judicial Court will still require the reasonable doubt standard. Given the Supreme Judicial Court's consistent requirement of a reasonable doubt standard in related areas, however, and that its analysis in *Doe* purports to be a statutory analysis, it is more likely than not that the Court will continue to require a stricter standard, notwithstanding *Addington*.

<sup>13</sup> 1979 Mass. Adv. Sh. at 354, 385 N.E.2d at 1001. G.L. c. 123, § 1, sets forth three categories for the likelihood of serious harm:

"Likelihood of serious harm", (1) a substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

<sup>14</sup> 1979 Mass. Adv. Sh. at 344, 385 N.E.2d at 997.

son by a guardian pursuant to chapter 201 produced the “same loss of freedom and the same label of mental illness” as commitment of a competent person by court order under chapter 123 of the General Laws.<sup>15</sup> Involuntary civil commitments have previously required proof regarding a reasonable doubt of the likelihood of serious harm.<sup>16</sup> The aim of the Court’s ruling was to give an incompetent person under guardianship the same rights and choices as those available to a competent person in involuntary civil commitment proceedings.<sup>17</sup>

The Court reviewed the statutory and judicial history of both kinds of commitment proceedings.<sup>18</sup> The review demonstrated that the development of stringent standards for involuntary civil commitment of competent persons pursuant to chapter 123 has progressed at a faster pace than those in guardian commitments under section 201, presumably because of the traditional assumption that a guardian has his ward’s best interests at heart and possibly also because the incompetent ward is unable to speak for himself. Since 1970 an involuntary civil commitment pursuant to chapter 123 could be made only on a finding that a failure to commit would create a “likelihood of serious harm.”<sup>19</sup> The finding must now be proved beyond a reasonable doubt.<sup>20</sup> Prior to 1970 a finding was required merely that the ward was mentally ill and a “proper subject for treatment in a hospital.”<sup>21</sup> It was not until 1977, however, that chapter 201 was amended to require that a commitment or admission by a guardian be made only if it is in the “best interests” of a ward. The amendment, however, enumerates no factors constituting “best interests” and no standards for making this determination.<sup>22</sup> Prior to 1977, the guardian appeared to have absolute discretion, without even a court hearing.<sup>23</sup>

The Court in *Doe* interpreted the “best interests” finding as an additional requirement over and above the standards of mental illness required for a guardianship.<sup>24</sup> This requirement suggested a legislative

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<sup>15</sup> *Id.* at 354, 385 N.E.2d at 1001.

<sup>16</sup> *Superintendent of Worcester State Hosp. v. Hagberg*, 1978 Mass. Adv. Sh. 187, 372 N.E.2d 242.

<sup>17</sup> 1979 Mass. Adv. Sh. at 354, 385 N.E.2d at 1001.

<sup>18</sup> *Id.* at 346-50, 385 N.E.2d at 998-99.

<sup>19</sup> G.L. c. 123, §§ 7, 8(a), and 12.

<sup>20</sup> *Superintendent of Worcester State Hosp. v. Hagberg*, 1978 Mass. Adv. Sh. 187, 372 N.E.2d 242.

<sup>21</sup> 1979 Mass. Adv. Sh. at 348, 385 N.E.2d at 998.

<sup>22</sup> *Id.* at 350, 385 N.E.2d at 998, 999.

<sup>23</sup> *Id.* at 347-48, 385 N.E.2d at 998.

<sup>24</sup> *Id.* at 350-51, 385 N.E.2d at 999. The Court has not yet addressed the issue of what standard of proof is necessary in guardianship proceedings which do not necessarily or directly involve or result in commitment. *Id.* at 354, 385 N.E.2d at 1001. See *Fazio v. Fazio*, 1978 Mass. Adv. Sh. 1539, 1548, 378 N.E.2d 951, 955.

judgment that a commitment may not be appropriate even though the ward is mentally ill and unable to care for himself.<sup>25</sup> In addition to taking into account the ward's stated preference as a "critical factor" in the determination of a ward's "best interests,"<sup>26</sup> the Court read into the "best interests" requirement of chapter 201 the necessity of a finding of a "likelihood of serious harm"<sup>27</sup> by proof beyond a reasonable doubt.<sup>28</sup> In the instant case the ward had expressed a "comprehensible opinion and strong feeling" that he should not be committed.<sup>29</sup> Furthermore, since the ward was neither suicidal nor homicidal at the time of the probate court hearing, the Court stated that the ward would have to be found to be facing "a very substantial risk of physical impairment or injury."<sup>30</sup> The Court ruled that this "best interests" standard, as interpreted, met constitutional requirements.<sup>31</sup>

