Chapter 10: Trusts and Estates

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CHAPTER 10

Trusts and Estates

JOSEPH L. HERN

§10.1. Wills: Execution: Bequest to Spouse of Subscribing Witness.
In Rosenbloom v. Kofosky, the Supreme Judicial Court upheld the judgment of the probate court voicing a bequest to the spouse of a subscribing witness. The will at issue left all the testator’s property in equal shares to his three daughters, who were his next of kin. The husband of one of the daughters was one of the three subscribing witnesses to the will. As the law then stood, three disinterested witnesses were required for a will to be valid. Thus, the probate court, applying chapter 191, section 2, voided this bequest. The beneficiary appealed, claiming that chapter 191, section 2, should have been interpreted to void only that much of a bequest to a witness’ spouse as exceeds the share that person would have taken, had the decedent died intestate. In the circumstances of this case, such an interpretation would have validated the entire bequest.

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2 Id. at 2534-35, 369 N.E.2d at 1142.
3 Id. at 2535, 369 N.E.2d at 1142.
4 See G.L. c. 191, § 1, before its amendment by Acts of 1976, c. 515, § 3, which required three subscribing witnesses to a will. The 1976 amendment reduced the required number of subscribing witnesses to two.
5 G.L. c. 191, § 2 now reads:
Any person of sufficient understanding shall be deemed to be a competent witness to a will, notwithstanding any common law disqualification for interest or otherwise; but a beneficial devise or legacy to a subscribing witness or to the husband or wife of such witness shall be void unless there are two other subscribing witnesses to the will who are not similarly benefited thereunder.
As it applied to Rosenbloom, § 2 required three disinterested subscribing witnesses in order to make the interested witness’s bequest good. Acts of 1976, c. 515, § 5 merely changed the word “three” to “two” in the second clause, leaving the statute otherwise intact.
8 See text at note 2 supra.

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The Supreme Judicial Court, in response to this contention, noted initially the common law rule that if a subscribing witness was a taker under the will, the will itself was void unless there were sufficient witnesses to the execution without the interested witness. It then set out the three legislative responses to the common law rule allowing the taker to serve as a witness, thereby validating the will, but affecting that person's bequest. The first approach voids only the amount of the bequest that exceeds what would have been the witness's intestate share. The second approach extends this rule to the spouse of the witness, the spouse receiving only what would have been his or her intestate share as if no will had been established. The third approach is that of Massachusetts, which also validates the will but voids in its entirety the bequest to the witness or the witness's spouse.

The Court felt unable to make chapter 191, section 2, fit either the first or the second approach, fully recognizing that the statute operates to defeat a testator's intent when applied. Since the language of section 2 is "clear and unambiguous," it is to be construed according to the "usual and natural meaning" of the words used by the legislature. Here the plain meaning of section 2 was to void entirely the bequest at issue. The Court went on to note that when the legislature last amended section 2, it did not disturb the void bequest provision. Thus, the Court presumed that the legislature's silence on this issue indicated that it adopted the Court's earlier interpretation that a bequest to an interested witness is entirely void.

The Court in *Rosenbloom* correctly refused to assign a new interpretation to section 2. The statute as it then and now reads admits of no other construction. Thus, the legislature should consider amending section 2 to bring it in line with the more liberal view that validates at least part of the bequest and thereby gives effect to the testator's intent without impairing the wills act's policy of requiring disinterested subscribing witnesses.

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10 1977 Mass. Adv. Sh. at 2536, 369 N.E.2d at 1143 (citing CAL. PROB. CODE § 51 (West); N.Y. DECEDENT ESTATE LAW § 27 (McKinney); T. ATKINSON, WILLS § 65, at 315 (2d ed. 1953); 1 W. PAGE, THE LAW OF WILLS § 335 (3d ed. 1941)).
14 *Id.* at 2537-38, 369 N.E.2d at 1144.
15 *Id.* at 2538-39. See note 5 supra.
18 See text at notes 10-11 supra.
§10.2. Revocation of Will: Probate Decrees: Vacation by Probate Court. On a petition for further appellate review, the Supreme Judicial Court upheld the Appeals Court's decision in the procedurally complex case of Olsson v. Waite.¹ The dispute centered around the probate of an executed carbon copy of Ann Francis' will.² On January 13, 1972, some two months after a bitter divorce proceeding which resulted in a decree nisi, Mrs. Francis executed a will and copy leaving all her property to Olsson, a friend of the Francis family, and naming Olsson her executor.³ The will recited that the testatrix was leaving nothing to her former husband or her daughter Christine Waite.⁴ At that time Mrs. Francis harbored bad feelings toward her daughter, who had testified against her mother in the divorce proceeding.⁵ The executed original was delivered to Mrs. Francis, and the executed carbon copy was kept by her attorney.⁶ Four months later, and two weeks after the divorce decree nisi became absolute, Mrs. Francis declared to her former husband and Christine: "I have torn up my will."⁷ Ten days later Mrs. Francis took her own life.⁸ Mr. Francis, Olsson, and others searched her house but were unable to find the original will.⁹ Olsson then offered for probate the carbon copy from the lawyer's files.¹⁰ The probate court, after two days of hearings, concluded that Mrs. Francis' declaration that she had destroyed her will indicated "that she wanted her daughter to have all her estate by inheritance, the divorce now being absolute and the divorced husband now having no claim to share in her estate."¹¹ A decree disallowing probate of the will offered by Olsson was entered on October 17, 1972.¹² The Supreme Judicial Court, applying the "plainly erroneous" standard to this finding, upheld the probate court's disallowance of the will.¹³ Moreover, the Court held that Olsson's failure to argue the issue of disallowance before either the Appeals Court or the Supreme Judicial Court would be deemed to be a waiver of the issue.¹⁴ This much of the case is straightforward. The

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² Id. at 519, 368 N.E.2d at 1195-96.
³ Id. at 518-19, 368 N.E.2d at 1195.
⁴ Id. at 519, 368 N.E.2d at 1196.
⁵ Id., 368 N.E.2d at 1195.
⁶ Id., 368 N.E.2d at 1195-96.
⁷ Id., 368 N.E.2d at 1196.
⁸ Id.
⁹ Id.
¹⁰ Id.
¹¹ Id. The quoted language is from the probate judge's findings of fact which were filed November 29, 1972. See id. at 519-20, 368 N.E.2d at 1196.
¹² Id. at 519, 368 N.E.2d at 1196.
¹³ Id. at 520-21, 368 N.E.2d at 1196-97.
¹⁴ Id. at 521-22, 368 N.E.2d at 1197. Olsson's "waiver" came about because of the procedural posture of the case. When the probate court vacated its decree of
remainder involves convoluted procedural postures stemming from the probate court's action after entering its decree of disallowance on October 17, 1972.

After this decree, Olsson filed an appeal and two weeks later moved the probate court to vacate its decree.\textsuperscript{15} The motion was based on Olsson's inability to appear at the second day of the probate proceeding because he, an attorney, was trying a case in superior court.\textsuperscript{16} At the probate proceeding Olsson was represented by counsel who declined to move for a continuance and declined to call Olsson to testify, although an arrangement with the superior court judge would have made him available to testify.\textsuperscript{17} Olsson claimed that his counsel was materially handicapped by Olsson's absence from the probate proceeding and that he was thereby deprived of an adequate presentation of his case.\textsuperscript{18} This motion was heard and allowed on December 1, 1972,\textsuperscript{19} on the ground that "available evidence was not offered" by Olsson's counsel.\textsuperscript{20} While many other procedural occurrences transpired between this vacation and the Supreme Judicial Court's ultimate disposition of the case,\textsuperscript{21} only the propriety of the probate court's vacation of its decree of disallowance will be discussed herein.

The Supreme Judicial Court, noting the strong public policy against opening final decrees,\textsuperscript{22} held that a probate court is powerless to upset its own decrees except for "fraud, or mistake, or want of jurisdiction, or for any reason adequate in law."\textsuperscript{23} The Court stated that the standards for vacating a probate decree are the same as those for granting a bill of review in equity: only for 1) error of law apparent on the record, 2) new evidence not susceptible to use at the trial, or 3) a matter occurring since the decree.\textsuperscript{24} The Court then applied these standards to the December 1 vacation of the October 17 decree.

disallowance, see text at notes 15-20 \textit{infra}, the court asked Olsson to seek dismissal of his appeal from the decree. The appeal was not dismissed but was withdrawn and later revived when Waite appealed. Thus Olsson believed that with the underlying decree vacated, he had no reason to argue that the decree should not have been given. \textit{See id.} at 521-24, 368 N.E.2d at 1197-98.

\textsuperscript{15} \textit{Id.} at 523, 368 N.E.2d at 1197-98.

\textsuperscript{16} \textit{Id.} at 524-25, 368 N.E.2d at 1198-99.

\textsuperscript{17} \textit{Id.} at 526-28, 368 N.E.2d at 1199-1200.

\textsuperscript{18} \textit{Id.} at 524-25, 368 N.E.2d at 1198-99.

\textsuperscript{19} \textit{Id.} at 525, 368 N.E.2d at 1199.

\textsuperscript{20} \textit{Id.} at 532, 368 N.E.2d at 1202.

\textsuperscript{21} \textit{See id.} at 521-24, 368 N.E.2d at 1197-98.

