Chapter 7: Trusts and Estates

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CHAPTER 7

Trusts and Estates

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§ 7.1. Culpable Neglect—Promise to make a Will—Damages. During the Survey year, in Hastoupis v. Gargas,¹ the Massachusetts Appeals Court decided that, under section 10 of chapter 197 of the General Laws, a creditor was not chargeable with "culpable neglect" for failing to bring his claim for services rendered within the nine month statute of limitations.² The court in Hastoupis also discussed the measure of damages in cases involving breaches of promise to make a will.³ The claimant, Hastoupis, had immigrated with his family from Greece to Massachusetts.⁴ Shortly after their arrival, they met the decedent, their relative, who was elderly and quite wealthy, and they moved into the decedent's home.⁵ Hastoupis' family cared for the decedent for the last five years of his life, performing domestic chores, maintenance work on his real estate, and nursing care.⁶ The claimant had given up an opportunity to buy his own business.⁷ The decedent on numerous occasions promised to leave the claimant one-half of his estate,⁸ but when he died, he had made no such provision in the will.⁹ Within a month of the death, the claimant contacted an attorney to represent him. The claimant frequently called the attorney and visited him to inquire about the progress of the case. Although the attorney assured him that the claim would be timely filed, it was not.¹⁰ The attorney was ill throughout most of the case.¹¹ When the attorney died, Hastoupis engaged another attorney who filed a complaint in the Superior Judicial Court for Suffolk County,¹² seeking section 10 relief from the bar of the nine-month statute of limitations.¹³ The case was remanded to the superior court¹⁴

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Footnotes:

2. Id. at 47, 398 N.E.2d at 748.
3. Id. at 50-54, 398 N.E.2d at 750-53.
4. Id. at 45, 398 N.E.2d at 747.
5. Id.
6. Id.
7. Id. at 45, 398 N.E.2d at 747.
8. Id. at 45-46, 398 N.E.2d at 747-48.
9. Id. at 47, 398 N.E.2d at 748.
10. Id.
11. Id.
12. Id.
where the judge granted the relief and awarded a judgment of $375,000. The executor appealed and the Appeals Court affirmed.

The court rejected the executor’s argument that Hastoupis was chargeable with “culpable neglect” for relying on his original attorney. The court apparently was influenced by several facts: that the claimant consulted with and retained an experienced member of the bar, and that on several occasions the claimant was assured that his interests would be cared for. The court also noted that the claimant spoke limited English, that he did not have any formal education, and that he was not familiar with legal rules. The court also rejected the argument that the original attorney was culpably neglectful and that his neglect vicariously bound the claimant, finding that the attorney’s actions were within “the range of ordinary excusable fallibility.”

The meaning of “culpable neglect” given in Hastoupis goes beyond historical cases. Although the term has not been limited to instances of fraud, accident, or mistake, it has been described as one which encompassed the neglect of an individual attributable to his own “carelessness, improvidence or folly.” The court in Hastoupis appeared to exclude from the term those instances which arise from an attorney’s “inadvertence, misunderstanding, illness or some other cause other than neglect or breach of duty.” Furthermore, such actions by the attorney would not be attributable to the creditor client. The creditor might be responsible, however, for his attorney’s “mere procrastination in callous disregard of professional responsibilities.” Whereas the Hastoupis court arguably could have found for the claimant because of his original attorney’s illness, the court chose rather to find that the attorney had misunderstood or had misinterpreted the provisions of the short statute of limitations. As a result, it is not clear whether the court purposely chose to open another avenue of attack for section 10 claims or whether it was particularly sympathetic to the plight of the practitioners with respect to the two “fairly radical changes” in the section 9 limitations period. In either case, the court undoubtedly will see claims

15 Id. at 44, 398 N.E.2d at 747.
16 Id. at 43, 398 N.E.2d at 746.
17 Id. at 44, 398 N.E.2d at 747.
18 Id. at 47-49, 398 N.E.2d at 748-49.
21 Id. at 50, 498 N.E.2d at 750.
25 Id.
26 Id. at 50, 398 N.E.2d at 749-50.
27 Id. The law changed twice in one year. Acts of 1971, c. 548, § 1, approved on July 21,
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for section 10 relief based on a misunderstanding or a misapplication of the law by a creditor's attorney.

