Chapter 2: Trusts and Estates

Emil Slizewski
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§2.1. Wills: Specific bequest. A testamentary gift of a designated number of shares of stock of a named corporation is ordinarily considered to be a general bequest.1 Such a gift is not subject to ademption and may be satisfied by the executor purchasing the shares on the market or delivering to the legatee funds of a sufficient amount to make the purchase.2 The courts have developed a preference for a construction that a legacy is general in order to avoid the severe consequence of ademption.3 However, a testator's disposition of "my" shares of stock, the "stock standing in my name" or similar designations would make the legacy specific.4

Igoe v. Darby,5 decided in the 1962 SURVEY year, held that a legacy was specific when the number of shares bequeathed corresponded exactly with the number of shares owned by a testatrix at the time of execution of the will. There were seventy-six shares, and she gave three separate legatees the amounts of twenty-five, twenty-five and twenty-six shares. Each bequest of stock appeared in a clause of the will which also disposed of specific tangible personalty in addition to the shares.6

The Court thought it significant that the number of shares owned at date of execution of the will and also the number disposed of equaled the odd amount of seventy-six. It also stressed the coupling

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3 See Paulus, Special and General Legacies of Securities — Whither Testator's Intent, 43 Iowa L. Rev. 467, 469-470 (1958).
6 The will provided in part: "First: To my grand-daughter, . . . twenty-five (25) shares of stock of American Telephone and Telegraph Company, and also my Chelsea china set. Second: To my grandsons, . . . twenty-five (25) shares of stock of American Telephone and Telegraph Company, and also my gold-band chinaware. Third: To my grandsons, . . . twenty-six (26) shares of stock of American Telephone and Telegraph Company, and also all other chinaware except as hereinbefore mentioned and located in my house at the time of my death . . ."
of each bequest of stock with a legacy which was obviously specific. These factors tended to show that the testatrix had a knowledge of her specific assets and intended to dispose of them as such.

The reason for a judicial preference for general bequests was not present in the Darby case. The issue was not one of ademption but whether a stock split after the making of the will and before the decedent's death gave the legatees the additional shares. In deciding that the increased shares went to the specific legatees the Court adopted a rule which was previously assumed without argument and judicial discussion. It was pointed out that the interest of the testatrix in the corporation remained the same after the split, the change being one of form rather than substance.

§2.2. Attorney's fees: Apportionment between probate and nonprobate assets. The personal representative of a decedent is the one primarily responsible for the payment of the federal estate tax even though the tax is with respect to a nonprobate asset. In Vaughan v. Smith a principal service of an attorney representing an administratrix related to the determination whether the proceeds of a life insurance policy and joint bank deposits rendered the estate liable for federal estate taxes. The entire fee including so much as was connected with the settlement of the estate tax problem was held chargeable to the administratrix as an item of her account. There was a suggestion, however, that upon the closing of the estate, there might be an apportionment of the burden of the counsel fees between the widow who took the nonprobate assets which occasioned the tax problem and the probate estate.

Cloutier v. Lavoie, decided during the 1962 Survey year, approved the Probate Court's reduction of legal fees shown in an executrix's ac-


8 Under Massachusetts law it would appear that additional shares resulting from stock dividends would not pass to a specific legatee. See First National Bank of Boston v. Union Hospital of Fall River, 281 Mass. 64, 183 N.E. 247 (1932). For an opposite view see In re Vail's Estate, 67 So.2d 665 (Fla. 1953); Chase National Bank v. Deichmiller, 107 N.J. Eq. 179, 152 Atl. 697 (1950).


3 "Counsel properly charged the estate. The estate is about ready to be closed and the distributive shares to be determined and paid. What part of the counsel fees, if any, should be chargeable to . . . [the widow who took the nonprobate assets] can then be easily and definitely settled." 335 Mass. at 420, 140 N.E.2d at 197.

count on a finding of the probate judge that a major portion of the fee should have been charged to joint property. The estate was insolvent, but real estate jointly owned by the testator and his wife approximated $100,000 in value. The amount of the fees reduced in Schedule B of executrix’s account represented the value of the attorney’s services relating to the jointly held property including the filing of federal and state tax returns. The Supreme Judicial Court observed that the probate estate was small and would have been insolvent whether or not any counsel fees had been paid from it; that the executrix was the testator’s widow, who acquired the jointly owned property by right of survivorship and who principally benefited from the attorney’s work; and that it could be considered “inequitable to charge the small probate estate with the expenses of settling taxes due because of substantial nonprobate assets which creditors of the testator might not be able to reach.”

In the Vaughan case the estate was solvent and the creditors were in no way affected by the initial allowance of the attorney’s fees in the account of the personal representative. An equitable allocation of the fees could have been made at the time of distribution to the next of kin.

Although it recognized that the statute providing for apportionment of estate taxes between probate and nonprobate assets did not deal with the apportionment of counsel fees,6 the Court in Cloutier pointed out that the allocation of the burden of the fees was consistent with the legislative policy of equitable apportionment.