\textsuperscript{22} \textit{Id.} at 528-29, 368 N.E.2d at 1201 (quoting Zeitlin v. Zeitlin, 202 Mass. 205, 207, 88 N.E. 762 (1909)).

\textsuperscript{23} \textit{Id.} at 529, 368 N.E.2d at 1201 (quoting Goss v. Donnell, 263 Mass. 521, 523-24, 161 N.E. 896, 897 (1928)).

\textsuperscript{24} \textit{Id.} at 530, 368 N.E.2d at 1201 (quoting Mackay v. Brock, 245 Mass. 131, 133-34, 139 N.E. 517, 518 (1923)).
The grounds on which the judge gave Mr. Olsson relief by vacating the decree of October 17, 1972, do not qualify as grounds for relief under a bill of review. The relief was not based on any error of law apparent on the record. It was based on the ground that his lawyer failed to introduce some evidence which was then known and could have been offered—it was evidence susceptible of use at the trial and not something which came to light after the trial. The basis for the relief granted was not something which arose after the entry of the decree. Therefore, Mr. Olsson was entitled to no relief by any analogy to a bill of review.

The Court concluded that no fraud prevented Olsson from presenting his case and therefore that the probate court erred in granting Olsson's motion for vacation. Accordingly, the Court affirmed the decree disallowing the offered will and reversed the decree that had vacated the decree of disallowance.

Justice Braucher dissented, contending that the Court did not have jurisdiction since the December 1 decree from which the appeal was taken was only interlocutory. In setting forth its argument, the dissent noted that the Court disregarded the probate judge's intent to order a new hearing on the issue of intent to revoke the will. Justice Braucher further asserted that the Court was making "its own findings on the basis of a transcript of conflicting testimony . . . and resolving questions of credibility." Justice Braucher argued that the Court's desire to expedite the matter did not justify the Court finding facts for itself.

§10.3. Wills: Construction: "Heirs," "Items of Personal Property."

Both the Supreme Judicial Court and the Appeals Court had an occasion during the Survey year to interpret language used in a will. A common theme emerging from the cases is that where a will employs legal terms, these terms will be interpreted strictly, while more common terms will be open to broader interpretation. A corollary to this approach is that extrinsic evidence is more likely to be admissible to shed light on the testator's intent when the meaning of common, non-legal terminology is at issue than when legal terminology is used in a will.

In Gustafson v. Svenson a legal term—heirs per stirpes—was used in the will and was given a strict interpretation by the reviewing courts.

25 Id. at 530, 368 N.E.2d at 1202.
26 Id. at 533, 368 N.E.2d at 1203.
27 Id. at 534, 368 N.E.2d at 1203-04 (Braucher, J., dissenting).
28 Id., 368 N.E.2d at 1204 (Braucher, J., dissenting).
29 Id. at 534-35, 368 N.E.2d at 1204 (Braucher, J., dissenting).
30 Id.
The wills of both Beda and Hilda Anderson made a residuary bequest to their brother Enoch J. Anderson or "his heirs per stirpes." Enoch predeceased the testatrices and his wife Martha claimed his shares as his sole survivor. In a petition for instruction after proof of the wills, the probate court admitted the testimony of the attorney who drafted the Anderson sisters' wills. This testimony was to the effect that before the wills were executed, the testatrices told the attorney that they did not want Martha to receive Enoch's share of their estates in the event Enoch predeceased them. On the basis of this evidence the probate court decreed that Martha was not entitled to any share in the estates of her two sisters-in-law. From this decree Martha appealed.

The Appeals Court had framed the issue as one of whether use of the term "per stirpes" was intended to limit the bequests to Enoch's blood heirs. The court noted that the literal meaning of the term is "by the roots" or "by stocks"; it imports the taking by the decendants of a deceased heir of the same share in the estate of another person as their parent would have taken if living. The court also noted, however, that Sweeney v. Kennard held that a widow would share in a bequest to her deceased husband or his "heirs by right of representation." The Gustafson court stated that "per stirpes" and "by right of representation" generally are recognized as having the same legal meaning. The court held that the attorney's testimony regarding the testatrices' instructions was inadmissible, since these declarations were "apart from, in addition to, or in opposition to the legal effect" of the actual language of the will. Moreover, the court noted that the residuary clauses of the two wills were intended to make an equal distribution to the branches of the testatrices' immediate family, that brother Enoch never had any issue, and was unlikely to inasmuch as he was 79 and Martha was 74 when the wills were executed in 1959. In addition to the legal effect of the words used, the court concluded that the sisters' manifest intention was to include Martha among Enoch's heirs at law

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2 Beda and Hilda Anderson were unmarried sisters whose wills were identical, except for provisions providing gifts to each other. They died within several weeks of each other, and thus both wills were considered together by the courts. See id. at 274, 366 N.E.2d at 761-62.
3 Id.
4 Id., 366 N.E.2d at 762.
5 Id.
6 Id. at 274-75, 366 N.E.2d at 762.
8 Id. at 339, 347 N.E.2d at 703.
11 Id. (quoting W. PAGE, THE LAW OF WILLS § 32.9 (Bowe-Parker rev. 1961)).
as provided in chapter 190, section 1 of the General Laws. Accordingly, the decrees of the probate court were reversed.

The Supreme Judicial Court granted further appellate review in response to the appellee's contention that the Appeals Court had acted contrary to the recent decision of McKelvy v. Terry. In McKelvy the testimony of the attorney who drafted the will was held admissible "for the purpose of removing ambiguity and illuminating meaning or intention." At issue was whether the testator had effectively demonstrated his intention to exercise a testamentary power of appointment. The Appeals Court in Gustafson distinguished McKelvy on the basis that the testimony there showed the testator's knowledge of his power of appointment, his feelings toward the donees (his children), and his own feeling about his father's having deprived him of outright ownership of the appointive assets. The Supreme Judicial Court upheld the Appeals Court's decision in Gustafson, stating that the latter had correctly interpreted and applied McKelvy.

The Court restated the familiar rule that extrinsic evidence may not be used to vary the terms of an unambiguous will. This is so even though the "unambiguous" language has a fixed legal meaning that is not likely to be known by the testator or which may not "correspond" to an oral statement of intent. Thus, whether or not the testator understood the meaning of legal terms used in his will is irrelevant. The Court held that the phrase "his heirs per stirpes" was not ambiguous: the term "heirs" has a fixed legal meaning which includes a decedent's surviving spouse. Therefore, the testatrix's statements to the attorney that they did not want Enoch's wife Martha to benefit from their estate was ineffective, since the will included her by using the term "heirs." Moreover, the words "per stirpes" merely pointed out that Enoch's heirs were to take by right of representation. Accordingly, the probate decrees denying Martha Enoch's shares as his sole survivor were reversed.

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13 Id.
14 Id.
16 370 Mass. at 334, 346 N.E.2d at 915-16.
18 373 Mass. at 275, 366 N.E.2d at 762.
19 Id.
21 373 Mass. at 275, 366 N.E.2d at 762.
22 See text at note 5 supra.
23 373 Mass. at 275-76, 366 N.E.2d at 762.
24 Id. at 276, 366 N.E.2d at 762.
While the Court is probably correct in its belief that the term “heirs per stirpes” is not ambiguous to lawyers and judges, it can certainly be said that the general public, and thus the average testator, is probably confused as to the legal effect of such terms when included in a will. Since the Court has now twice held that the testator’s misunderstanding of terms used in his will is of no import, members of the bar must draft their clients’ wills and other instruments with a heightened sense of responsibility. The attorney has the power to fix dispositive schemes directly contrary to the client’s wishes. In light of Gustafson, then, it is especially important that the attorney choose legal terms carefully and that he explain carefully to the client the legal effect of the language employed before the client executes the will or other document.

In the other Survey year case involving interpretation of a will the Appeals Court showed more flexibility, but it was construing terms that did not have a rigid legal meaning as the terms did in Gustafson. In Spring v. Lonigro the meaning of a less legally fixed phrase—“items of tangible personal property” was at issue. Article Second of the will of Blanche E. Marston was a lengthy disposition of various objects to various individuals. Besides giving Michael Lonigro a certain billiards table, Article Second gave him “his choice of any three (3) items of tangible personal property not otherwise specifically given hereunder.” Michael selected a stamp collection appraised at $10,890 and the residuary legatee, a charitable foundation, and the Attorney General appealed the decision of the probate court upholding Michael’s right to select the collection. The Attorney General and the foundation argued that the gifts under Article Second should be limited to household and personal effects, but the Appeals Court disagreed.

Scrutinizing the general testamentary disposition in Marston’s will, the court determined that the testatrix intended the term “tangible personal property” to embrace a much broader category than that urged by the residuary legatee. The court found that the testatrix intended...

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26 See id. at 136, 372 N.E.2d at 1309-10.
27 The Appeals Court observed that Article Second was divided into seven paragraphs and many subparagraphs. The first five paragraphs made specific gifts of antique furniture, furnishings, jewelry, and silver. The sixth paragraph gave Michael the nonspecific bequest at issue (see text at note 28 infra) and the seventh paragraph provided, “Any tangible personal property not otherwise disposed of, exclusive of cash, bank deposits, securities and the like, shall be sold by my executors and the proceeds of such sale shall be disposed of as part of the remainder of my estate.” See 1978 Mass. App. Ct. Adv. Sh. at 136, 372 N.E.2d at 1309-10.
28 See id., 372 N.E.2d at 1309.
29 Id. at 140, 372 N.E.2d at 1311. See note 37 infra.
31 See note 27 supra.
by Article Second to dispose of all her tangible personal property exclusive of "cash, bank deposits, securities, and the like." The executors were directed to sell what remained of the included personal assets after Michael had selected his three items and after the specific legatees had received their bequests and then turn the proceeds over to the residuary legatee. Given the testatrix's intent to make a final disposition of her personal estate—as she defined it in Article Second—the court held that "tangible personal property" was not restricted to "household and personal effects" and therefore included testatrix's stamp collection.

