1-1-1965

Chapter 4: Trusts and Estates

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CHAPTER 4

Trusts and Estates

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§4.1. Administration of estates: Short statute of limitations: Income taxes. Statutes of limitations are applicable to tax claims. The six-year general statute of limitations\(^1\) has barred personal liability for real estate taxes when a municipality failed to bring suit within six years of assessment.\(^2\)

The one-year short statute of limitations\(^3\) has barred actions by tax collectors for the recovery of local property taxes which were assessed to the decedent in his lifetime.\(^4\) Yet, property taxes assessed to a deceased's personal representative are not subject to the one-year statute, since the statute by its terms applies only to proceedings brought by creditors of the deceased.\(^5\) It appears, then, if a suit seeks to enforce taxes which are debts of the decedent the short statute is an effective bar to recovery, but if the obligation is imposed upon the personal representative, payable out of the estate, this statute is inoperative.\(^6\)

The applicability of the one-year statute of limitations to state income tax claims may readily be analogized to the local property tax cases. If the decedent was personally liable for the payment of the tax in his lifetime, it would follow that any action to recover such tax must be brought within one year from the date of the approval of the bond of the personal representative. An income tax claim originally payable by the executor would appear to be beyond the pale of the short statute.

The question, whether an assessment of an additional income tax on an estate with respect to income received by the decedent during his lifetime creates such a claim as to be within the purview of the

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\(^1\) G.L., c. 260, §2.
\(^3\) G.L., c. 197, §9, which provides in part "... an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond. ..."
short statute of limitations, remained undecided until 1965. A previous Massachusetts case had left the question open, but made the observation that

There is a substantial question . . . whether the provisions of the short statute of limitations . . . do not control the present case rather than the limitation provision of . . . c. 62, in view of the very strong public policy in favor of “limiting the time within which creditors of an estate may bring actions to enforce their claims” which will of course, tend “to expedite the settlement of estates.”

This question was resolved in Levin v. Commissioner of Corporations and Taxation. There, a testator reported income received in 1957 in his income tax return seasonably filed the following year. He died in 1960 and his executors gave bond in October of 1960. An additional tax with respect to the testator’s 1957 income was duly assessed to one of his executors on April 14, 1961. No action having been instituted by the Commissioner of Corporations and Taxation within a year from the date of approval of the executors’ bond, the executors sought declaratory relief against the commissioner.

The Supreme Judicial Court upheld the Probate Court’s ruling that the income tax assessed upon the 1957 income gave the commissioner a claim which was not barred by the short statute. Although the Court recognized that there was nothing in the provisions of the one-year statute rendering it inapplicable to the present case, it felt obliged to give effect to the general statutory purpose to collect taxes on income of decedents as manifested by Chapter 62 of the General Laws

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8 Id. at 341-342, 145 N.E.2d at 722-723.
10 See G.L., c. 62, §37.
11 The decree of the Probate Court was modified to provide “that the claim of the commissioner against the estate of [the testator] for an additional tax under G.L., c. 62 upon income received by him in 1957 is now barred by G.L., c. 197, §9, but that an action may be maintained (without regard to the limitation imposed by G.L., c. 197, §9, but prior to the expiration of any otherwise applicable period of limitation) against the executors, as individuals, if and to the extent that, at or after the time of the demand upon them for such additional income tax, they have had in their possession funds of the estate ‘applicable to the payment of the [additional] tax’ within the meaning of G.L., c. 60, §36, as amended . . . .”
12 G.L., c. 62, §9, provides: “Estates of deceased persons, if assessed within the time limited by section thirty-seven, shall be subject to the taxes imposed by this chapter upon all income received by such persons during their lifetime. . . .” (as amended through Acts of 1957, c. 644, §2).
13 G.L., c. 62, §25, provides: “Every individual who while an inhabitant of the commonwealth, and every executor, administrator, trustee or other fiduciary who while such an inhabitant or while acting under an appointment derived from a court of the commonwealth, has received any income taxable under this chapter, and the
as a whole. Sections 9, 25, and 37 of Chapter 62 indicate a legislative intent to impose liability for additional taxes if assessed within the permissible period of time. With express authorization of an assessment within three years after an income tax return is due, the inference seems clear that the legislature must have intended that the taxes so assessed be collectible.