§2.3 Probate decree: Persons entitled to appeal. During the 1962 Survey year there were three cases concerned with the standing of persons to appeal from a probate decree. Boudakian v. Town of Westport1 decided that a town was “a person aggrieved” entitled to appeal from a decree allowing an account of an administratrix.2 The town brought an action against the estate for reimbursement for old-age benefits paid to the decedent3 and objected to different items of the administratrix’s account, which, if allowed, would have left nothing for the town. The town was a creditor whose pecuniary interest was adversely affected by the allowance of the account.

In Budin v. Levy4 an executor was held to be “a person aggrieved” entitled to appeal a decree ordering distribution of the decedent’s estate in accordance with the provisions of a compromise agreement.

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5 §43 Mass. at 128, 177 N.E.2d at 586.
6 G.L., c. 65A, §§5, 5A, 5B.

2 General Laws, c. 215, §9, provides: “A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction.”
Even though he might not be a necessary party to the compromise agreement, he has the duty to carry out the testator's intent to the extent that it is feasible. His standing to appeal here is unlike the case in which an executor attempts to appeal from a decree entered on his petition for instructions.⁵

An administrator was permitted to appeal from a probate account even though he was not joined by his co-administrator in the case of *Phelan v. McCabe*.⁶ A previous case had allowed one administrator to appeal when the record showed that the co-administrator opposed the appeal.⁷ The Court in *Phelan* was disposed to extend the right to one of several personal representatives to appeal although nothing in the record as such indicated opposition by the others. It reasoned that omission of one of the co-administrators to claim the appeal is enough to indicate that the appeal is opposed by that one. The only other inference is that the omitted co-administrator approves the appeal but for some unknown reason his name is omitted. If this were so, then the appeal of the one should be considered to have been made on behalf of the other as well.

§2.4. Construction of wills: Gap in dispositive provisions. A bequest to B for the life of C gives B a vested interest which will pass to B's personal representative upon his death in the lifetime of C. In *Hussey v. Hussey*¹ the testator left the residue of his estate in trust to pay the income to A and B or the survivor of them for the life of C. Upon the death of both A and B prior to C, the Court directed that the income be paid to the executor of the survivor of them. “The general rule is that where the payment of income to a person is not limited in terms to the life of a beneficiary but is limited to some other lawful period of time, and before the expiration of that period the beneficiary dies, his personal representative is entitled to the income for the remainder of the period.”²

This rule of construction was deemed to be inapplicable in the recent case of *Wheeler v. Kennard*.³ There, the testatrix left personal property in trust to pay the net income

to my nephew, Waldo . . . during his life and on his decease to pay one-third of the net income to his wife, Margaret . . . during her life and the residue of said net income and the whole after the death of said Margaret . . . to be paid in equal shares to Adams . . . and Harry . . ., sons of said Waldo, or the survivor of them:

⁷ French v. Peters, 177 Mass. 568, 573, 59 N.E. 449, 450 (1944); there is in effect a severance in pleading.

provided, however, that if either said Adams . . . or Harry . . . shall have died leaving issue then surviving, the surviving issue of such deceased son shall take the parent's share of income by right of representation.

It was provided that the trust should terminate on the death of Waldo, Margaret, Adams and Harry and that the principal be paid to the then surviving issue of Adams and Harry. If there were no surviving issue then the principal was to be paid to those persons who would be entitled to take had the testatrix died intestate at the date of termination of the trust. There was also a residuary clause.

Waldo, Margaret, Adams and Harry survived the testatrix. Adams, Waldo and Harry died in that order, Adams and Harry both dying without issue. Margaret was still alive. The Supreme Judicial Court decided that one third of the net income was to be paid to Margaret until her death and that for the same period two thirds of the net income was to be paid to the residuary legatees.

The Court thought that the principle applied in the Hussey case was not applicable here since the gift over to issue showed an intent to limit the income gifts to Adams and Harry to their lives. It is difficult to see how the gift over to issue in the form of a condition subsequent should make for a manifestation of an intent to limit the interests of Harry and Adams for their lives, while the absence of such a conditional limitation would make the rule of construction applicable. It may, however, be of some slight significance that the limitation in question appeared in the residuary clause in Hussey, while in Wheeler this was not so and the presumption against intestacy was therefore not available.

Margaret's claim that she was entitled to all of the income after the death of the survivor of Adams and Harry on the ground that the dispositive scheme made her a member of the class of income beneficiaries was rejected. Her share was fixed at one third.

§2.5. Construction of wills: Date of determination of testator's "heirs." The question of the date of determination of the heirs of a testator in a will which provided for an end limitation in favor of his heirs arose in Perkins v. New England Trust Co. The will provided for a part of the residue to be divided into equal shares for the testator's living children and the issue of deceased children. There was a direction that the share given to each child be converted into money and paid to an insurance company in trust, the declaration of trust "to be, as nearly as practicable, the form commonly used by said Company in like cases." The interest of each share was to be paid to the child for life, and upon his death the principal amount with any accumu-
lated interest was to be paid to the trustees under the testator's will. When the principal amount was paid to the trustees, they were to hold for the benefit of the issue of a deceased child, "but if at the time of the decease of any child of mine there shall be no issue of him or her living then in trust to hold this trust property to the use of my heirs at law and to convey the same in fee." There was no spendthrift provision in the will.