The residuary legatee also contended that the stamp collection did not constitute "an item" of tangible personal property. The court reasoned, however, that the testatrix would not have considered the collection "as representing tens of thousands of units" but rather would have considered it as a single unit. This was suggested by testatrix's gift in another article of her "tape measure collection." The court noted that various other legatees received gifts of similar value to the stamp collection. Finally, the court noted that the general testamentary plan would not be destroyed: since the foundation was to receive approximately $1,000,000, Michael's selection of a stamp collection appraised at $10,890 did not render his gift disproportionate vis-a-vis that to the foundation. Thus, the Spring court encountered little difficulty in giving the testatrix's words a broad interpretation which very likely reflected the testatrix's intent.

§10.4. Executors and Administrators: Permissible Waiver of Protection of Chapter 197, Section 1. During the Survey year, the Supreme Judicial Court considered whether an executor or administrator may waive the protection against actions brought against the estate within

34 Id. at 137, 372 N.E.2d at 1310.
35 Id. The court noted that courts of other jurisdictions have reached varying results when deciding what constitutes "household and personal effects." See id. at 138, 372 N.E.2d at 1310 for cases cited. The court properly refused to decide the meaning of that phrase, since the testatrix did not even use those words. Id.
36 Id. at 138, 372 N.E.2d at 1310.
37 Id. at 138-39, 372 N.E.2d at 1310-11. The collection consisted of tens of thousands of stamps, including postage, documentary, revenue, war ration, and broadcasting station stamps. The probate judge said that a philatelist had examined the collection and concluded that the testatrix "collected and accumulated every stamp that came her way." Id.
38 Id. at 139-40, 372 N.E.2d at 1311.
39 Id. at 140, 372 N.E.2d at 1311. One presumes that the legatee who received the tape measure collection was not put in that category solely by receipt at that bequest.
40 Id.
three months of the administrator's becoming qualified. In *Kofinke v. Maranhas* the Court held that the protection of chapter 197, section 1, may be waived and determined further that a waiver had been made under the circumstances of the case.

The original plaintiff, Laura May Ross, commenced an action in the District Court of Brockton against the executor of the estate of Francisco Maranhas to recover for services rendered to the decedent before his death. The action was commenced on June 3, 1974, less than three months after the executor had given bond and thus was subject to dismissal under chapter 197, section 1. The defendant-administrator's attorney, however, assured the plaintiff's attorney that an answer would be filed and that the plaintiff need not bring a new action. When the answer was filed, however, the defendant alleged merely "that the plaintiff's action was not commenced in accordance with the proper statute of limitations." In November 1975, Kofinke was substituted as plaintiff for Laura Ross when a new complaint was filed. In May 1976, the defendant filed a late answer to the substituted complaint, again pleading the statute of limitations, and in June he successfully moved for a dismissal on the grounds that the action had been commenced contrary to chapter 197, section 1.

The district court granted the motion. Because it ruled that an administrator may not waive the protection of chapter 197, section 1, the court did not reach the issue of whether the defendant attempted a waiver. The appellate division held that a waiver was possible but because the defendant's original answer pleaded the statute,
there was no waiver in the case.\textsuperscript{13} Because this answer had been filed before the nine-month statute of limitations had run,\textsuperscript{14} the appellate division saw no application of equitable estoppel against the defendant.\textsuperscript{15}

The Supreme Judicial Court, agreeing with the appellate division, held that the protection against actions afforded to an executor or administrator for his first three months may be waived.\textsuperscript{16} The Court reasoned that section 1, unlike section 9, is not a jurisdictional bar. While an executor or administrator may not waive the section 9 statute of limitations, the Court saw no reason why this result should obtain with the section 1 statute of limitations.

The purpose of the statutory requirement of forbearance is to afford an executor or administrator time to assess the status of the estate and to review claims against it, while free from the burdens of litigation. If an executor or administrator does not wish to take advantage of the statutory restraint, he may decline to do so, and the case may proceed as if seasonably brought. The situation where an action is brought too late under G.L. c. 197, § 9, is different because there waiver would subject the estate to a claim which could be forever barred. . . . A premature action . . . stands in a different posture because a plaintiff who has sued too early may correct the error, and the asserted claim is not forever foreclosed.\textsuperscript{17}

Having held that the statute of limitations could be waived, the Court turned to the issue of whether or not there had been an actual waiver. The situation was murky because the defendant formally pleaded a statutory bar after he had said there would be no need for the plaintiff to reinstitute the action.\textsuperscript{18} The Court held that there was a waiver for two reasons. The first was that the defendant's first answer was not specific enough to call the plaintiff's attention to the fact that the defendant had changed his mind.\textsuperscript{19} Secondly, while the answer to the substituted complaint clearly referred to section 1, the period for filing

\textsuperscript{13} Id.
\textsuperscript{14} See G.L. c. 197, § 9.
\textsuperscript{15} 1978 Mass. Adv. Sh. at 1167-68, 375 N.E.2d at 713.
\textsuperscript{16} Id. at 1168-69, 375 N.E.2d at 713.
\textsuperscript{17} Id.
\textsuperscript{18} See text at notes 5-7 supra.
\textsuperscript{19} The Court pointed out that the defendant's vague pleading of "the proper statute of limitations" (see text at note 7 supra) could easily have been interpreted as referring to the claim for services extending back as far as 1938. Since the defendant's attorney had told plaintiff's attorney that he need not recommence the action after three months had expired, the Court stated that it would not "construe the answer as adequately raising the very defense so recently disclaimed." 1978 Mass. Adv. Sh. at 1169, 375 N.E.2d at 714. Compare the specificity of the answer to the original complaint, set forth in text at note 7 supra, with that of the answer to the substituted complaint, set forth in note 9 supra.
an action under section 9 had already expired. The Court concluded that the plaintiff's continued reliance on the early representation of the defendant's counsel was reasonable and that the defendant should therefore be estopped from raising the defense of section 9.

§10.5 Charitable Trusts: Cy Pres. Questions relating to the doctrine of cy pres reached the Supreme Judicial Court in a variety of circumstances during the Survey year. The Court was faced with important constitutional questions arising from proposed legislative application of cy pres to a bequest by Benjamin Franklin, a case raising jurisdictional questions under the Uniform Management of Institutional Funds Act, and a case involving traditional questions of cy pres.

The will of Benjamin Franklin, probated in 1790, left one thousand pounds in trust to the Town of Boston to be invested in loans to young married artisans. After one hundred years of accumulation, the managers were to expend a portion of the fund on certain public works. The balance was to be accumulated for another hundred years, or until 1991, at which time one-fourth of the fund was to be disposed of by the inhabitants of the Town of Boston and three-fourths by the government of the state.

At the end of the first hundred years of the trust the managers withdrew a portion of the fund. In 1905, with the aid of a grant from Andrew Carnegie, they established the Franklin Technical Institute. In 1908, the General Court incorporated the managers as the Franklin Foundation.

In Opinion of the Justices to the House of Representatives the Court considered the constitutionality of proposed legislation that would bring about an early disposition of Franklin's bequest. The legislation

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21 Id.
6 Id., 371 N.E.2d at 3152.
7 Id.
8 Id.
9 Id.
10 Id. at 4, 371 N.E.2d at 1352.
would have allowed the trustees of the Franklin Foundation and the City of Boston to transfer all the assets of the fund, including the Institute, to Boston University, which had exhibited interest in taking over the Institute. The bid did not contemplate an early termination of the fund itself, but it would have allowed the City of Boston, through the City Council, to make a present designation of the university as recipient of the City’s share in the principal due to be distributed in 1991. In like manner, the bill would have designated the university as recipient of the Commonwealth’s share in the principal which was also due to be distributed in 1991.

The House of Representatives asked the Court: 1) whether enactment of the bill, without a petition from the City of Boston, would violate the Home Rule Amendment, 2) whether authorizing the assignment or designation of the City’s interest prior to 1991 would violate the separation of powers provision of the Massachusetts Constitution, 3) whether the assignment or designation by the Commonwealth of its interest prior to 1991 would also violate the separation of powers provision, and 4) whether the legislation would be contrary to the “anti-aid” amendment or the constitutional mode for making appropriation of public money.

In response to the first question, the Court found that the proposed legislation would indeed violate the Home Rule Amendment. The bill would have implications only for the City of Boston and would “dramatically alter” the ordinary processes for disposing of bequests and devises to the City. Normally, the Mayor and City Council acting together may expend gifts of funds, and the City charter calls for a two-thirds vote of the City Council to dispose of most city real estate. The bill, however, would have allowed a majority of the Council to make these dispositions.