The Court gave recognition to an obstacle of precedent in the form of Bartlett v. Tufts. That case involved a suit to collect a local personal property tax commenced some time beyond the period of the short statute of limitations. The action was based on a so-called “omitted assessment” on personal property made after the decedent’s death referring to a property tax which should have been assessed in testator’s lifetime. In deciding that the executrix should prevail, the Court held that the short statute applied. The town collector was by statute given the remedial rights of creditors of the testator and was to be treated the same as any other creditor in the application of the one-year statute. There was also the observation that the “omitted” tax should have been regarded as part of the original tax levied in the testator’s lifetime rather than as a separate tax.

The analogy of Bartlett v. Tufts to the Levin case is obvious. One involved a tax which should have been assessed in the decedent’s lifetime, and the other had to do with a tax liability with respect to income which should have been paid during the deceased’s life. The statutory remedies given the town tax collector and the commissioner were similar.

After a recital that the Bartlett case might have been decided correctly upon the record, the Court in Levin stated that Bartlett estate of every deceased inhabitant of the commonwealth, shall be subject to the taxes imposed by this chapter. . . ."

G.L., c. 62, §37, provides: “If the commissioner finds from the verification of a return, or otherwise, that the income of any person subject to taxation under this chapter, or any portion thereof, has not been reported, he may, at any time within three years from the last day for filing the return required by this chapter, or from the day on which said return was actually filed, whichever is later, assess a tax or an additional tax, first giving notice to the person so to be assessed of his intention. . . .” (as amended through Acts of 1961, c. 555, §2).

14 241 Mass. 96, 134 N.E. 630 (1922).
15 Now G.L., c. 60, §36.
17 Id. at 98, 134 N.E. at 631-632.
18 G.L., c. 62, §9, gives the commissioner all the remedies provided by c. 60 for collection of income taxes under c. 62. Chapter 60 relates to collection of personal property taxes by town collectors. G.L., c. 60, §35 (as amended through Acts of 1946, c. 251, §1), reads: “If a tax which has been committed to a collector remains unpaid after it has become due and payable, it may be recovered in an action of contract or in any other appropriate action. . . .” G.L., c. 60, §36, provides: “If a person assessed for a tax dies. . . . before the payment thereof, or if a tax is assessed upon the estate of a deceased person, the executor. . . . shall, if a demand has been made on him therefor, forthwith on receipt of any money applicable to the payment of the tax, pay the same, and in default shall be personally liable therefor as for his own tax.”

"must be taken as now overruled by what is said in this opinion in so far as hitherto it may have been thought to apply to assessments under c. 62."20 The commissioner should not be relegated to the status of the ordinary creditor of the testator simply because the statute affording a remedy provides that the tax may be recovered in a contract action.21 The executor's liability for the tax is as an individual and limited to the "money applicable to the payment of the tax" at the time he receives notice of the further assessment.22

The result of the Levin case may to some extent conflict with the general purpose of the short statute of limitations to expedite the settlement of estates. However, barring the commissioner's suit would make the three-year assessment provision of the income tax statute largely nugatory. Moreover, the observation was made that the decision need not unduly delay the closing of estates. "If the commissioner unreasonably postpones making an assessment, the estate's tax liability may be finally established in declaratory proceedings."23

§4.2. Administration of estates: Allocation of succession tax. By statute the Massachusetts succession or so-called inheritance tax is a charge against the legatee even though it is payable by the personal representative in the first instance.1 A testator may, however, shift the burden of the tax to any part of his estate as he sees fit. It has been stated that a clear manifestation of intent must appear from the words of the will before the tax impact will be borne in a manner different from that of the statute.2