Three children of the testator survived him. The designated sum of money was paid to the insurance company, which issued three documents, each entitled "Annuity in Trust." The documents provided that the company would pay interest quarterly to the annuitant for life and that: "The rights to demand and receive this Annuity, and the Principal Sum, are both hereby declared to be inalienable by the parties respectively entitled thereto, and not subject to their debts or control, or to the claim of any creditor."

Two of the testator's children died without issue, and the Supreme Judicial Court, relying on a rule of construction, decided that the testator intended that his "heirs at law" be determined as of his death rather than as of the deaths of the children respectively. The canon of construction was deemed applicable although it led to the result that the life beneficiaries shared in the remainder as well.

If a testamentary gift is made to B for life with a remainder to the heirs of the testator, and if B is the sole heir of the testator, there would be some incongruity in giving B the remainder as well as the life estate. The incongruity would not be present if "heirs" were to be determined as of B's death. However, in Perkins the gift over to the heirs was preceded by an alternative limitation in favor of the life tenant's issue. Furthermore, each life tenant was not the sole heir of the testator and, consequently, had to share the remainder interest of his portion with the other heirs. These added factors weaken the argument of incongruity significantly.

2 "When a limitation is in favor of the 'heirs,' . . . of a designated person, or in favor of other groups described by words of similar import, and the persons who come within the term employed to describe the conveyees are to be determined by a statute governing the intestate succession of property, then the statute is applied as of the death of the designated ancestor, unless an intent of the conveyor to have the statute applied as of some other date is found from additional language or circumstances." 3 Restatement of Property §308. See also New England Trust Co. v. Watson, 330 Mass. 265, 265-266, 112 N.E.2d 799, 800 (1953); Tyler v. City Bank Farmers Trust Co., 314 Mass. 528, 551, 50 N.E.2d 778, 780 (1943); 2 Simes and Smith, Future Interests §734 (2d ed. 1956).

3 3 Restatement of Property §308, Comment k.


5 See 3 Restatement of Property §308, Comment k, which provides in part: "If A conveys property by will 'to T in trust to pay the income to B for life then to the children of B but if B dies without leaving children to my heirs,' the fact that B is the sole heir of A at the death of A tends to establish that A intended his heirs to be ascertained as of the death of B but the tendency again is somewhat weakened by the fact that B is not certain to acquire the complete interest in the

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An argument was made that the spendthrift provisions attached to the life beneficiaries' interests rendered the general rule inapplicable. In some previous Massachusetts cases a life beneficiary's interest having been subject to spendthrift provisions was considered a factor in decisions that remainders to heirs of the testator were to be determined at the life tenant's death. In Boston Safe Deposit and Trust Co. v. Waite a testamentary trust of a sum of money provided for the application of income for the benefit of a testator's child during minority and after minority for the payment of income to the child for life, such income to be subject to spendthrift provisions. On the child's death there were alternative contingent gifts to the child's issue, brothers and sisters or issue of deceased brothers and sisters with an alternate gift over "to my heirs at law in fee and absolutely." The residue was disposed of on the same trusts except that portions of principal could be distributed to the child on his attaining twenty-one and thirty years of age subject to a power in the trustees to refuse if in their judgment it was for the best interests of the beneficiary to retain control.

The heirs were determined as of the death of the life tenant in order to give the spendthrift provisions full effect. If they were ascertained at the testator's death, then their interests would have been alienable, no restraint on alienation of the remainder interest having been imposed, and the testator in large part would have undone what he had sought to do by the spendthrift provisions. 

Perkins was distinguished from Waite on the ground that "[t]he mere utilization of the commonplace spendthrift clause is not sufficient evidence . . . of a dominant purpose to keep the property' from being wasted through weakness in . . . [testator's] children." Other cases have applied the canon for determination of heirs at testator's death despite the coincidence of the life beneficiary as an heir and a restraint on alienation of his income interest.

§2.6. Construction of wills: Meaning of "issue." A testamentary property even if the heirs are ascertained as of the death of the ancestor, A. This is due to the fact that the limitation to the children of B may deprive B of the property.

"When the taker of a prior interest is one of several heirs of the designated ancestor at the ancestor's death, no constructional tendency is sufficiently definite to be capable of statement."

The spendthrift provisions appeared in the insurance company's "Annuity in Trust," but the Court assumed, "without deciding, that the spendthrift provisions are entitled to as much weight as if they appeared in the will itself." 1962 Mass. Adv. Sh. 721, 724 n.4, 182 N.E.2d 308, 311 n.4.

7 278 Mass. 244, 179 N.E. 624 (1932).
8 278 Mass. 244, 247, 179 N.E. 624, 626 (1932).
gift to "issue" ordinarily includes all lineal descendants. Context, however, may rebut this rule of construction, and "issue" may be given the meaning of "children." Watson v. Goldthwaite was concerned with the meaning of the word in a will which contained the following trust limitation:

One-tenth of said net income to be divided equally between Dana . . . and Hilda . . . share and share alike, during their lives, and upon the death of each, his or her issue to take the deceased parent's share per stirpes during their lives, and in default of any issue of either, the other, if living, or if the other is not living, the issue of the other, shall take the share of the one dying without issue.