In response to the second and third questions, the Court noted that the bill would change the trustees and possibly the beneficiaries of the Franklin bequest. The Court determined that this would overstep

\[\text{\textsuperscript{12}} \text{See 1978 Mass. Adv. Sh. at 1-2, 371 N.E.2d at 1351.}\]
\[\text{\textsuperscript{13}} \text{See id. at 2, 371 N.E.2d at 1351.}\]
\[\text{\textsuperscript{14}} \text{See id.}\]
\[\text{\textsuperscript{15}} \text{See Mass. Const. amend. art. LXXXIX (formerly amend. art. II, § 8).}\]
\[\text{\textsuperscript{16}} \text{See Mass. Const. pt. 1, art. XXX.}\]
\[\text{\textsuperscript{17}} \text{See id.}\]
\[\text{\textsuperscript{18}} \text{See Mass. Const. amend. art. XLVI.}\]
\[\text{\textsuperscript{19}} \text{1978 Mass. Adv. Sh. at 4-5, 371 N.E.2d at 1352. See Mass. Const. amend. art. LXII, §§ 1 and 3.}\]
\[\text{\textsuperscript{20}} \text{1978 Mass. Adv. Sh. at 8-9, 371 N.E.2d at 1353-54.}\]
\[\text{\textsuperscript{21}} \text{id., 371 N.E.2d at 1354.}\]
\[\text{\textsuperscript{22}} \text{id.}\]
\[\text{\textsuperscript{23}} \text{id. at 11, 371 N.E.2d at 1354.}\]
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the legislature's power to deal with charitable trusts, and would thus constitute an impermissible exercise of *cy pres*, a function reserved to the judiciary under the separation of powers.\(^\text{24}\)

Finally, in answering the fourth question, the Court determined that the "anti-aid" amendment would not be violated. That provision forbids the use of public money to aid private institutions. Since the Franklin fund was created by a private gift, rather than by tax assessments, the Court held that the fund did not constitute "public money" within the meaning of article XLVI.\(^\text{25}\) As for the appropriations issue, the Court reasoned that while article LXIII requires all money received by the Commonwealth to be paid into the state treasury and disbursed through a general appropriation bill, the Commonwealth could nevertheless designate its interest in the fund to the university consistent with article LXIII.\(^\text{26}\) This designation was permissible because the Commonwealth had never "received" any money from the fund and never would unless it appointed itself beneficiary in 1991.\(^\text{27}\) The Court concluded, however, that its answers to the earlier questions were dispositive of the issue, and therefore the legislation could not be constitutionally enacted.\(^\text{28}\)

Another *cy pres* matter before the Court this Survey year was the construction to be given chapter 180A of the General Laws.\(^\text{29}\) In *Williams College v. Attorney General*,\(^\text{30}\) the college sought an order of the probate court that would release separate investment restrictions contained in trust instruments created by deceased donors. The restrictions prevented the college from investing the funds with its consolidated endowment fund and were described by the college as "obsolete, inappropriate, and impracticable."\(^\text{31}\) Since the donors, being deceased, were unable to lift the restrictions, Williams sought relief under chapter 180A, section 9.\(^\text{32}\) The Attorney General appeared and assented to the pro-

\(^{24}\) *Id.* at 11-15, 371 N.E.2d at 1354-56.

\(^{25}\) *Id.* at 16-18, 371 N.E.2d at 1356-57.

\(^{26}\) *Id.* at 18, 371 N.E.2d at 1357-58.

\(^{27}\) *Id.*, 371 N.E.2d at 1357.

\(^{28}\) *Id.* at 19, 371 N.E.2d at 1358.

\(^{29}\) G.L. c. 180A, the Uniform Management of Institutional Funds Act, was added by Acts of 1975, c. 886.


\(^{31}\) *Id.* at 1265-66, 375 N.E.2d at 1227.

\(^{32}\) G.L. c. 180A, § 9 reads in part:

With the written consent of the donor, the governing board [i.e., the body responsible for the management of an institution or institutional fund] may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to a court of competent jurisdiction for release of a restriction imposed by the applicable gift instrument on the
posed changes, but the Berkshire probate judge reported to the Supreme Judicial Court questions regarding jurisdiction, venue, and notice.\textsuperscript{33}

The Court held that the phrase "court of competent jurisdiction" as it appears in section 9 \textsuperscript{34} embraces a probate court.\textsuperscript{35} The Court reasoned that since chapter 215, section 6 invests probate courts with general equitable jurisdiction, the relief sought—release of separate investment restrictions—is akin to modification of a charitable trust instrument and is thus "subject to the general equitable powers of the courts." \textsuperscript{36}

The probate court, situated in Berkshire County, asked whether it was the proper forum for resolving questions arising from inter vivos instruments created outside the commonwealth and outside Berkshire County.\textsuperscript{37} It also asked the same question with respect to testamentary bequests from wills probated outside the commonwealth and outside Berkshire County.\textsuperscript{38} The Court held that venue was proper in three of the above instances: the action was transitory and therefore could be brought in the county where one of the parties lives or has a usual place of business. Since Williams College's usual place of business is in Berkshire County, venue was proper with that county's probate court with respect to the inter vivos trusts and with respect to testamentary trusts of wills probated in Massachusetts.\textsuperscript{39} Because the issue did not arise in the case, the Court declined to rule on whether its holding would extend to trusts created by wills probated outside of Massachusetts.\textsuperscript{40}

Another venue question posed by the probate court was whether it was the proper forum for the section 9 action where the donors and the trust "are strangers to the probate court in the sense that the trust institution, in its formation and operation, and the gifts to it, were all without the judicial aegis of the Berkshire Probate Court." \textsuperscript{41} The Court

\begin{itemize}
  \item This section does not limit the application of the doctrine of cy pres.
  \item 1978 Mass. Adv. Sh. at 1266, 375 N.E.2d at 1227.
  \item See note 32 supra.
  \item \textit{Id.} at 1268, 375 N.E.2d at 1228.
  \item \textit{Id.} at 1269, 375 N.E.2d at 1228. One of the trust funds came from a trust instrument made in New York. \textit{Id.}
  \item \textit{Id.} at 1270, 375 N.E.2d at 1228.
  \item \textit{Id.} at 1269-70, 375 N.E.2d at 1228.
  \item \textit{Id.} at 1270, 375 N.E.2d at 1228.
  \item \textit{Id.}
\end{itemize}
again held that venue was proper. It did not appear that any other probate court had taken jurisdiction over any case involving the inter vivos gifts; had such an event occurred, then jurisdiction would have remained with that other probate court.\(^{42}\) As for the testamentary trusts created by wills probated in Suffolk County,\(^{43}\) the Court did not find probate by another court to bar exercise of jurisdiction by the Berkshire Probate Court. Although chapter 215, section 7 gave the Suffolk Probate Court exclusive jurisdiction over the proof of these wills and administration of the estates, \("[t]he earlier probate proceedings ended with the final distribution of the property to the college."\)\(^{44}\) The Court emphasized the distinction between release of investment and use restrictions on the one hand and probate of a donor's will on the other.\(^{45}\)

Finally, the Court ruled that due process does not require giving notice of the action to anyone other than the Attorney General, since it would not be possible to serve notice on the donors.\(^{46}\) The Court noted here that Williams only sought release of separate investment restrictions, an alteration that did not affect anyone else.\(^{47}\)

In another case decided during the Survey year the Supreme Judicial Court held that the doctrine of *cy pres* is inapplicable to a will containing conditions and providing for gifts over in the event of the beneficiary's failure to fulfill the conditions. In *First Church in Somerville v. Attorney General*,\(^ {48}\) the Court considered the will of Columbus Tyler, admitted to probate in 1881. Tyler left the residue of his estate to the First Congregational Society of Somerville, of which he was a founder.\(^ {49}\) The Society was to use the bequest to deposit annually a sum into a savings bank for each boy or girl who regularly attended sabbath school sessions, to distribute flowers and decorate the church, to expend up to $100 to repair buildings, and to provide other specified services.\(^ {50}\) The principal was not to be spent, and excess income was to go to Harvard College for scholarships to its theological school and to Massachusetts General Hospital \(^ {51}\) for its affiliate the McLean Asylum, where Tyler and his wife had worked for many years.\(^ {52}\) Tyler provided gifts over

\(^{42}\) Id. at 1270-71 and n.5, 375 N.E.2d at 1229 and n.5.
\(^{43}\) See id. at 1271, 375 N.E.2d at 1229.
\(^{44}\) Id.
\(^{45}\) Id.
\(^{46}\) Id. at 1272, 375 N.E.2d at 1229.
\(^{47}\) Id.
\(^{49}\) Id. at 1445, 376 N.E.2d at 1228.
\(^{50}\) Id.
\(^{51}\) Id. at 1445-46, 376 N.E.2d at 1228-29.
\(^{52}\) Id. at 1448-49, 376 N.E.2d at 1230.
to Harvard and Massachusetts General in the event the Society failed to use the bequest according to the set conditions.\(^{53}\)

The Somerville Society, by then known as the First Church in Somerville, was dissolved in 1975. Most of its assets, including restricted funds, were transferred to the Unitarian Universalist Association.\(^ {54}\) In a complaint for instructions or application of *cy pres* brought by the First Church and the Association against the donees of the gifts over and the Attorney General, a single justice of the Supreme Judicial Court ordered that the gifts over be made.\(^ {55}\) The Association, joined by the Attorney General, appealed.\(^ {56}\)

The Supreme Judicial Court affirmed.\(^ {57}\) It determined first that the bequest to the “Society and its successors and assigns forever” did not prevent the gift from failing on dissolution of the Society and transfer of its assets.\(^ {58}\) The Court also held that deviation from specific provisions of the trust, now incapable of fulfillment, was not permissible because it would upset Tyler’s stated impact. The Court stated that “the limited purposes for which the Society, while in existence, was obliged to use the trust income indicate that the restrictions imposed by Tyler were not merely subordinate details.”\(^ {50}\) The Court added that the provision for disposition of excess income to other beneficiaries confirmed its view that the restricted uses of the trust were central to Tyler's overall plan.\(^ {60}\)

Finally, the Court turned to the appellant's contention that the doctrine of *cy pres* should be applied to the Tyler Fund. Because *cy pres* cannot be applied without a general charitable intent by the testator,\(^ {61}\) the Court looked to the circumstances surrounding the bequest. Tyler was a founder of the Somerville Society who was also aware of the

\(^{53}\) Article Sixteenth of the will, which created the trust, read in part: [i]f the . . . Society decline[s] to accept this trust with the obligations imposed, or if at any subsequent time in the future shall change its religious tenets and cease to inculcate a Liberal Religion then I declare these bequests annulled in [sic] inoperative and this estate hereby bequeathed with its accumulations both real and personal shall accrue equally to Harvard and Massachusetts General for the same purposes as the excess income of the trust was to be used.