Thomas v. Fox,3 decided during the 1965 Survey year, held that the following limitation was sufficient to transfer the legacy tax from pecuniary and specific bequests to the residuary legatee:

I direct that all my debts, including funeral expenses, expense of my last illness, the expenses of the administration of my estate and all inheritance taxes be paid by my executors, hereinafter

20 Id. at 584, 206 N.E.2d at 74.
21 See note 18 supra.
22 Ibid.

§4.2. 1 G.L., c. 65, §17, provides: "An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy subject to said tax until he has collected the tax thereon. An executor or administrator shall collect taxes due upon land passing by inheritance or will which is subject to said tax from the heirs or devisees entitled thereto, and he may be authorized to sell said land, in the manner prescribed by section twenty-one, if they refuse or neglect to pay said tax." See also G.L., c. 65, §§6, 7, and 18.
Ferguson v. Massachusetts Audubon Society, 316 Mass. 436, 448, 55 N.E.2d 891, 897 (1944), makes reference to "an adequate testamentary provision" being required to shift the burden of taxes. [Emphasis supplied.]
named, out of the first moneys coming into their hands and available therefore.

The testator's classification of inheritance taxes together with debts, funeral expenses, expense of last illness, and administration expenses was thought to express a desire that such taxes be paid from the same sources as the other recited charges.

A direction to pay debts, funeral and administration expenses, and expense of last illness may amount to little more than a ritualistic introductory statement in a will. It merely restates the law's requirement that these claims be given priority over any of the testamentary gifts. It may be questioned whether the collective treatment of inheritance taxes and these charges shows "clearly" an intent to allocate the tax burden to the residue. Under the relevant statute the executor is obliged to deduct the tax on a pecuniary legacy and withhold delivery of a specific bequest until he collects the tax thereon. A provision that he pay these taxes conforms with the statutory requirements.

The limitation in question ends with the somewhat ambiguous statement that the specified charges and taxes be paid "out of the first moneys coming into [the executor's] hands and available therefore." Although the Court placed no emphasis on these words, they could be construed to mean that the source for payment of the legacy taxes is other than that set forth in the statute and the same that would be available for the satisfaction of the other claims. The "first moneys" would arise out of the residue.

§4.3. Allocation of death taxes: Marital deduction. The amount of the federal estate tax marital deduction is based upon the net value of the property passing to the surviving spouse. The value of the interest qualifying for the deduction is reduced, therefore, by liabilities imposed upon such interest among which may be state inheritance and estate taxes and federal estate taxes. The extent to which these death taxes diminish the amount of the available estate tax marital deduction depends upon specific tax provisions in the instruments of transfer or, in their absence, state law with respect to tax apportionment.

4 See note 1 supra. If the will devises land, the land bypasses the personal representative, who is still required to collect the tax attributable to the devise. It does not appear that there was any specific devise in the will involved in the present case.

5 See In re Crozier's Estate, 105 N.H. 440, 201 A.2d 895 (1964), where the will provided: "I direct the payment of all my just debts, funeral charges, expenses of administration and inheritance taxes out of my estate as soon as practicable after my decease." The court, admitting that the provision was ambiguous, held that the death taxes were payable out of the residue, relying in large part upon the apparent dispositive scheme which seemed to prefer the general and specific legatees over the residuary legatees.

2 Id. §2056(b)(4)(A).
§4.3 TRUSTS AND ESTATES

In *Boston Safe Deposit and Trust Co. v. Commissioner of Internal Revenue* the estate of a Massachusetts resident suffered adverse tax consequences when portions of estate and inheritance taxes were allocated to a marital deduction trust. Two revocable inter vivos trusts, "Trust A" and "Trust B," were created by the decedent. Trust A qualified as a marital deduction power of appointment trust, the amount set aside being described as a sum equaling one half the value of the settlor's "adjusted gross estate" as defined in the Internal Revenue Code reduced, however, by the value as finally determined for federal estate tax purposes of all other property passing to the donor's wife in such a way as to qualify for the marital deduction. Trust B was nonqualifying. There were no tax provisions in Trust A or in the donor's will. Trust B, however, contained an article giving the trustee absolute discretion to pay all inheritance and estate taxes out of it.