The decision leaves several questions unanswered. Although the Court found that commitment pursuant to chapter 201 produces the same loss of freedom and same label of mental illness as commitment under chapter 123, the Court limited its holding to section 6 guardianships of mentally ill persons. While a similar finding should be appropriate under section 6A guardianships of mentally retarded persons, it may be that the conditions requiring the appointment of a temporary guardian in order to commit a ward permit a lesser burden of proof because of the existence of an emergency situation.<sup>32</sup> It may well be that the nature of the confinement should have a bearing on the standard and burden of proof needed for an admission.<sup>33</sup> The Court in-

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<sup>25</sup> 1979 Mass. Adv. Sh. at 351, 385 N.E.2d at 999.

<sup>26</sup> *Id.* at 352, 385 N.E.2d at 1000.

<sup>27</sup> *Id.* As that term is defined in G.L. c. 123, § 1, governing court ordered commitments. G.L. c. 123, § 1, requires a showing of suicidal or homicidal tendencies or "a very substantial risk of physical impairment or injury."

<sup>28</sup> *Id.* at 354, 385 N.E.2d at 1001.

<sup>29</sup> *Id.* at 353, 385 N.E.2d at 1000.

<sup>30</sup> *Id.* at 352, 385 N.E.2d at 1000.

<sup>31</sup> *Id.* at 355, 385 N.E.2d at 1001. See text at note 22 *supra*. The imposition of the reasonable doubt standard apparently could have been supported by either a due process analysis or by an equal protection analysis. See Comment, 13 SUFFOLK U.L. REV. 191, 193 (1979).

<sup>32</sup> It should be noted that an emergency commitment pursuant to § 12 of c. 123 may last only ten days. It might be possible to allow the appointment of a temporary guardian with authority to admit a ward in an emergency situation pursuant to § 14 of c. 201. Since, however, admission by a guardian is considered "voluntary" under § 10 of c. 123, there is no automatic mechanism for a review of the ward's admission.

<sup>33</sup> The United States Supreme Court in holding that a standard lesser than a reasonable doubt was required in *Addington v. Texas*, 435 U.S. 967 (1979), noted that the Texas statute on civil commitment entitled the patient to treatment, to periodic and recurrent review of his mental condition and to release at such time that the patient was no longer a danger to himself and to others.

licated that it may employ the doctrine of “substituted judgment,” that is, judgment of the guardian, in order to determine the ward’s desires.<sup>34</sup>

Finally, it is not clear what kind of evidence is necessary to establish a likelihood of serious harm for a ward who falls into Doe’s category. The Court had referred to the categories of “serious harm” as set forth in section 1 of chapter 123 and had placed Doe into the category of “a very substantial risk of physical impairment or injury.” The Court suggests that there might be evidence on the issue that the ward’s “judgment is so affected that he is unable to protect himself in the community” and that “reasonable provision for his protection is not available in the community.”<sup>35</sup> This suggestion is merely a restatement of the legal requirements set forth in that particular category. It has been suggested that the kinds of physical injury or impairment contemplated may be starvation or “overexposure to the elements.” It may well be that because the harm contemplated in the third category is likely to occur more gradually than the harm from the first two categories of suicide and homicide, the likelihood of its occurrence is required to be greater.<sup>36</sup>

**§3.9. Legislation—Self-Proving Affidavits—Temporary Executor—Temporary Administrator with the Will Annexed—Creditor’s Claims.** Chapter 546 of the Acts of 1979 made several changes to statutory sections enacted by the so-called “Omnibus Probate Act” of 1976.<sup>1</sup> Section 2 of chapter 192 of the General Laws was amended to permit a will to be allowed without testimony if it is self-proved by affidavit of the testator and the witnesses.<sup>2</sup> The affidavit may now be made before an officer authorized to administer oaths under the laws of the state where executed.<sup>3</sup> Prior to the amendment, the affidavit stated that it could only be made in Massachusetts.<sup>4</sup> The amendment conforms to the provisions of the Uniform Probate Code.<sup>5</sup> Section 1 of chapter 192

<sup>34</sup> 1979 Mass. Adv. Sh. at 351-52, 385 N.E.2d at 1000. See *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

<sup>35</sup> 1979 Mass. Adv. Sh. at 352, 385 N.E.2d at 1000.