\(^{55}\) *Id.*

\(^{56}\) *Id.*

\(^{57}\) *Id.* at 1443, 1450, 376 N.E.2d at 1228, 1230.

\(^{58}\) *Id.* at 1446-47, 376 N.E.2d at 1229.

\(^{59}\) *Id.* at 1447, 376 N.E.2d at 1229.

\(^{60}\) *Id.*

Association's existence. The conditional gift over to Harvard was consistent with his Unitarian beliefs because the theological school was a center of Unitarian learning at that time. The conditional gift over to Massachusetts General reflected Tyler’s long-term ties with the McLean Hospital. Thus, the Court concluded that there was no general intent to benefit religion, that Tyler intended to support the particular church he had founded and alternatively to support Unitarian teaching at Harvard and the poor at McLean Asylum. The Court concluded that its construction of Tyler’s will promoted his stated charitable intent and prevented the fund from failing altogether and passing by intestate succession. The gifts over would be triggered not merely by the Society’s failure to observe the restrictions, but also if the Society should “change its religious tenets and cease to inculcate a Liberal Religion.” The Court, reading this phrase disjunctively, concluded first “by dissolving, the Society has ceased to inculcate any religion . . .” thus triggering the gift over.

First Church in Somerville with First Bank & Trust Co. v. Attorney General, which was decided the previous Survey year, provides an interesting comparison. In that case the Court held that the dissolution of the First Unitarian Society of Chicopee by merger with the Third Congregational Society in Springfield did not cause certain charitable trusts established for the Chicopee Society to cease and revert to donors’ residuary estates. The Court determined that the trusts, which were intended to support Unitarian preaching in Chicopee, did not require that the preaching actually be done in Chicopee. The Springfield Society, in taking over the work of the Chicopee Society, made possible the continued preaching for the benefit of Chicopee residents, thus meeting the testators’ intents.

It is not clear why the Court determined that the Somerville testator only wanted to benefit a particular congregation but that the Chicopee testators wished to benefit whatever congregation would provide Unitarian services for Chicopee residents. Perhaps the greater specificity attached to the Somerville bequests, which could not be met by the

63 Id. at 1449-50, 376 N.E.2d at 1230.
64 Id. at 1450, 376 N.E.2d at 1230. See note 53 supra for the text of the gift over.
67 371 Mass. at 799, 802, 359 N.E.2d at 940, 942.
68 Id. at 800, 802, 359 N.E.2d at 940, 942.
69 Id. at 802-03, 359 N.E.2d at 942.
http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/13
Unitarian Universalist Association, was sufficiently distinctive from the more general Chicopee bequests, which could continue to be applied by the Springfield Society. It seems to be of no small importance that the Somerville bequest provided conditional gifts over to other charities while the Chicopee bequests provided a conditional reverter to the residuary estates of the testators.

§ 10.6. Trusts: Administration. In *Nexon v. Boston Safe Deposit & Trust Co.*, the Appeals Court held that the trustee of a testamentary trust could not distribute the entire principal to the life beneficiary, even though the trustee was given broad discretion to invade some or all of the principal for the life beneficiary. The life beneficiary, Nettie Zides, was the testator’s sister and one remainderman, Abraham Zides, was Nettie’s husband. The surviving trustee sought instructions from the probate court as to whether he could properly comply with Nettie’s request that all the principal be paid out to her. She desired the principal in order to assure herself that the entire remainder would be available for Abraham’s support if he survived her.

The trust instrument provided that Nettie was to receive income for life, with the trustees to invade principal if necessary to ensure that she would receive $5200 per year. Additionally, the trustees were allowed to pay Nettie “at any time and from time to time, and for any purpose, any part of the whole of the then principal . . . as they, in their sole discretion, shall determine to be necessary or advisable for her support, maintenance and greatest comfort and happiness.” While the testator desired that the trustees exercise their discretion “generously” in order to keep pace with the cost of living, he nevertheless directed that they dispense principal to the life beneficiary “solely with regard to her interests and needs and without any regard whatever” to the remaindermen. Not surprisingly, the trustee informed the probate court that it would give Nettie the “greatest comfort and happiness” if she were to have the entire principal delivered to her. The probate court ruled that the trustee could not deliver the principal to Nettie in order to satisfy her desire to benefit Abraham.

2 *Id.* at 841, 364 N.E.2d at 1078. Abraham, whose interest would vest only if he survived Nettie, was to receive the lesser of $10,000 or one-half of the principal remaining on Nettie’s death. *Id.* at 843, 364 N.E.2d at 1078.
3 *Id.* at 841, 364 N.E.2d at 1078.
4 *Id.*
5 *Id.* at 842, 364 N.E.2d at 1078.
6 *Id.* The quoted language is from the will itself.
7 *Id.* at 842-43, 364 N.E.2d at 1078. Again, the quoted language is from the will.
8 *Id.* at 841-42, 364 N.E.2d at 1078.
9 *Id.* at 842, 364 N.E.2d at 1078.
The Appeals Court affirmed. It read the phrase "greatest comfort and happiness" in conjunction with the immediately preceding words "support" and "maintenance." The court expressly noted that no mention of Abraham's support and maintenance was in the instrument and that the testator made clear that the invasion of principal was to be without regard to the remainder interest. Having characterized the trust as a support trust, the court went on to hold:

It is the duty of the trustee to confine the expenditures of principal to Nettie's interests and needs as they arise during her lifetime, and it would be a violation of that obligation and an abuse of discretion were he to accede to her wish to pay out the principal of the trust to her for the ultimate benefit of Abraham even if that would result in her greatest comfort and happiness.

The rationale for the court's holding is unclear. Would the result have been any different if the intended object of the life beneficiary's bounty were not named as a contingent remainderman? In other words, was the court seeking to prevent Abraham from taking more than the maximum one-half of the principal assigned him, thereby upsetting the testator's plan for him and hurting the other remainder interests? The court's holding may simply be that the words "greatest comfort and happiness," even when used as a standard for invading all the principal, are mere surplusage if the general tenor of the trust is for maintenance and support. Viewed in this light, it seems that in construing a trust instrument with inconsistent standards for expenditures, the court prefers a conservative construction which emphasizes preservation of the trust property and meeting the necessities, and not extravagances, of the beneficiary.

One aspect of the Appeals Court's construction of the trust seems aberrant. The provision that principal could be invaded without regard to the prospective interests of the remaindermen most likely meant that the trustees should not be concerned with diminishing these interests and had nothing to do with affirmatively, albeit indirectly, enhancing one of the remaindermen's share in the trust, as the court had concluded.

Some clarification of the Appeals Court's decision in Nexon can be discerned from its later decision in Mahoney v. Mahoney. In Mahoney, the testator—a non-lawyer—drafted his own will, disposing of the bulk of his estate "to my wife, Anne Elizabeth Mahoney, IN TRUST for the

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10 Id. at 842, 844, 364 N.E.2d at 1078, 1079.
11 Id. at 843, 364 N.E.2d at 1078. See text at note 6 supra.
13 Id. at 844, 364 N.E.2d at 1079.
14 See text at note 7 supra.
purposes... of provid[ing] continued operation of the Park National Bank of Holyoke... of which I own the controlling interest, and to provide an income for my wife, Anne Elizabeth Mahoney, for her life as well as an income, if possible, for [the testator's two sons Douglas and Stephen]." The trust also provided that the shares could be voted to elect Douglas or Stephen to the board of directors of the bank and that Anne, the trustee, should have discretion to "participate in any plan of reorganization or consolidation or merger involving any company" whose stock comprised part of the fund. The most significant feature of the instrument was the one allowing Anne, as trustee, to invade principal "for the necessity of providing for [her] comfort and happiness if the income proves to be insufficient...."

Upon the testator's death, Anne Mahoney was appointed executrix in December 1969, and during the following year she began to distribute all of the assets of the estate to herself. She took the position that the trust under the will was not enforceable. In July 1972, Douglas S. Mahoney filed a bill in equity seeking to establish the validity of the trust, to compel return of the trust assets, and to have a new trustee appointed. A preliminary injunction was entered prohibiting Anne from transferring or conveying any of the trust property. Later this injunction was modified to allow Park National shares to be exchanged for Western Bank and Trust Company shares, which shares would become subject to the injunction. The probate court entered judgment for the plaintiff, declaring the existence of a trust and directing appointment of a new trustee and transfer of the assets to the new trustee.