Even though the trustee exercised his discretion to pay all death taxes out of Trust B, the Court of Appeals held that the amount of the marital deduction as calculated under the formula of Trust A was to be diminished by the portion of inheritance and estate taxes charged to it by state law. The tax clause was insufficient to remove the tax burden from the qualifying trust, the critical date for determining the "net value" of the gift being the date of the donor's death. At that time there was no way of knowing how the discretion to pay taxes would be exercised, if at all. There being no contrary indication the Massachusetts succession tax impact remained on the beneficial interests received by the wife.

The diminution of the value of the marital gift by a portion of the federal estate tax raised a more complex issue. The state apportionment statute was deemed applicable to define the allocation of the tax load at the moment of decedent's death since the discretion to shift the tax impact had not been exercised at that time. The executor argued that no part of the estate tax should be charged to the marital deduction gift because such gift, being a deduction under the Internal Revenue Code, failed to generate the tax. The Court rejected this argument but in no way indicated what portion of the estate tax was to be charged to Trust A.

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4 §345 F.2d 625 (1st Cir. 1965).
6 Treas. Reg. §20.2056(b)-4(a); Ballantine v. Tomlinson, 293 F.2d 311 (5th Cir. 1961); Starrett v. Commissioner of Internal Revenue, 223 F.2d 163 (1st Cir. 1955).
7 G.L., c. 65, §17. See §4.2, note 1 supra.
8 G.L., c. 65A, §§, the relevant parts of which provide:
"Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, trustee, or other person acting in a fiduciary capacity, has paid or may be required to pay an estate tax levied or assessed under the provisions of this chapter, or under the provisions of any estate tax law of the United States heretofore or hereafter enacted, upon the transfer of the estate of any person who at the time of his death was an inhabitant of this commonwealth, the net amount of said tax shall be apportioned among and borne by recipients and beneficiaries of the property and interests included in the gross estate in the following manner: . . .
If the fraction of the estate tax allotted to the marital deduction trust were computed on the basis of the value of the corpus, there would appear to be a departure from the objective of the apportionment act to impose the tax burden proportionately on taxable items. The numerator of the fraction consists of property "included in the measure of [the estate] tax" and the denominator is made up of the "net estate" comprising "the gross estate as defined by the applicable estate tax laws of the United States less the deductions, other than specific exemptions allowed by the provisions of such laws."

The portion of the estate tax allocable to the marital deduction trust was, however, spelled out when the case was before the Tax Court in the following manner:

Under section 2031 of the Internal Revenue Code, the full value of the Trust A property was includible in the gross estate, and since, as we have held, the value of such property must be reduced for marital deduction purposes, by the amount of the Massachusetts inheritance tax, it follows that the value of the Trust A property, to the extent of the amount of the inheritance tax, remained as a part of the taxable estate for Federal estate tax purposes. We therefore think that, within the contemplation of the Massachusetts statute, the Trust A property was included to that extent in the measure of the Federal estate tax, and that under such statute, as of the date of death, such property was charged with its proportion of such tax.

Charging the marital deduction gift with a portion of the death taxes is in derogation of the donor’s apparent objectives. Trust A’s utilization of a formula tied to the language of the Internal Revenue Code makes it clear that the settlor desired that the maximum marital deduction be available. The tax clause empowering Trust B corpus to be used to satisfy these taxes shows further that he did not wish to reduce the maximum deduction. His apparent purpose in making the power to pay taxes out of Trust B discretionary was to provide for the administrative flexibility in the use of either the probate estate or

"2. If any portion of the property with respect to which such tax is levied or assessed is held under the terms of any trust created inter-vivos, . . . such proportion of the net amount of the tax so levied or assessed shall, except as otherwise provided or directed by the trust instrument with respect to the fund established thereby, or by the decedent's will, be charged to and paid from the corpus of the trust property . . . as the net amount of the property of such trust . . . and included in the measure of such tax bears to the amount of the net estate as hereafter defined in this section. The amount so charged shall not be apportioned between temporary and remainder estates. . . .