The rule of construction was applied with the observation that the provision that issue shall take the "deceased's parent's share per stirpes" did not express a contrary intent. The word "parent" in context meant ancestor. Furthermore, "per stirpes" would have been redundant if it referred only to children. The term indicated that the descendants of Hilda and Dana were to take by right of representation.

The Court, however, held that the classes of descendants would close on the deaths of Hilda and Dana. During their respective lives the classes would remain open to take in any descendants born after the testator's death. There would have been a violation of the rule against perpetuities if all generations of lineal descendants whenever born were to take as income beneficiaries. Consequently, the interpretation which would validate the gifts was chosen.

§2.7. Construction of wills: Gift to "issue" per stirpes or per capita: Date of determination of class. It is a general rule of construction that a gift to "issue" means that they are to take per stirpes; that is, the subject matter is to be distributed to such persons and in such a manner as the laws of intestate succession require had the named ancestor died leaving only lineal descendants as his next of kin. This interpretation is based on a policy that grandchildren of the ancestor and their

5 "... if there are two or more reasonable interpretations of a dispositive scheme, one of which does not result in holding ... interests void under the rule against perpetuities when others do so, the interpretation leading to a holding of validity should be adopted, if consistent with the ... [testatrix's] general intention and with the public policy behind the rule itself." Second Bank-State Street Trust Co. v. Second Bank-State Street Trust Co., 335 Mass. 407, 412, 140 N.E.2d 201, 206 (1957).

§2.7. 1 Boston Safe Deposit and Trust Co. v. Park, 307 Mass. 255, 29 N.E.2d 977 (1940); Silsbee v. Silsbee, 211 Mass. 105, 97 N.E. 758 (1912); 3 Restatement of Property §303.
descendants should not be allowed to compete with their parents unless the donor manifested a different intention. In 1958 Welch v. Phinney held that the canon preferring a per stirpes distribution was rebutted when a testator's will directed that the principal of a fund be distributed "to and among the issue then living of my said nephews and said niece, per capita and not per stirpes." The phrase "per capita and not per stirpes" manifested the testator's desire to benefit all persons of every generation equally despite competition between parent and child and an awkward dispositive scheme involving a division into thirty equal shares.

The case of New England Trust Co. v. McAleer, decided during the 1962 Survey year, involved the determination of corpus beneficiaries in a will that gave the income of a trust to the testator's five children; upon the death of the last surviving child the income was to be paid "to and among all the issue of my said five children share and share alike until my youngest grandchild shall have arrived at the age of twenty-one years"; and "[w]hen my youngest grandchild shall have arrived at the age of twenty-one years to pay over, convey and transfer the entire principal of the estate herein devised in trust to and among all the issue of my said five children share and share alike, in fee simple." The Supreme Judicial Court ordered a division per stirpes, declaring that the provision for a distribution among "all" the issue of the five children "share and share alike" fell short of an expression of a desire that the distribution be made per capita.

The strong preference for a distribution by right of representation falls in line with precedent. It has been held that a gift to issue "share and share alike," "equally," "in equal shares," or "equally ... among all such issue or children share and share alike" did not sufficiently express a desire to give to all the issue alive per capita. There was no room for a per stirpes interpretation in the Phinney case as there was in McAleer and the above-mentioned cases.

Another question before the Court in McAleer concerned the date of determination of the class of issue who were entitled to share in the distribution of the trust fund. It held that the trust fund was to be distributed per stirpes to the issue who were alive at the death of the last surviving child of the testator, which was sometime after the youngest grandchild reached the age of twenty-one years. The contention that the class was to be determined when the youngest grandchild reached twenty-one despite outstanding life interests in the children was rejected. The general rule that a class closes at the date set for

8 Hall v. Hall, 140 Mass. 267, 2 N.E. 700 (1885).
distribution was applied. Before final distribution could take place, two events had to happen — all the children of the testator had to die, and the youngest grandchild had to become twenty-one years old.

The case of Dickerman v. McGregor was distinguished. There the residue was left in trust to pay the income to the testator's widow for life and upon her death to pay the income equally to the testator's sisters and brother then living, and "upon the death of all my said sisters and my said brother I give and devise all said estate and property . . . to the children then living of my said sister Sarah . . ." The conclusion was reached that the will clearly expressed the intention that all the children of Sarah who might be alive at the death of all the testator's sisters and brother should share equally. It made no difference that the date of distribution — the death of testator's widow — occurred later. There was nothing in the context of the will in McAleer that resembled such a clearly expressed intent.

In the McAleer case the Court appeared to equate the time for closing the class of issue to take with the date of their determination — implying a condition that the issue survive the date set for distribution. In the ordinary case a condition of survivorship will not be implied when there is a gift to a class subject to open. Furthermore, interim income to members of a class might give rise to a rule of construction that the members took vested interests on their birth. However, when the class designation is that of "issue," there is an inclination to imply a condition of survivorship of the time set for distribution.