<sup>36</sup> Walker, *Mental Health Law Reform in Massachusetts*, 53 B.U. L. REV. 986, 994 (1973).

§3.9. <sup>1</sup> Acts of 1976, c. 515. For an analysis of its provisions, see DeGiacomo and Wyman, *Trusts & Estates*, 1977 ANN. SURV. MASS. LAW § 3.12 at 53-61; Young, *Probate Change*, 20 Boston Bar J. 6 (December 1976).

<sup>2</sup> Acts of 1979, c. 546, § 1, amending § 2 of c. 192, as amended by Acts of 1976, c. 515, § 9, and was effective 90 days after its approval on August 20, 1979.

<sup>3</sup> Acts of 1979, c. 546, § 1.

<sup>4</sup> See former c. 192 § 2 (Acts of 1976, c. 515, § 9).

<sup>5</sup> UNIFORM PROBATE CODE, as amended by the 1975 Amendments, § 2-504. The Uniform Code with official comments was promulgated in August 1969, approved by the House of Delegates of the American Bar Association, and was adopted by the National Conference of Commissions on Uniform State Laws. There are now 14

also eliminates the requirement of filling in the testator's and witnesses' names in the affidavit,<sup>6</sup> thereby reducing the possibility of oversight and error.

Section 13 of chapter 192 was amended<sup>7</sup> to clarify the notice provisions for the appointment of a temporary executor, because it had been unclear whether notice could be dispensed with if there were minors or incompetent heirs or next of kin. When a testator has requested a temporary executor in his will, the probate court may appoint as such the named executor or executors without notice if the surviving spouse and all heirs at law and next of kin of full age and competence assent to the petition.<sup>8</sup> If the assents are not obtained, the court may appoint the named executor upon seven days' written notice of intent to seek the appointment to all heirs at law and next of kin of the decedent.<sup>9</sup> Where a testator has not requested a temporary executor in his will, however, the court may nevertheless appoint a temporary executor if the surviving spouse and all heirs at law and next of kin of full age and competence assent to the petition.<sup>10</sup>

Similar amendments were made to section 7A of chapter 193 of the General Laws with respect to notice requirements for the appointment of a temporary administrator with the will annexed.<sup>11</sup> Although a commentator has stated that the amendments merely "clarify the language which was ambiguous,"<sup>12</sup> it is suggested that the amendments do make a substantive change to these notice provisions. Prior to the amendment, the probate court could appoint a temporary administrator with the will annexed without notice if the testator had requested the appointment, whether or not surviving spouse and all heirs at law and next of kin of full age and competence had assented.<sup>13</sup> The amended

states which have adopted all of the Uniform Probate Code and 3 states which have adopted portions of it.

<sup>6</sup> The Uniform Probate Code provides for the filling in of the testator's and witnesses' names. UNIFORM PROBATE CODE, § 2-504, as amended by the 1975 amendments.

<sup>7</sup> Acts of 1979, c. 546, § 2, amending § 13 of c. 192, added by Acts of 1976, c. 515, § 10, and was effective 90 days after its approval on August 20, 1979.

<sup>8</sup> Acts of 1979, c. 546, § 2.

<sup>9</sup> *Id.* Although the statute calls for the assent of the surviving spouse, heirs at law, and next of kin, it requires notice only to the heirs at law and next of kin. The reason for specifically including the surviving spouse in the first instance and not in the second is unclear, since the surviving spouse is an heir at law and entitled to notice in either instance. See *Sweeney v. Kennard*, 331 Mass. 542, 120 N.E.2d 910 (1954).

<sup>10</sup> Acts of 1979, c. 546, § 2.

<sup>11</sup> Acts of 1979, c. 546, § 3, amending § 7A of c. 193, added by Acts of 1976, c. 515, § 11. It became effective 90 days after its approval on August 20, 1979.

<sup>12</sup> G. NEWHALL, *SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS* § 61.1 n.2 (4th ed. 1958 with 1980 cum. supp.).