"4. The term 'net estate' as used in this section shall mean the gross estate as defined by the applicable estate tax laws of the United States less the deductions, other than specific exemptions, allowed by the provision of such laws."

9 Id. §5(2), appearing in note 8 supra.
10 Id. §5(4), appearing in note 8 supra.
12 41 T.C. at 351.
§4.4 TRUSTS AND ESTATES

Trust B property for the satisfaction of these claims. A view of the obvious dispositive scheme readily creates an implication that Trust A assets were to remain unburdened by any death taxes.¹⁸

§4.4. Wills: Meaning of “descendants.” The words descendants and issue, when used to identify legatees, include all persons of any generation who trace their lineage to the named ancestor.¹ However, when distribution is to be made to the “descendants” or “issue” of a named person, a well-recognized rule of construction would require that the distribution be per stirpes so as to avoid competition between parents and their descendants.² The per stirpes distribution will be made in a manner corresponding to the local statute of descent and distribution; that is, the property is to go to such persons and in such shares as the intestacy law would require had the named ancestor died leaving only lineal descendants as his next of kin.³ Since this is a canon of construction only, a manifestation of an intent to create a different dispositive scheme will be given effect.⁴

Whether a testatrix in a homemade will sufficiently showed a desire to have a per capita distribution was the question before the Supreme Judicial Court in the case of Evarts v. Davis.⁵ Her will left property “to the descendants of my maternal grandmother . . . in whatever proportion shall be thought equitable by them.” At the testatrix’s death there were twenty-one lineal descendants of her maternal grandmother living: four grandchildren (who were first cousins and the only heirs at law of the testatrix), six great-grandchildren, and eleven great-great-grandchildren.

The Court, being of opinion that the testatrix’s intent could best be served by interpreting the limitation in such a way as to avoid competition between parents and their children, concluded that only the top generation—the four grandchildren—could take. If the grandchildren could not agree as to what proportion each should take, the estate should be divided equally among them.

The phrase—“in whatever proportion shall be thought equitable by them”—following the word “descendants” might be considered to give the descendants something akin to a power of appointment. If a donee has a power to appoint to his descendants, the prospective ap-


pointees would include lineals of any degree of kindred. This would be the presumed intent of the donor who ordinarily creates a power of appointment to provide flexibility in his estate plan, and the broader the scope of the powers, the greater the flexibility. In *Evarts v. Davis*, however, the power to determine the shares resided in the descendants themselves; and the Court observed that the testatrix must have thought in terms of a group of persons of sufficient age to reach such an agreement. If all generations were within “descendants,” it would almost inevitably result in the inclusion of minors who could agree only through their representatives.

Since the administrator’s petition for instructions alleged that the lineal descendants could not agree as to division among themselves, it was probably unnecessary for a decision as to who might so agree. The distributions to the “descendants” might then be analogized to an implied gift in default of appointment, with the canon of construction favoring per stirpes division becoming operative. A transfer to B for life with a remainder to such of B’s descendants as B may appoint by will, gives B a special testamentary power to appoint to his descendants of any generation. But, if B dies without having exercised his power, there will be a distribution to his descendants per stirpes.

§4.5. Remainders, vested or contingent: Meaning of “the issue of any deceased child taking the parent’s share.” In *De Ford v. Coleman* a testator left a portion of the residue of his estate in trust to pay the income thereof to his daughter for life and after her death to pay the income to her children “in equal shares until they attain the age of twenty-five years and to each child his or her share of said principal sum when he or she shall attain the age of twenty-five years, the issue of any deceased child taking the parent’s share.” There were express gifts over if any child of the daughter died under twenty-five leaving no issue, if the daughter died leaving no issue, or if all her children died before attaining the age of twenty-five leaving no issue. At testator’s death the daughter and her two children were living. Both children (being over the age of twenty-five years when they died) predeceased their mother leaving issue surviving her. The administrators of the estates of the children claimed the res on the ground that the remainders were indefeasibly vested at death; while the issue of the children contended that they should receive the principal as substitutional takers when their parents failed to survive the date set for distribution of the trust fund.