§2.8. Construction of wills: Residuary clause as an exercise of a special power of appointment. It is firmly established in Massachusetts that a general residuary clause will operate as an exercise of a general testamentary power of appointment unless a contrary intent appears in the will. Until the 1962 Survey year the Court had not had the occasion to decide directly whether this rule of construction applies to special powers. In the past there have been intimations that

9 3 Restatement of Property §295, Comment l.
10 278 Mass. 593, 180 N.E. 151 (1932).
11 3 Restatement of Property §295, Comment l, was cited.
12 Thus a gift to A for life, with a remainder to the children of A, gives a child living in the lifetime of A a vested remainder subject to open. As a vested interest it is transmissible inter vivos and at death. See 1 Simes and Smith, The Law of Future Interests §146 (2d ed. 1956).
13 See 2 Simes and Smith, The Law of Future Interests §588 (2d ed. 1956). In the McAleer will there was a provision that the trustees upon the decease of any one of testator's children was to pay his or her share of the net income to his or her issue in equal shares until the death of the last surviving child.

a residuary clause would be enough to manifest an intent to exercise special as well as general powers of appointment. Such dicta were rejected, however, in the case of *Fiduciary Trust Co. v. First National Bank of Colorado Springs*, in which the Supreme Judicial Court held that the canon should not apply to cases involving special testamentary powers of appointment.

Major emphasis was placed on the difference in the extent of the dispositive powers. The canon is applicable to general testamentary powers because of the virtually unlimited power of disposition which so closely approximates a property interest. The special power restricts the prospective appointees to a limited class of persons exclusive of the donee's estate.

The Court made reference to the many different legal consequences that attach to the two types of powers. Creditors of a donee of a general testamentary power of appointment may reach the subject matter if the power is exercised, while the creditors of a donee of a special power cannot reach the appointive assets whether or not the power is exercised. The doctrine of "capture" which applies in ineffective attempts to exercise general powers is not available in cases of special powers. Whether a donee of a power may in the exercise of it create a new power depends in large part on the nature of the original power.

The Court also observed:

There are, however, other considerations, less involved in the niceties of property law, which indicate the same result. The donee of a general testamentary power can appoint the property to anyone, including his own estate. It may well be that a layman with such extensive power of disposition over property is not to be expected to distinguish between such property and that in which he has, in addition to such power of disposal, what the law calls


6 "It is a recognized principle in the law of property that where the donee of a general power attempts to make an appointment that fails, but where, nevertheless, the donee has manifested an intent wholly to withdraw the appointive property from the operation of the instrument creating the power for all purposes and not merely for the purposes of the invalid appointment, the attempted appointment will commonly be effective to the extent of causing the appointive property to be taken out of the original instrument and to become in effect part of the estate of the donee of the power." *Fiduciary Trust Co. v. Mishou*, 321 Mass. 615, 624, 75 N.E.2d 3, 9 (1947).


"title" or a "property interest" and that he can reasonably be presumed to regard this appointive property as his own. The donee of a special testamentary power, however, can, by definition, appoint only to a limited class of persons exclusive of his estate. It would in our opinion be unreasonable to presume that a layman with such a limited power of disposal over property would regard such property as his own.10

§2.9. Construction of trusts: Gifts in default of exercise of powers of appointment. The 1962 Survey year brought forth two cases involving the meaning of an ambiguous gift in default of the exercise of a power of appointment. Boston Safe Deposit and Trust Co. v. Boston Safe Deposit and Trust Co.1 considered a limitation following a general testamentary power of appointment which provided: "and if . . . [the donee] dies intestate, his third shall be divided among his heirs at law and next of kin in the same proportion in which they are by law entitled to his property." The donee released his power and died leaving a will which gave all his property to charity. His next of kin were held entitled to the appointive assets when the Court refused to construe the limitation literally. Context made it clear that the donor intended that the next of kin were to be the takers in default of appointment whether or not there was intestacy.

In New England Trust Co. v. Faxon2 the gift in default of the exercise of a general testamentary power of appointment was to go to donee's issue, and if the donee died without issue then "to and among the same persons who would have been entitled thereto if . . . [the donee] had held the same in her own right at the time of her decease and had died unmarried . . ." The donee released her power and then died unmarried and without issue leaving a will with a residuary clause which specifically excluded the property over which she had a power of appointment.

A majority of the Court, rejecting the view that the gift in default was intended to be to the donee's heirs as though she had died intestate, construed the language literally:

. . . the ultimate default gift was intended to be (a) to . . . [the donee's] heirs (excluding her husband, if any) if she should die intestate or (b) to those persons, if any, who would have taken this property under her will if she had died testate and owned this property outright, or if there were no such persons, then to her heirs as if she had died intestate.8

This interpretation made the default gift redundant to some extent. It in effect gave the donee a second opportunity to dispose of the appointive assets by will. Context would seem to indicate that the gift

8 343 Mass. at 280, 178 N.E.2d at 492.
in default was to those who would have taken the property had the
donee died intestate.\textsuperscript{4} Despite the literal construction the Court held that the subject mat-
ter of the power of appointment passed to the donee’s heirs as in intes-
tacy. The residuary clause, because of the specific exclusion, did not
purport to dispose of the appointive property. Consequently, it passed
“to . . . the same persons who would have been entitled thereto if . . .
[the donee] had held the same in her own right . . . .” The con-
clusion that the residuary legatees were not to take the appointive as-
sets was fortified by the donee’s release of the power. It was a pre-1942
power, and the donee apparently had the desire to keep the subject
matter out of her gross estate.\textsuperscript{5} If she had the intent to have the resid-
uary clause identify the takers of this property, her estate tax objectives
would have been jeopardized.