<sup>13</sup> See former c. 193, § 7A (Acts of 1976, c. 515, § 11).

statute now requires that, unless those parties assent, seven days' written notice of the intent to seek such an appointment must be given to all heirs at law and next of kin.<sup>14</sup> It is still possible, as with the appointment of a temporary executor, to secure the appointment of a temporary administrator, even if the testator does not request it in his will, without notice, so long as the surviving spouse and all heirs at law and next of kin of full age and competence assent. With one exception, these amendments have resulted in parallel provisions for the appointment of a temporary executor and a temporary administrator with the will annexed. Only the party named as executor in the will may be appointed temporary executor. It does not appear, however, that the temporary administrator with the will annexed must be the same party petitioning to become permanent administrator with the will annexed.<sup>15</sup>

The procedure for the presentation of claims against a decedent's estate, section 9 of chapter 197 of the General Laws, was also amended during the *Survey* year.<sup>16</sup> A creditor whose claim has been allowed pursuant to the provisions of that section<sup>17</sup> but who has not been paid may now file a complaint in the probate court and secure an order directing the executor or administrator to pay the claims to the extent that funds are available for payment. The new section is now in conformity with the Uniform Probate Code.<sup>18</sup> Although no time limit is specified in section 9 for filing the complaint for payment, a limit is implied at least by the provision that there be "funds . . . available for payment."<sup>19</sup> The statute also does not address what time period for payment the court may order.<sup>20</sup> Of specific concern, the statute does not prohibit the court from directing payment prior to the expiration of the section 9 period. The fiduciary may find himself in an awkward position indeed if he has been directed to pay a claim which depletes the estate's assets during the nine-month period, only to discover that additional claims are still outstanding and yet to be presented. Furthermore, there is no definition of what comprises "funds . . . available for payment."<sup>21</sup> Such a term may or may not allow a fiduciary to retain a reserve for

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<sup>14</sup> Acts of 1979, c. 546, § 2.

<sup>15</sup> Cf. G.L. c. 192, § 13, with G.L. c. 193, § 7A.

<sup>16</sup> Acts of 1979, c. 546, § 5, amending § 9 of c. 197, as amended by Acts of 1976, c. 515, § 15. It became effective 90 days after its approval on August 20, 1979.

<sup>17</sup> A claim can be allowed pursuant to § 9 of c. 197 by a judgment in a proceeding in another court against the executor or administrator or by the action or inaction on the part of an executor or administrator in response to a claim filed with him or with the probate court within four months of the approval of his bond. G.L. c. 197, § 9.

<sup>18</sup> UNIFORM PROBATE CODE § 3-807.

<sup>19</sup> Acts of 1979, c. 546, § 5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

future contingencies, including other creditors' claims and additional estate taxes.<sup>22</sup>

**§3.10. Legislation—Voluntary Administration—Voluntary Executor.** Section 16 of chapter 195 of the General Laws, which deals with voluntary administration, was amended twice during the *Survey* year. The first amendment increased from two to three thousand dollars the maximum amount of personal property, in addition to an automobile, which a decedent's estate can contain and still be eligible for voluntary administration.<sup>1</sup> The probate estate must still consist solely of personal property.<sup>2</sup> The second amendment provided that the statement required by the probate court to be filed under oath by the putative voluntary administrator must now include the names and addresses known to the affiant of all persons who would take by intestacy.<sup>3</sup>

A new position of voluntary executor was created by the insertion of section 16A in chapter 195.<sup>4</sup> Its provisions are similar to those for the voluntary administrator but are designed for disposing of assets in accordance with a decedent's will, where the probate estate consists entirely of a motor vehicle and personal property not in excess of three thousand dollars.<sup>5</sup> To become a voluntary executor, the person named as executor in the will must file a statement under oath containing the same information required in a voluntary administration and a list of the names and addresses known to the affiant of persons who would take under the will.<sup>6</sup> Upon filing the statement and paying the filing fee, the person becomes voluntary executor.<sup>7</sup> After the payment of debts and expenses, the voluntary executor must distribute any balance according to the terms of the will.<sup>8</sup> If it is "impossible" to distribute the property in accordance with the will's terms, the balance is to be distributed to the surviving spouse, if any, or otherwise to those who would take in the case of an intestacy.<sup>9</sup>

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<sup>22</sup> Any fiduciary who is concerned with the possibility of an insolvent estate should be all the more certain to disallow any claims made during the first four months after his appointment which do not have priority over taxes. See G.L. c. 197, § 9.

§3.10. <sup>1</sup> Acts of 1979, c. 209, amending § 16 of c. 195. It became effective 90 days after its approval on May 22, 1979.

<sup>2</sup> G.L. c. 195, § 16.