On appeal, Anne contended that the trust existed in name only and that its terms evidenced the testator's intent to confer on her full ownership and control of the property. The Appeals Court disagreed, holding that the provision of the will allowing Anne to invade principal for her comfort and happiness "does not enable Anne to call the principal at will. Any question in this regard has been settled by [Nexon]." The court further stated: "The instrument, read as a whole, unmistak-
ably indicates an intention to create a trust.” 27 The court also found no error in the probate court’s decision removing Anne as trustee since that court found her to be lacking in competence and knowledge to manage the property and, perhaps more importantly, to have a tendency to divert the trust assets to herself. 28

In *Mahoney* it seems that the court was on firmer ground in limiting the “comfort and happiness” clause of the will than it was in *Nexon*. The unhappy appointment of the life beneficiary as trustee with power to invade principal should naturally raise the court’s guard in construing such a clause. Moreover, the will, though inartfully drawn, clearly conditioned invasion of principal for the beneficiary’s “comfort and happiness,” the very next words being “if the income proves to be insufficient.” 29 These words together provide a sufficient standard to enforce a trust against a beneficiary-trustee’s abuse of discretion, but they do invite uncertainty for a lay trustee.

Another trust administration case decided during the Survey year, *Samuels v. Attorney General*, 30 considered whether a fund originally established for relief could be used to erect a building. The Order of the Knights of Pythias, a secret fraternal and benevolent society, voted in convention in 1922 to establish a relief fund for members of the Order. 31 The vote followed the recommendation of a lodge committee that some $14,000 surplus moneys previously collected for relief be maintained as a permanent relief fund instead of being used for constructing a Pythian social center in Boston. 32 The committee rejected the latter use of the money as “not the proper aim for a fund raised for benevolent work.” 33 Over the years the fund was augmented by annual levies of the Order’s members and by gifts, bequests, and other sources. 34 The fund, which had been invested over these years, had a 1975 worth of approximately $980,000, with nearly all of its $380,000 in disbursements expended for relief. 35

27 *Id.* at 1251, 370 N.E.2d at 1014.
28 *Id.* at 1251-52, 370 N.E.2d at 1015.
29 See text at note 18 *supra*.
31 *Id.* at 846, 370 N.E.2d at 699-700. The resolution stated that the fund’s purpose was:
   to provide immediate or temporary relief in cases of destitution and distress among the membership of the order of this Grand Domain, to assist in relief in cases of calamity within or without this Grand Domain; and especially to see that members who served in the World War are protected by way of relief to the same extent as if War Relief Fund continued in force.
*Id.*
32 *Id.*, 370 N.E.2d at 699.
33 *Id*.
34 *Id.*, 370 N.E.2d at 700.
35 *Id.* at 847, 370 N.E.2d at 700.
http://lawdigitalcommons.bc.edu/asml/vol1978/iss1/13
The annual convention of the Grand Lodge from time to time amended the resolution governing the fund.\(^{36}\) The most significant amendment, added in 1966, allowed the fund “to expend such sums for the advancement of the Order as the Grand Lodge or the Executive Council may prescribe, subject to the approval of the Commissioners of Relief, and to assist transient members from other domains who may be found in distress in this domain.”\(^{37}\)

After this 1966 resolution the fund was used to study the future of the Lodge, which was badly in need of revitalization because of a sharp decline in membership.\(^{38}\) As part of its “revitalization program,” the Lodge authorized use of the fund to purchase land and to construct a regional hall for the Order.\(^{39}\) In a declaratory action brought by the Grand Trustees of the Lodge, the probate court ruled that the funds were subject to a trust for relief and could not be applied for the purpose of acquiring land and erecting a hall.\(^{40}\)

The Supreme Judicial Court, quoting the Restatement (Second) of Trusts,\(^{41}\) stated that a trust for the relief of members of a fraternal order and their families, as opposed to a trust for the organization’s general purposes, is charitable in nature.\(^{42}\) The Court noted that the fund’s purpose was set forth by the 1922 convention vote.\(^{43}\) Therefore, money given to the fund for that stated purpose could only be applied to that particular purpose, and subsequent amendment of that vote was ineffectual to divert the fund from that original purpose.\(^{44}\) The Court concluded with the remark that “those who contributed to the fund before 1966 were entitled to have their money used for the stated purpose. It follows that the Fund cannot be used for the purchase of land and the construction of a regional hall for use by the Lodge.”\(^{45}\)

The Court’s opinion should not be read to mean that the entire fund may not be applied to the construction program. By referring to donors before 1966, when the fund’s purpose was broadened to go beyond relief, the Court seems to suggest that post-1966 donors were giving to a new fund or at least a fund whose stated purposes embraced construction of

\(^{36}\) Id. at 846-47, 370 N.E.2d at 700.

\(^{37}\) Id. at 847, 370 N.E.2d at 700.

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) Id. at 845, 370 N.E.2d at 699.

\(^{41}\) See Restatement (Second) of Trusts § 375, comment e (1959).

\(^{42}\) 373 Mass. at 848, 370 N.E.2d at 700.

\(^{43}\) Id.

\(^{44}\) Id., 370 N.E.2d at 701 (citing Animal Rescue League of Boston v. Assessors of Bourne, 310 Mass. 330, 334, 37 N.E.2d 1019, 1022 (1940)).

\(^{45}\) 373 Mass. at 849, 370 N.E.2d at 701.
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a regional hall. Thus there seems to be no reason why the fund could not be segmented into pre-1966 property (and earnings based thereon) and post-1966 property (and earnings based thereon). Certainly, income attributable to property acquired before the 1966 amendment must continue to be applied to the original purposes of the fund.

§10.7. Trusts: Accounting: Allocation of Taxation Expenses to Income or Principal. In New England Merchants National Bank v. Converse (and two companion cases) the Supreme Judicial Court considered challenges by guardians ad litem to accounts filed under the wills of Mary Ida Converse and Anne Shaw Proctor. The guardians claimed that the trustees should have charged income for a portion of federal capital gains taxes borne by principal. The problem arose because section 643 of the Internal Revenue Code allocates to current income beneficiaries deductions for state taxes on gains, trustees' capital compensation, and other administration expenses. The local practice has been to charge these expenses to principal. Yet section 643 does not allow principal to claim these deductions when paying capital gains taxes. Although these testamentary trusts made no provision for the allocation of charges between income and principal, the guardians sought compensation to the trust fund from income beneficiaries for capital gains taxes on the amounts that principal had been unable to deduct.

The probate court reported the matter to the Appeals Court, and the Supreme Judicial Court granted direct appellate review.

The Court initially noted that it has not been the usual practice in Massachusetts to make the adjustment sought by the guardians. It recited that six corporate fiduciaries in Boston had provided estimates for change-over costs ranging from $1,485 to $17,000 and for annual allocation costs ranging from $18 to $100 per account. The Court then observed that the practice of making the adjustment is followed in Philadelphia but not in New York and Pittsburgh.

46 See text at note 37 supra.
§ 10.7. 1 373 Mass. 639, 369 N.E.2d 982 (1977). The companion cases were Boston Safe Deposit & Trust Co. v. Shaw, and Boston Safe Deposit & Trust Co. v. Converse.
2 Id. at 640, 369 N.E.2d at 982.
3 See id. at 641, 369 N.E.2d at 983.
4 See I.R.C. § 643(a)(3).
5 For the three trusts at issue, principal paid extra taxes of $3,191.53, $4,158.55, and $17,298.61. For these extra taxes the guardians sought compensation to principal in the amounts of $2,584.32, $3,110.41, and $14,595.96. 373 Mass. at 640-41, 369 N.E.2d at 983.
6 Id. at 640, 369 N.E.2d at 982.
7 Id. at 641, 369 N.E.2d at 983.
8 Id.
9 Id.
Recognizing its power to order trustees to make equitable adjustments so as to alter the impact of federal tax statutes, the Court turned to the question of whether this was a proper case for ordering such relief. It indicated that it probably would have allowed trustees to make this adjustment if it had been faced with the question when the deduction was first granted to income beneficiaries in 1954. It determined, however, that practical considerations militated against requiring the adjustment. Chief among these considerations were unfair and disparate effects that an adjustment now, contrary to the settled practice, would have on current income beneficiaries where several years accounts have not yet been allowed. The effect would be unfair because the current beneficiary might have to pay for several years' adjustment out of one year's income. It would be disparate because an adjustment now would only effect trusts with unallowed accounts, allowed accounts not being subject to reopen. Another consideration was the Court's view that for the trusts under consideration the benefit to principal would be low compared to the expenses for making the adjustments. Thus the Court declined to "require the trustees to incur expenses they resist."