The donee’s heirs were deemed to have succeeded to the property
as remaindermen under the donor’s trust and not by intestacy from the
donee. Such property, therefore, bypassed the donee’s probate estate.

\textsection{2.10. Restraint on alienation.} In \textit{Bowen v. Campbell}\textsuperscript{1} a will
designed land

in equal shares to the six grandchildren of [testatrix’s father] . . .
absolutely, the child or children of any deceased grandchild . . .
to take his, her and their parent’s share. Subject . . . to this con-
dition that neither of said grandchildren or his or her heirs shall
during the life . . . of any of said grandchildren . . . or during
the further period of lives in being of the children of said grand-
children . . . at the time of the [p]robate of this will, alien . . .
his, her or their interest in said real estate, except to some other or
others of the grandchildren . . . or their heirs. It being my in-
tention that said real estate shall be retained by said grandchildren
. . . and their . . . heirs so long as . . . may be permitted by the
laws of . . . Massachusetts.

The restraint on alienation was declared to be void, and each of the
grandchildren alive at the date of the testatrix’s death was given an
equal share of the land in fee simple absolute.

The Court recognized that the restraint might have been invalid on
the ground that it was unreasonably limited as to the permissible trans-
ferees.\textsuperscript{2} It determined, however, to strike down the restraint as one
which might have lasted for an unreasonably long time. The period
of restricted alienation might have been longer than twenty-one years
after the expiration of the designated lives in being at the testatrix’s

\textsuperscript{4} Ibid.
\textsuperscript{5} See Int. Rev. Code of 1959, §811(f), as amended by 56 Stat. 942, 952, presently

\textsection{2.10. 1} 1962 Mass. Adv. Sh. 427, 181 N.E.2d 342, also noted in §1.1 \textit{supra}.
\textsuperscript{2} See Mills v. Blakelin, 307 Mass. 542, 30 N.E.2d 392 (1940); Roberts v. Jones, 307
Mass. 504, 30 N.E.2d 873 (1940). See 4 Restatement of Property §406(b); 6 Ameri-
can Law of Property §26.32 (Casner ed. 1962).
death. The will specified that the land could be transferred only to the grandchildren and their heirs during the lives of the grandchildren and "during the further period of lives in being of the children of any said grandchildren . . . at the time of the [p]robate of this will." It was possible for the probate to take place after the death of all the grandchildren living at testatrix's death and at a time when none of the great-grandchildren living at the date of probate were among those alive when the testatrix died. 8

Since the six grandchildren had vested interests on the testatrix's death, there was no violation of the rule against perpetuities. The period of the rule was utilized to determine the maximum permitted duration of the restraint on alienation. 4

Referring to the clause of the devise which read, "said real estate shall be retained . . . so long as . . . permitted by the laws of . . . Massachusetts," the Court concluded that it did not purport to be a limitation on the period of restraint. 5 The clause was thought to be ambiguous, and the restriction was interpreted literally under the rule of construction preferring no restraint. 6 The period of restriction of transfer was explicitly set forth earlier in the will.

§2.11. Compromise agreement changing the terms of a testamentary trust. A testamentary trust cannot be terminated if a material purpose of the trust would be defeated, even though all the parties with beneficial interests are sui juris and agree to its termination. 1 Budin v. Levy 2 indicated that a different rule should be applied when a compromise agreement settling a will contest did away with a trust created in the will.

In the Budin case a will left the residue to trustees to pay the income to testator's sister for life and gave the trustees the power to invade principal for her support. Upon the sister's death whatever remained was to go to her children. A codicil eliminated the power to pay principal to the sister, gave her children income for life after she died and disposed of the corpus to a synagogue. After the will and codicil were allowed, the sister filed a petition to revoke so much of the decree as concerned the codicil. Subsequently, the sister, her living children and the synagogue entered into a compromise agreement which gave the sister and the synagogue certain amounts of the residue free of any trust. A petition was brought to obtain a decree ordering distribution of the estate according to the terms of the agreement.

3 See Estate of Campbell, 28 Cal. App. 2d 102, 82 P.2d 22 (1938); Miller v. Weston, 67 Colo. 534, 189 Pac. 610 (1920); Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001, 10 L.R.A., N.S. 564 (1907).


6 4 Restatement of Property §418.

Such a decree was entered by the Probate Court after a finding that the compromise agreement represented a "just and reasonable settlement of a genuine controversy over the validity of the alleged codicil and the allowance thereof;" and that the agreement did not affect any material purpose of the testator.

The Supreme Judicial Court upheld the decree stating that when all interested parties are competent they can settle their differences by a compromise agreement which creates rights which are wholly contractual and not testamentary. It announced that the probate judge's finding that no material purpose of the testator was defeated by the agreement was not necessary to uphold the agreement.