6 §3 Restatement of Property §267, Comment h (1940); 2 Simes and Smith, Future Interests §1033 (2d ed. 1956).
7 It may be argued that the phrase, “in whatever proportion shall be thought equitable by them,” is either redundant or repugnant to a previously created absolute interest. See *Martin v. Foskett*, 189 Mass. 368, 75 N.E. 709 (1905); *Johnson v. Whiton*, 159 Mass. 424, 34 N.E. 542 (1893).
8 See note 6 supra.
9 §3 Restatement of Property §§292, 303 (1940); 2 Simes and Smith, Future Interests §§1032, 1033 (2d ed. 1956).

The Supreme Judicial Court decided that the issue were entitled to the trust corpus per stirpes. Each of testator's two grandchildren had a vested remainder in one half of the trust res at the date of the testator's death. Although they were not to enjoy the principal before attaining the age of twenty-five, the provision for interim income until reaching that age made their interest presently vested with only enjoyment postponed. Their interest, however, was made defeasible by the clause, "the issue of any deceased child taking the parent's share," the issue having an executory limitation which gave them the right to enjoyment in place of their parents when the corpus of the trust became distributable.

In selecting the date of distribution as the critical date to determine whether the issue would take in substitution for their parents, the Court chose what would appear to be the more reasonable interpretation. The average testator making substitutional gifts is more inclined to think in terms of possession being transferred than in the niceties of the law of vesting of future interests (including a vague "policy" favoring the early vesting of estates). If his grandchild could not enjoy the property because of death before the termination of the trust, the testator wanted such grandchild's issue to take in his stead.

The failure to mention a preference for an early vesting of contingent interests made for a desirable departure from the Court's approach in an earlier case. In Old Colony Trust Co. v. Clemons a revocable inter vivos trust was created under the terms of which income, after the settlor's death, was to be paid to his wife for life and upon her death the principal was to go to nieces and nephews and to "the issue of any deceased niece or nephew by right of representation." Relying heavily upon the policy favoring the early vesting of future interests, the Court held that the remainders to the nieces and nephews were indefeasibly vested at the donor's death—the estate of any nephew or niece who died between the settlor's death and the death of the wife, thereby, succeeding to the share of such niece or nephew.


3 There was no violation of the common law rule against perpetuities. The shares of the grandchildren were severable and treated, therefore, as separate limitations. The testators had no afterborn grandchildren. See Second Bank-State Street Trust Co. v. Second Bank-State Street Trust Co., 335 Mass. 407, 140 N.E.2d 201 (1957), discussed in 1957 Ann. Surv. Mass. Law §12.7.

4 See Boyd v. Bartlett, 325 Mass. 206, 211, 89 N.E.2d 772, 776 (1950); Cotter v. Cotter, 293 Mass. 500, 503-504, 200 N.E. 411, 413 (1936); Dodd v. Winship, 144 Mass. 461, 11 N.E. 588 (1887); 3 Restatement of Property §§254, Comment a, Illus. 1; 269, Comment i (1940); 1 Simes and Smith, Future Interests §§144, 146-149 (2d ed. 1956).

5 See Massachusetts Law §535, 126 N.E.2d 193 (1955), noted in 1955 Ann. Surv. Mass. Law §2.13. The Court in De Ford v. Coleman, referring to the Clemons case, said: "The original papers [of the Clemons case], however, reveal that the case was argued almost entirely on the issue whether the remainder interests were vested or contingent prior to the life beneficiary's death. No argument appears to have been made by the issue of deceased nieces and nephews, living at the life beneficiary's death, that they, rather than the estates of their parents, should take their respec-
If the policy expediting early vesting of estates is to have any significance in modern times, it should not be relevant in cases like Clemons and De Ford where the question was not whether the remainder was vested or contingent but whether it was indefeasibly vested. Relating the divesting limitation to the date of a donor’s death instead of the time of distribution might remove the property from the family line intended to be benefited.