The Court hastened to minimize the significance of its holding, however. It pointed out that instruments drafted after 1954 commonly

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10 Id. at 642, 369 N.E.2d at 984 (quoting Holcombe v. Ginn, 296 Mass. 415, 417, 6 N.E.2d 351, 354 (1937)).
11 373 Mass. at 643, 369 N.E.2d at 984.
12 Id. at 643-44, 369 N.E.2d at 984.
13 The Court reasoned:
   For a period of more than twenty years, the adjustment now sought has not been made by corporate fiduciaries in Massachusetts. There may be numerous trusts where the adjustment has not been made, and which have unallowed accounts stretching back a number of years. The present cases involve some capital gains taxes in unallowed accounts for years as far back as 1969. To make adjustments now for a period of several years might be to deprive the income beneficiary, often the testator's widow, of badly needed current income. In some cases the income beneficiary at the time of the capital gains may have since died, and the adjustments might then require withholding of income from a successor income interest.
Id.  
14 Here the Court reasoned:
   Accounts in large numbers must have been allowed in which the adjustment sought might have been but was not made. It is not suggested that such accounts could be reopened. But the rule advocated by the guardians ad litem would require the adjustment in accounts not yet allowed, covering some or all of the same periods as allowed accounts. Thus, accounts in trusts similarly situated might receive unequal treatment because of the fortuitous timing of their allowances.
Id. at 644, 369 N.E.2d at 984.
15 Id.
16 Id., 369 N.E.2d at 985.
17 The trusts at issue were created in wills probated in 1916 and 1940. Id.
provide for this adjustment. The Court also reasoned that "[a]s to small sums, the equity of the adjustment is in serious doubt; . . . below some level the game is not worth the candle." Finally the Court pointed out:

Nothing we say here is intended to question adjustments made by a trustee who has been making such adjustments routinely over a period of years. Nor do we decide what is to be done where a trustee seeks to begin making such adjustments on some intelligent basis, or what is to be done if the inequity resulting from the Federal tax laws appears dramatic and significant. . . . No such case is presented to us.

One hopes that the impact of Converse will be as limited as the Court suggests. While the Court seemed to signal to trustees that they ought to make the adjustment, it appears that it will never require the adjustment. The major reason the Court advanced for denying these guardians ad litem the adjustment was because the benefits to principal would be minimal. Yet another reason also advanced for not ordering the adjustment was that the adjustments might be too costly to some income beneficiaries. Surely what would be costly to income beneficiaries is of great benefit to principal beneficiaries. Conversely, what is of little benefit to principal beneficiaries cannot be too costly to income beneficiaries. It is hoped that trustees will take the initiative and follow the Philadelphia practice, thereby obviating the problem.

§10.8. Trusts: Construction: Settlor's Intent to Shift Federal Tax Burdens. The appellate courts of the Commonwealth were occupied this Survey year with deciding how certain trust instruments were intended to allocate federal tax burdens. Two of the cases were concerned with how much of an estate tax marital deduction the testator intended to create, and another case was concerned with whether a testator had created only a special power of appointment, thus excluding the appointive assets from the donee's gross estate. A fourth case presented a novel twist: whether the testator's language in a will manifesting an intent to maximize the estate tax marital deduction created an interest in the estate where there was no federal estate tax liability to begin with.

18 Id.
19 Id.
20 Id. at 644-45, 369 N.E.2d at 985.

2 See I.R.C. § 2056(a).
4 See I.R.C. § 2041. Section 2041 includes, in the gross estate, assets subject to a general power of appointment in the decedent.
I. INTENT TO MAXIMIZE MARITAL DEDUCTION

Under section 2056(b)(4) of the Internal Revenue Code, the value of property passing to a surviving spouse and qualifying for the estate tax marital deduction is to be reduced by the amount of any federal or state estate or inheritance taxes which might be paid from the spouse's share. Massachusetts law provides, in general, that such taxes, "except as otherwise provided or directed by the will [or trust] involved, be charged and apportioned among beneficiaries." Because of these two provisions, the Internal Revenue Service has taken the position that unless the decedent has, by the language of the will or trust, clearly shifted the burden of payment of the tax to another source, the amount of the allowable marital deduction will be reduced by the value of the estate and inheritance taxes, even if those taxes were in fact paid from another source.

Babson v. Babson, the first Survey year case involving the marital deduction, decided the question of whether the testator's failure to insert the words "maximum marital deduction" in the clause providing for his widow's share required the executors of his estate to charge that share with payment of the Massachusetts inheritance tax on future interests. Babson died in 1972, survived by his wife. The executors of his estate filed a federal estate tax return claiming the maximum marital deduction. The executors also paid Massachusetts inheritance taxes from the residue of the estate, including $110,840.15 representing Massachusetts inheritance taxes on future interests in the trust created for Mrs. Babson. An auditing agent of the Internal Revenue Service determined that the value of the marital deduction should be decreased by the amount of the state taxes on the trust's future interests and assessed a deficiency of $57,415.20. The executors paid the deficiency and filed a claim for a refund. The claim was disallowed, but on appeal to the Appellate Division of the Regional Commissioner, the Appellate Conference agreed to recommend the refund if the Supreme Judicial Court were to determine that Babson's will indicated his intention to receive the benefit of the maximum possible marital deduction. The executors thereupon brought an action in the Supreme Judicial Court under General Laws chapter 231A, section 1, against all legatees and

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6 See G.L. c. 65A, § 5.
7 See Ballentine v. Tomlinson, 293 F.2d 311, 313 (5th Cir. 1961).
9 Id. at 2761, 371 N.E.2d at 432.
10 Id. at 2762-63, 371 N.E.2d at 433.
11 Id. at 2763, 371 N.E.2d at 433.
12 Id.
13 Id. at 2764-65, 371 N.E.2d at 433.
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beneficiaries, the Attorney General, and the Commissioner of Internal Revenue.\textsuperscript{14} The Commissioner expressly declined to appear, stating that he was immune from suit in the courts of the Commonwealth and did not intend to waive that immunity. The other named defendants did not appear.\textsuperscript{15}

Before deciding the issue of the testator’s intent, the Court considered whether there existed a controversy so as to make a grant of declaratory relief appropriate, in view of the non-adversarial flavor of the proceedings. The Court held that there was a controversy within the meaning of chapter 231A, section 1, in that the executors were uncertain which fund would pay the estate taxes.\textsuperscript{16} Thus, even though the Service would not be bound by the Court’s decision, the remaining parties would be bound, and the executors would know which course to pursue. Additionally, the question of Babson’s interest was purely a question of state law and thus appropriate for the Court’s determination.\textsuperscript{17}

The Court then determined that the testator indeed had intended to fully utilize the marital deduction, notwithstanding his failure to employ the word “maximum” in the provision creating the marital deduction trust.\textsuperscript{18} The Court arrived at this conclusion by construing the will as a whole, considering “[t]he accomplishment of identifiable tax objectives” as an aid to construction.\textsuperscript{19} First, the provision creating the trust referred to and met the Internal Revenue Code requirements for a qualifying marital deduction trust, particularly the grant of a life estate in Mrs. Babson with a general power of appointment and the right to income at least annually.\textsuperscript{20} Secondly, the testator stated that the trust was to be funded with assets equaling fifty percent of his adjusted gross estate, which was the maximum amount then allowable under the Code.\textsuperscript{21} Thirdly, the testator stated in another clause that the will should be construed as intending the maximum allowable marital deduction.\textsuperscript{22} Finally, the testator directed that the executors charge “all estate taxes occasioned by my death, and all inheritance taxes on present . . . [and]
on future or contingent interests in property passing or accruing from me . . . to the residue.”

The Court deemed the most significant indicia of the testator’s intent to utilize fully the maximum marital deduction to be the maximum funding provision and the tax shifting provision.

First National Bank of Boston v. First National Bank of Boston was the other marital deduction case brought under chapter 231A, section 1. Here the bank as executor sued itself as testamentary trustee, as well as other parties with an interest in the estate, seeking a declaration of the testator’s intent to utilize fully the marital deduction in creating a marital deduction trust. Again the proceeding was amiable; the only real adversary, the Service, was not even named as a party defendant. Nevertheless, the Court had no doubt that the proceeding was adversarial because the determination of which assets should bear the taxes affected the shares of the interested parties.

The will of Leon W. Crockett directed his trustee “to appropriate a portion of the estate to form a separate trust the value of which shall be exactly the sum necessary to obtain the maximum marital deduction in determining the Federal Estate Tax on my estate . . . .” Like the trust at issue in Babson, this trust met the requirements of section 2056(b)(5) of the Code by granting the life tenant widow income at intervals at least annually and granted her a general power of appointment over the assets. Unlike Babson, however, the instrument did not have a provision apportioning estate and inheritance taxes among particular assets. Thus, the question before the Court was whether the testator had manifested an intent to maximize the estate tax marital deduction to the point of shifting taxes to non-marital deduction assets, in the absence of an explicit provision so stating. The Internal Revenue Service disallowed the part of the marital deduction for Massachusetts inheritance taxes due on the trust, probably because the will did not apportion the taxes.