<sup>3</sup> Acts of 1979, c. 744, § 1, amending § 16 of c. 195. It became effective 90 days after its approval on November 14, 1979.

<sup>4</sup> Acts of 1979, c. 744, § 2, effective 90 days after its approval on November 14, 1979.

<sup>5</sup> G.L. c. 195, § 16A.

<sup>6</sup> Subsection (h) of the first paragraph of § 16A of c. 195 is the only additional requirement made in the statement to be filed by the voluntary administrator. Cf. G.L. c. 195, § 16.

<sup>7</sup> G.L. c. 195, § 16A.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Before the enactment of the voluntary executor provision, it was not uncommon to file a will<sup>10</sup> but take out voluntary administration rather than have it probated. The property would pass to the surviving spouse even if the will provided otherwise. With the enactment of section 16A, it is unclear whether this option is still available. There may be situations when voluntary administration is preferable, even though a will exists. For example, the named executor may be a nonresident, deceased, or have declined to serve. Additionally, if the residuary beneficiary is not the surviving spouse, it may make sense to have the property pass to the surviving spouse. Since property passes to the surviving spouse under voluntary administration, the legatee can thus avoid filing a disclaimer of his interest in the will, and the estate can save the expense and bother of probating the will and filing a waiver by the spouse. Given the apparent legislative intent to provide a means for inexpensive and efficient administration of small estates, at least upon good cause shown, voluntary administration should be permitted even if a will exists and voluntary executorship is possible. The new procedure should be viewed as optional, not mandatory. Newhall, apparently subscribing to the option interpretation, points out that there is nothing in either section which appears to preclude a statement from one person seeking to be voluntary administrator and another seeking to be voluntary executor.<sup>11</sup>

In the new procedure, the person named in the will as executor must be an inhabitant of the commonwealth in order to serve as voluntary executor,<sup>12</sup> and there is no provision for the proof of the will. Unfortunately for prospective voluntary executors, there are no standards for determining the "impossibility" of distribution of property in accordance with the terms of the will.<sup>13</sup> The effective date for the legislation was February 12, 1980.<sup>14</sup> As was the case with some provisions of the Omnibus Probate Act, it is not clear whether the statute applies

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<sup>10</sup> G.L. c. 191, §§ 7 and 13.

<sup>11</sup> G. NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS § 6 (4th ed. 1958 with 1980 cum. supp.).

<sup>12</sup> G.L. c. 195, § 16A. Although a voluntary administrator must also be an inhabitant of the commonwealth, the statute provides a list of relatives who may serve in that capacity. *Id.* G.L. c. 195, § 16. The requirement that an inhabitant of the commonwealth serve as voluntary executor may restrict the usefulness of the statute. The requirement is important, in theory, because the safeguards resulting from the appointment by a nonresident fiduciary of an agent in the commonwealth upon whom legal process may be served are not applicable to the legislative scheme as set forth in G.L. c. 195, §§ 16 and 16A.

<sup>13</sup> G.L. c. 195, § 16A. Since a voluntary executor is liable as an executor *de son tort* to persons "aggrieved by his administration" of the estate, he acts at his peril if he does not distribute the property in accordance with the terms of the will.

<sup>14</sup> Acts of 1979, c. 209, was approved on May 22, 1979, and was effective 90 days thereafter.



to decedents dying on or after February 12, 1980, wills written on or subsequent to that date, or voluntary executor statements filed on or subsequent to that date.<sup>15</sup> As was the case with that Act, corrective legislation is probably called for to clarify the effective date.

**§3.11. Legislation—Beneficiary Designation—Deferred Compensation—Retirement Plan.** Section 68 of chapter 167 provides that a beneficiary designation of any employee benefit plan enumerated in that section is valid notwithstanding the statute of wills.<sup>1</sup> Section 68 was amended by chapter 326 of the Acts of 1979<sup>2</sup> to eliminate the possible implication that a beneficiary designation of an employee benefit plan not so enumerated might be interpreted to be an invalid testamentary disposition.

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<sup>15</sup> See Acts of 1976, c. 515, §§ 33-35, and the corrections to effective dates by Acts of 1977, c. 76, § 2, approved with emergency preamble March 28, 1977.

§3.11. <sup>1</sup> G.L. c. 167, § 68.

<sup>2</sup> Acts of 1979, c. 326, effective 90 days after its approval on June 25, 1979.