Whether the codicil created a trust the material purpose of which would have been frustrated by a termination before the date specified in the testator's will may be subject to some conjecture. However, it was made clear that the answer to this question was immaterial. This view appears to be at odds with the rule of the Claflin case. It may be necessary for the protection of the interests of beneficiaries of a testamentary trust that they give up part of their interests to the contesting heirs in a will settlement. But it does not follow that a frustration of the testator's desire to create a trust with specific objectives should be allowed when the matter is of no concern to the contestants.

The attitude that the Claflin rule gives way to a compromise agreement is supported by prior local precedent. In National Shawmut Bank of Boston v. Fitzpatrick a will creating a spendthrift trust was contested by the heirs. A compromise agreement was reached requiring that payments be made to the contestants and that the remainder of the assets be held in trust for the beneficiaries but without any spendthrift provisions. The compromise was given effect, and a trustee in bankruptcy was held entitled to reach the interest of a beneficiary.

Professor Scott, commenting on the Fitzpatrick case, states:

It is rather extraordinary that the Supreme Judicial Court of Massachusetts, which has gone to such lengths in upholding spendthrift trusts and in protecting the beneficiaries against their own acts, should permit them through the device of a compromise agreement to strip themselves of the protection which the testator intended to give them through the creation of a spendthrift trust. 

8 All the sister's children were adults, and there was undisputed medical evidence that the sister could no longer bear children. See Commissioner of Corporations and Taxation v. Bullard, 313 Mass. 72, 46 N.E.2d 557 (1943).
7 256 Mass. 125, 152 N.E. 328 (1926).
8 §2 Scott, Trusts §337.6 (2d ed. 1956). In the Budin case the Court concluded that the executor was entitled to appeal from the decree because he had the duty to carry out the testator's intent. See §2.3 supra.
§2.12. Trust vs. annuity: Taxing trust income to settlor. The question whether a certain arrangement created a trust or an annuity was considered by the United States Court of Appeals for the First Circuit in the case of Samuel v. Commissioner of Internal Revenue.\(^1\) Archbishop Samuel, who owned a number of the "Dead Sea Scrolls," transferred the scrolls to himself and another in trust designated the "Archbishop Samuel Trust." All of the income and 90 percent of the principal was to be disposed of subject to the direction of the settlor. At the death of the archbishop the trustees were directed to pay his mother so much money as would be sufficient to support her in the style to which she was accustomed but not exceeding $2500 annually. A power to revoke and amend the trust was reserved by the archbishop.

Subsequently there was an amendment which provided that $30,000 was to be paid to the settlor for the reimbursement of the cost and expenses relating to the scrolls. In addition $10,000, payable from income or principal, was to be paid to him annually, and upon his death the trustees were to pay sums of money to his mother upon the same terms and conditions as set forth in the original trust. There was an ultimate gift over for religious purposes. The amendment made the trust irrevocable and amendable only for the purpose of reducing the yearly payments to the settlor and his mother.

When the scrolls were sold by the trustees approximately two years after the amendment, the gain on the sale was taxed to the archbishop as income held for future distribution under a so-called "grantor trust."\(^2\) The taxpayer contended that despite the literal wording of the Internal Revenue Code it had no application since the arrangement after amendment created a contractual obligation rather than a trust relationship — that the scrolls were sold by him to the trust in return for annuity payments to himself and his mother.

The court held that the capital gain was properly taxed to the archbishop. The original instrument as well as its amendment used trust terminology and brought the arrangement within the literal language of Section 677(a) of the Internal Revenue Code. The view of the taxpayer that he sold the scrolls to the trust for an annuity was rejected.

In concluding that the transaction did not contain sufficient indicia of an annuity contract the following factors were stressed: the trust was not regularly engaged in the business of writing annuities; the language used was that of a trust and did not typify an annuity contract; if there were an annuity, the transferor would have been a creditor of

\(^1\) Int. Rev. Code of 1954, §677(a), provides in part: "The grantor shall be treated as the owner of any portion of a trust . . . whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party or both, may be . . . (2) held or accumulated for future distribution to the grantor . . . ."

\(^2\) The co-trustee did not have any beneficial interest in the trust and consequently could not come under the designation of "adverse party." See Int. Rev. Code of 1954, §672(a).
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himself as trustee and transferee; unlike the normal annuity where
the annuitant is unconcerned with the ultimate disposition of the
property in the hands of the obligor, here the arrangement purported
to determine the distribution of the proceeds of the property trans-
ferred; had the scrolls been retained, the annual payments would have
been rendered impossible; the provisions for payments to his mother
for support and maintenance were inconsistent with the usual annuity
contract which calls for the payment of fixed and definitely ascertain-
able amounts; and the reservation of a right to reduce the amounts to
be paid to the archbishop or his mother would be most unusual for
an annuity arrangement. In short the transaction seemed to have all
of the earmarks of a trust and very few, if any, of a contract. 3

The position might be taken that even if the arrangement were
technically an annuity the wording of Section 677(a) of the Code
brought the transfer within its purview. 4 The opinion of the court,
however, appeared to stress the difference between a trust and an
nuity because of the taxpayer's principal reliance upon Becklenberg's
Estate v. Commissioner of Internal Revenue. 5 In that case a transfer
to a trust was held to have created an annuity in effect so as to keep the
subject matter out of the transferor's gross estate for estate tax pur-
poses. The decedent was one of several grantors to a trust, her con-
tribution amounting to 26.78 percent of the corpus. The trust instru-
ment provided for a liquidation of the res to purchase annuities for
specified members of the decedent's family including one for the de-
cendent for $10,000 a year for life. The sum of $10,000 a year was to be
paid to the decedent until such time as an annuity was purchased for
her. It appeared that the property transferred to the trust by the
decedent was more than enough to produce the $10,000 payments
which were made to her by the trust until she died. No annuity was
purchased for her by the trust.