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23 Id. The Court stated that this language has been held to shift taxes from specific bequests to the residue (citing Boston Safe Deposit & Trust Co. v. Children’s Hospital, 370 Mass. 719, 723, 351 N.E.2d 848, 850-51 (1976); Putnam v. Putnam, 366 Mass. 261, 268, 316 N.E.2d 729, 735 (1974)).
26 Id. at 1099-1100, 375 N.E.2d at 1185-86.
27 Id. at 1100 n.1, 375 N.E.2d at 1186 n.1.
28 Id. at 1100, 375 N.E.2d at 1186.
29 Id. at 1100-01 n.2, 375 N.E.2d at 1186 n.2.
30 See text at note 23 supra.
32 Id. at 1101, 375 N.E.2d at 1186.
The Court held that the testator’s expression of intent to maximize the marital deduction, without more, “necessarily implies an intent to preserve the deduction unreduced by the amount of Federal estate tax and Massachusetts inheritance tax which might otherwise be allocated to the marital trust property.” 33 The Court saw Crockett’s silence in an affirmative light, stating: “A contrary intent is not to be found on examination of the will. Nowhere in the instrument is there language which suggests that Crockett intended that taxes or expenses of the estate were to be paid from funds set aside for the marital deduction trust.” 34 Thus the Court held that the executor was precluded from charging the marital trust res with any taxes or expenses.35

Justice Quirico dissented in both Babson 36 and First National Bank 37 and on the same grounds. In his view, the only controversy was between the plaintiffs and defendant beneficiaries on the one hand and the Commissioner of Internal Revenue on the other.38 Since the Commissioner declined to appear, the Court did not have the benefit of opposing briefs or arguments. Justice Quirico contended that in such cases the Court should abstain.39

The procedural realities and substantive results of Babson and First National Bank may be distinguished from Boston Safe Deposit & Trust Co. v. Children’s Hospital, 40 which was cited in Babson.41 In Children’s Hospital, the question was whether Massachusetts inheritance taxes should be paid by the marital fund established under the will of Seward M. Paterson or by the residuary beneficiaries, certain charities.42 The charities were represented, and the Court eventually determined that the residue in which they were to share would bear the burden of the tax.43 Under the peculiar circumstances of that case, the estate’s charitable deduction was reduced, and as a result, the federal estate tax was actually increased as a result of the Court’s decision.44

In a case in which there is a controversy between claimants to a fund there is no doubt that the Court must render a decision. Where,

33 Id. at 1101-02, 375 N.E.2d at 1186.
34 Id. at 1104, 375 N.E.2d at 1187.
35 Id. at 1105, 375 N.E.2d at 1187.
39 Id.
42 370 Mass. at 722, 351 N.E.2d at 850.
43 Id. at 725, 728, 351 N.E.2d at 851, 853.
44 Id. at 725, 351 N.E.2d at 851.
however, the parties are all in agreement, as Justice Quirico pointed out, the Court is without benefit of any briefs or arguments other than those advanced by the plaintiffs. There is a danger in such cases that the Court may find itself rubber-stamping the plaintiff's position. Consider the Court's rulings in three “adversarial” proceedings relative to the federal estate tax marital deduction. In *Putnam v. Putnam* the Court, in holding that the testator intended to avail himself fully of the deduction, decided that no inheritance taxes should be charged to the marital trust, despite an express provision to the contrary. In *Babson* the Court, in finding that the testator harbored a similar intention, was most impressed by both an expression of intent to fund the trust to the fullest extent and an explicit clause directing that taxes attributable to the trust be paid out of residue. Finally, in *First National Bank* the Court relied solely on the testator's expressed intent to fund the trust to the fullest extent and was unconcerned by the lack of a tax apportionment clause as was present in *Babson*. Moreover, Chief Justice Hennessey, who authorized both Survey year opinions, did not even refer to *Babson* in *First National Bank*. Thus, the Court has held in three cases that a marital trust should not be reduced by state inheritance taxes or expenses attributable to the trust where a) the testator directs that the taxes not be charged to the trust, or b) the testator directs that the taxes be charged to the trust, or c) the will is silent in this regard.

While the cases illustrate how far the Court will go to find an intent to maximize the marital deduction, they also illustrate how far the Service will go to advance its position with regard to taxes payable from the marital share. Thus, while the draftsman can feel confident that the client's intent to shift tax burdens and other expenses will find easy expression as far as the Massachusetts courts are concerned, the true objective should be to make this intent precise to alert to the more critical eyes of the Service. The draftsman should be aware of this problem and should endeavor to spell out in the clearest possible language the intention of the donor or testator regarding the payment of taxes and other expenses. Where the directions are specific the risk of litigation will be substantially lessened.

II. INTENT TO CREATE TAXABLE GENERAL POWER OF APPOINTMENT

In *Dana v. Gring*, an action somewhat similar to the cases discussed above, the executors of Helen Gring's will brought a complaint for in-
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Instructions seeking a determination of her interest in a trust established by her father.50 The questions were whether under Massachusetts law Mrs. Gring held a general power of appointment or whether the trustees’ discretion to distribute principal to her was limited by “an ascertainable standard relating to . . . [her] health, education, support or maintenance”51 and whether she, as one of the three trustees, had power to participate in any decisions relating to payment to her of such principal.62 If she held a general power of appointment the assets of the trust would be includable in her estate under section 2041 of the Internal Revenue Code; if not, they would not be taxable.53

This time the United States made a response to the state court action. It filed an amicus brief in which it argued that the Court should decline to decide the case because its decision would not “[affect] the nature of state property interests.”54 The Court disagreed, however, and determined that the provisions of the trust instrument relating to distribution of principal to the life beneficiary did provide an ascertainable standard.55

Article Fourteen of the will of Frank B. McQuesten provided that a portion of the residue of his estate should be held by trustees for the benefit of Mrs. Gring. The trustees were “authorized to pay over to her from time to time such amounts of the principal for her own use as said trustees may deem necessary or advisable for the purpose of contributing to the reasonable welfare or happiness of my said daughter or her immediate family.”56 Mrs. Gring was given a special testamentary power to appoint the trust assets to any of her father’s lineal descendants then living.57 She was named as one of the three trustees of the trust, which contained a spendthrift clause limiting her right to alienate or assign the fund to her creditors.58

The Court determined that the language used by McQuesten to guide the trustees in distributing principal—the “reasonable welfare or happiness” of Mrs. Gring—did limit the trustees’ discretion.59 The Court determined this “judicially enforceable, external, and ascertainable standard”60 to be that “[t]he beneficiary is to be maintained in accordance with the standard of living which was normal for [her] before [she]

50 Id., 371 N.E.2d at 756.
51 See I.R.C. § 2041(b)(1)(A).
53 See I.R.C. § 2041(a).
55 Id. at 2784-85, 371 N.E.2d at 759-60.
56 Id. at 2778-79, 371 N.E.2d at 756-57.
57 Id. at 2779, 371 N.E.2d at 757.
58 Id.
59 Id. at 2784-85, 371 N.E.2d at 759.
became a beneficiary of the trust.” The above standard is to be applied to trusts containing similarly broad language. The Court negated the importance of the word “happiness” appearing in Article Fourteen by noting the testator’s concern that the trust fund be conserved for the remaindermen. This concern was shown by the fact that McQuesten had limited Mrs. Gring’s power of appointment to lineal descendants alive at his death and had made them takers in default of appointment and by the fact that McQuesten had used a spendthrift provision to limit Mrs. Gring’s power to reach the assets. Thus, because the trustees were obliged to consider the remainder interests as well as the interests of the life beneficiary, they could not have distributed the entire principal to Mrs. Gring.

Addressing the second issue in the case, the Court held that Mrs. Gring as trustee did not have the power to participate in a decision to distribute principal to her. Since the non-participation of a trustee-beneficiary is the traditional trust law rule, the Court held that the language in the will referring to decisions by “my trustees” should not be interpreted to mean that the testator intended to depart from this principle. Thus, the Court determined, the testator meant the trustees other than the beneficiary. Any other construction "would favor the tax authorities and no one else. The propriety of such a construction is not to be lightly presumed.”

III. INTENT TO MAXIMIZE MARITAL DEDUCTION AS CREATING A MARITAL DEDUCTION GIFT

The Appeals Court’s rescript opinion of Young v. Dempsey upheld the probate court’s determination that where the testator’s estate amounted to less than $60,000, and thus was not taxable under the federal estate tax law then in effect, Article First of the testator’s will passed nothing to his widow. Article First purported to give the widow outright only so much of the estate “as is necessary . . . to entitle her to the maximum credit available as a marital deduction” under section 61 1978 Mass. Adv. Sh. at 2785, 371 N.E.2d at 760 (quoting Woodberry, 359 Mass. at 243, 268 N.E.2d at 844).


64 Id.

65 Id. at 2788-89, 371 N.E.2d at 761.

66 Id. at 2789, 371 N.E.2d at 761.

67 Id.


2056 of the Internal Revenue Code.\textsuperscript{71} The Appeals Court held that the estate’s full exemption from federal estate taxation meant that “there was nothing from which any of the statutory deductions, marital or otherwise, could have been made.”\textsuperscript{72} Thus, the Court viewed assets equalling “the maximum credit available” and the amount “necessary” for such a credit to be nonexistent.\textsuperscript{73}

The court then examined other provisions of the will which buttressed its belief that “tax minimization was the testator’s only purpose in including the marital deduction gift. . . .”\textsuperscript{74} Article Second gave the widow the residue of the estate in trust for her life but made her sole trustee and beneficiary with broad powers of invasion.\textsuperscript{75} Since this was “virtually the equivalent” of an outright gift, Article First was “superfluous except for its potential tax consequences.”\textsuperscript{76} Additionally, Articles Fourth, Sixth, and Seventh manifested the testator’s intent to benefit his children and their issue, if any.\textsuperscript{77} Construing Article First as passing property to the widow would wholly frustrate the testator’s intent to benefit these parties.\textsuperscript{78}

\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 630-31, 363 N.E.2d at 285-86.
\textsuperscript{76} Id., 363 N.E.2d at 286.
\textsuperscript{77} Id. at 631, 363 N.E.2d at 286.
\textsuperscript{78} Id.