§4.6. Charitable trust: Indefinite beneficiaries. One of the distinguishing features of a charitable trust is a purpose to benefit the community or a large segment thereof. It is often stated that a charitable unlike a private trust must be for the benefit of an indefinite number of persons. This generalization may be misconstrued. Thus, in a California case, In re Estate of Huebner, a trust to help defray the expense of educating some boy or girl in music or art was declared invalid, the court ruling that it failed as a charitable trust because it was not to benefit “an indefinite number of persons.” A similar trust limitation was considered by the Supreme Judicial Court during the 1965 Survey year.

In Brady v. Ceaty, the testatrix left the residue in trust:

To expend the income therefrom and so much of the principal of said funds as may be deemed by my Executor and Trustee advisable or necessary for the education of one or more deserving boys or girls, who, in the sound judgment and discretion of my said Trustee is worthy, needy and deserving of help in his or her education. I leave it to the judgment of my Executor and Trustee as to whether the student is studying for the secular or religious life or vocation.

Since the probate inventory showed only personal property of the value of $11,163.88, it was apparent that very few persons would receive

Section 4.6. 1 See 2 Restatement of Trusts Second §375 (1959); 4 Scott, Trusts §§375, 375.1 (2d ed. 1956). See the oft-quoted statement from the leading case of Jackson v. Phillips, 14 Allen 539, 556 (Mass. 1867): “A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.”


3 Compare In re Estate of Carlson, 187 Kan. 543, 358 P.2d 669 (1961), holding as charitable a trust to educate a medical student who would promise to return to the city to practice his profession; Sheen v. Sheen, 126 N.J. Eq. 132, 8 A.2d 136 (Ch. 1939), where a trust awarding an annual prize to the outstanding doctor of medical science was held charitable; see also Matter of Judd, 242 App. Div. 389, 274 N.Y. Supp. 902 (1st Dept. 1934), aff’d, 270 N.Y. 516, 200 N.E. 297 (1936).

payments from the trust. The probate judge, apparently influenced by the requirement that the beneficiaries of a charitable trust be indefinite in number, ruled that the trust was private and lapsed as such.

The Supreme Judicial Court reversed the lower court, pointing out that the error of the approach of the probate judge and the Huebner case lay in the failure to observe that the class benefited was not small. Both Huebner and Brady involved trusts to promote education and the class from which recipients of the direct tangible awards were to be chosen was large and indefinite in extent. The Brady case was analogized to an earlier local case, Sherman v. Shaw,5 where a $1000 bequest to an executor to be expended for the benefit of ten poor boys chosen by him in amount of $100 each was held to create a valid charitable trust.6

§4.7. Charitable trust: Power of disposition. A transfer in trust may be implied from the nature of the subject matter and the circumstances surrounding the conveyance. Newhall v. The Second Church Society of Boston,1 decided during the 1965 Survey year, found five silver vessels—a baptismal basin, a flagon and three dishes—donated to a church by different donors, to be impressed with a trust. The baptismal basin had an inscription in Latin stating that it was dedicated to the church “for the purpose of most holy baptism.” One of the silver dishes bore on its rim the legend that it was bequeathed to the church “for the use of the Communion table.” The other two dishes and the flagon had inscriptions identifying the donors and the church as donee with no specific mention of their intended use.

One of the questions before the Court was whether the five silver items could be sold to a museum. Without deciding whether the deacons or the church corporation had the legal title, the Court concluded that all items were held in trust for charitable purposes. The baptismal basin and the dish with the description of its intended use were held not to be subject to sale. The gifts of these vessels imposed an express commitment for specified church uses and thereby placed a restriction on their distribution. Although the other silver items were appropriate for a particular church use—for communion—such suitability was not considered sufficient to infer a restriction limiting the transfer of the legal title.2

It appeared that at the date of the gifts of the silver pieces the church was a Trinitarian Congregational Church observing the sacraments of baptism and holy communion. Since that time it adopted Unitarianism and in recent years had observed no sacraments and thus

2 The Court observed: “That these three vessels were appropriate for covenanted church use distinguished from general parish use should guide the disposition of the proceeds should they be sold.” Id. at 1137, 209 N.E.2d at 301.