The trust was construed as having had the obligation to pay the
amount of $10,000 to the decedent annually and "that her right to re-
ceive it was not limited to the proceeds transferred by her or the income
thereof." 6 The Samuel case distinguished Becklenberg's Estate on the
ground that a creditor-debtor relationship was more apparent in Beck-
lenberg — the Samuel trust was impecunious at creation; the decedent
in Becklenberg was not a trustee with power to manage the trust, nor
did she have any control over the res; in Becklenberg, unlike Samuel,
the transferor had made claims against the trust for failure to make

3 See generally 1 Scott, Trusts §§12-14.4 (2d ed. 1956).
4 See the concurring opinion of Judge Aldrich: "I would prefer not to discuss
the extent to which the payments to the petitioner might or might not technically
be considered an annuity as I do not think on the fiscal facts of this case the plain
words of the statute are to be so circumvented." 306 F.2d 662, 669 (1st Cir. 1962).
5 273 F.2d 297 (7th Cir. 1959).
6 Id. at 301. See also Fidelity-Philadelphia Trust Co. v. Smith, 356 U.S. 274, 280-
281, 78 Sup. Ct. 730, 733, 2 L. Ed. 2d 765, 769 (1958). Compare Estate of Moreno
v. Commissioner of Internal Revenue, 260 F.2d 389 (8th Cir. 1958); Toeller's Es-
tate v. Commissioner of Internal Revenue, 165 F.2d 665 (7th Cir. 1948).
back payments; and the purpose for the creation of the Becklenberg
trust was to provide for $10,000 annual payments until there was a
liquidation to purchase a commercial annuity, the payments having
been considered as a temporary substitute.

Company stock has been widely held in trust portfolios for a long
period of time, trustees and their advisers have been greatly concerned
with the effect of the order that Du Pont divest itself of General Mo-
tors stock. If a dividend in the form of General Motors stock is to
be allocated to income, it would appear that a substantial impairment
of the principal of a trust would result with a probable emasculation
of the intended dispositive scheme. Under the Massachusetts rule a
distribution by a corporation of stock of another corporation is allo-
cated to income unless the terms of the trust provide otherwise or the
distribution is one of liquidation. There is some authority holding
that a distribution by a corporation of its shares of a subsidiary as the
result of a direction by public authority may be deemed to be in the
nature of a partial liquidation allocable to corpus. There is, how-
ever, local precedent to the contrary.

Massachusetts trust men, apprehensive of the probability that the
distribution of the General Motors stock resulting from the Du Pont
divestiture order would not be treated as a capital distribution in par-
tial liquidation but would be governed by the ordinary rule, filed a bill
which was enacted as Chapter 481 of the Acts of 1962. This legisla-
tion provides in part:

Except as otherwise provided by a will or other instrument by
which a trust is created, distributions to a trustee by a corpora-
tion . . . of shares . . . of corporations . . . other than the one
making the distributions shall be treated as income; provided,
however, that if a trustee, not including a trustee who is a settlor
or beneficiary of the trust, determines that this section would be
unjust or inequitable in its effect upon the income beneficiaries
or the remaindernmen, or both, the trustee may treat such distribu-
tion in whole or in part as income or principal in such manner
and in such proportions as the trustee deems just and equitable.

The statute provides that it is applicable to any distributions re-
ceived after its effective date whether or not the trust is in existence
on or is created after that date. There is also a constitutional severa-
Bility clause. The retroactive application of the act may invite litiga-

Ct. 1245, 6 L. Ed. 2d 318 (1961).
2 3 Scott, Trusts §236.5 (2d ed. 1956).
8 Id. §§236.5, 236.10.
§2.14 Other legislation. Chapter 271 of the Acts of 1962 amends the Uniform Gifts to Minors Act\(^1\) by including life or endowment insurance policies and annuity contracts within the meaning of "custodial property." The custodian is to have the incidents of ownership of such policies or contracts except that the designated beneficiary must be the minor, or in the event of his death, the minor's estate.

Chapter 273 amends the lapse statute\(^2\) by providing that the word "issue" shall include adopted children.

Chapter 370 amends G.L., c. 229, §6A, by providing that sums recovered in death actions shall be subject to funeral, administration, medical and hospital expenses necessitated by the injuries causing death and also to attorney's fees, and the costs and expenses of the suit of recovery if the assets of the estate are insufficient to satisfy these claims.

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\(^1\) G.L., c. 201A.

\(^2\) Id., c. 191, §22.