5 243 Mass. 257, 137 N.E. 374 (1922).
had not made any sacramental use of the silver vessels. Despite these developments the Court ruled that the restrictions on the title of the baptismal basin and the dish donated specifically for the communion table were not destroyed. A cy pres application might be called for and a separate action with notice to all interested parties would be more appropriate to present all the issues involved.  

§4.8. Dower and curtesy: Land to which applicable. The anachronisms of dower and curtesy were to some extent deprived of their nuisance value by legislation enacted in 1959. The practical effect of these estates was minimized during the 1965 Survey year by the enactment of Chapter 165 of the Acts of 1965 which restricts dower and curtesy to land owned by the decedent spouse at the time of death.

Since the curtesy and dower interests are limited to life estates in one third of the land owned by the decedent spouse at the time of death, it will be the very rare case where they will be elected. The intestate share or the forced share will give the surviving spouse a greater beneficial interest in every instance except in the case of insolvency or near insolvency of the estate. Both the intestate and forced shares are subject to claims of creditors of the estate while dower and curtesy interests are not. However, the statute expressly provides that any encumbrances on land at the time of death is to have precedence over dower or curtesy.

§4.9. Oral contracts to die intestate. A recent decision of the United States Court of Appeals for the First Circuit held that an oral agreement to die intestate was not within the Massachusetts statute of frauds. An earlier Massachusetts case, however, decided that an oral promise not to revoke a will was rendered unenforceable by the statute. The legislation made reference only to agreements to make wills: the agreement not to revoke was thought to be the equivalent of a promise to make a will, while a promise to die intestate did not involve a willmaking process. The dangers contemplated by the statute of frauds would appear to be present in both instances where the objective of the oral promises was to transmit property to the promisees at the death of the promisors.

Chapter 560 of the Acts of 1965 amended Section 5 of Chapter 259


1 Amending G.L., c. 189, §1. See also §1.1 supra.


2 G.L., c. 259, §5, which read: "No agreement to make a will of real or personal property or to give a legacy or make a devise shall be binding unless such agreement is in writing signed by the person whose executor or administrator is sought to be charged, or by some person by him duly authorized."

8 This case was brought by a proprietor of the church for injunctive relief against the sale of the silver pieces. Neither the deacons nor anyone to represent the body of worshipers were parties to the proceeding.
of the General Laws and adds a new Section 5A, applicable only to agreements made after September 30, 1965. Section 5A provides:

No agreement to make a will of real or personal property or codicil thereto or make a bequest or devise, or to revoke or not to revoke a will, codicil, bequest or devise, or to refrain from making a will, codicil, bequest or devise or other agreement relative to making or not making a will, codicil, bequest or devise, shall be binding unless such agreement is in writing and signed by the person whose executor or administrator is sought to be charged, or by some person duly authorized thereunto by him in writing.

Unlike Section 5, which is still applicable to agreements made prior to October 1, 1965, the new legislation applies to any agreement relative to making or not making a will. It also clarifies matters which seem to be implicit in Section 5: agreements to make codicils as well as wills are treated alike, and the authorization for a proxy signing of the required memorandum must itself be in writing.

§4.10. Adopted child: Position as heir. By statute an adopted child inherits from his adopting parent as if born in lawful wedlock. Prior to 1965 the adopted child was treated as though born in lawful wedlock and entitled to inherit from the legal descendants but no other kindred of the adopting parent. This was changed by Chapter 252 of the Acts of 1965 which provides that the adopted child shall stand to any of the kindred of the adopting parent in the same position as if born to him.

§4.10. 1 G.L., c. 210, §7.