Having found that section 10 relief was properly granted, the court directed its attention to the issue of damages. The court attempted to clarify the type of evidence the court will consider in cases involving a breach of contract to make a will. To reach the issue, the court in Hastoupis first had to find that an express agreement existed, that the decedent had promised to leave one-half of his estate to plaintiff in exchange for plaintiff's performance of services, and that the plaintiff had fulfilled the terms but that the decedent had not. Because the Statute of Frauds prevented the enforcement of the oral contract to make the will, the plaintiff's action was based on quantum meruit for the value of the services rendered.

Hastoupis follows a long line of cases in Massachusetts which permit recovery in quantum meruit when an action on the contract has been barred by the Statute of Frauds. The theory behind the recovery is not to provide an indirect means to avoid the statute, but to prevent the statute from being used as an instrument of fraud by compelling the defendant to pay for what he has received. The measurement of damages is thus based on principles of restitution, to prevent the defendant from being unduly enriched.


G.L. c. 259, § 5A.


See Parady v. Lewis, 338 Mass. 800, 157 N.E.2d 531 (1959) (couple moved in with elderly man and maintained his house; promised to leave them the house); Turner v. White, 329 Mass. 549, 109 N.E.2d 155 (1952) (couple moved onto farm and maintained it for 33 years; promise to leave them the farm); Hollister v. Old Colony, 328 Mass. 225, 102 N.E.2d 770 (1952) (step-daughter was driver for 10 years; promise to leave a bequest); Raine v. Shea, 259 Mass. 412, 156 N.E. 541 (1927) (woman did housework and nursing for 14 years; promise to leave her entire estate); Dixon v. Lamson, 242 Mass. 129, 136 N.E. 346 (1922) (woman rendered services for 8 years; promise to devise one-half of property). See also cases cited in G. NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS, §§ 181, 239 (4th ed. 1958).


The court in *Hastoupis* refined the holding in *Green v. Richmond*\(^{16}\) with respect to the measurement of damages. The *Hastoupis* court said that the injury may be of two kinds: services of a routine and ordinary nature which need not require any evidence as to value,\(^{37}\) and services for which there exists no established value in the marketplace and which cannot be measured by ordinary standards.\(^{38}\) In determining the value of the second kind of services, the court stated that the situation and relationship of the parties,\(^{39}\) the nature and extent of the services,\(^{40}\) and the value of the estate should be considered.\(^{41}\) The value of the estate is evidence of the "price" one of the parties has put on the services and is an admission against that party's interest.\(^{42}\) The value of the estate cannot be the "per se measure of damages, however."\(^{43}\) The *Hastoupis* court found that the lower court had applied the evidence properly. Thus, the court affirmed the judgment.\(^{44}\)

§ 7.2. Mistake—Fiduciary Relationship—Rescission—Counsel Fees. During the Survey year, the Appeals Court refined the standards for the attorney-client relationship in trusts and estates practice, and specified the consequences of failures to perform up to that standard, in *Markell v. Sidney B. Pfeifer Foundation, Inc.*\(^1\) The Appeals Court held that where an attorney, even one who is a natural object of a settlor’s bounty, prompts or induces a settlor to execute a trust in which the attorney has even an indirect


\(^{42}\) Id. at 53, 398 N.E.2d at 751. The authority for the admission into evidence of the value of the estate already has been established in earlier cases. See Green v. Richmond, 369 Mass. 47, 55-58, 337 N.E.2d 691, 697-99 (1975); Turner v. White, 329 Mass. 549, 109 N.E.2d 155, (1952) (plaintiffs entitled to show value of land); Downey v. Union Trust Co., 312 Mass. 405, 413-14, 45 N.E.2d 373, 378 (1942) (value of promised annuity); Foman v. Davis, 316 F.2d 254, 256-57 (1st Cir. 1963).

\(^{43}\) 1980 Mass. App. Ct. Adv. Sh. at 54, 398 N.E.2d at 752. The lower court had received evidence in the form of "estate and tax documents" which showed the size of the gross estate, the amount of taxes, debts and pecuniary legacies and the size of the residue (approximately $1.3 million). *Id.* at 53, 398 N.E.2d at 751. In *Green v. Richmond*, 369 Mass. 47, 337 N.E.2d 691 (1975), the Court held that it had been error to admit the probate inventory as evidence of the value of the estate, since no preliminary inquiry had been made as to its reliability as evidence of the "net value of the estate". *Id.* at 59, 337 N.E.2d at 699.

\(^{44}\) 1980 Mass. App. Ct. Adv. Sh. at 44, 53, 55, 398 N.E.2d at 747, 751, 752. The court also found that it would not overrule the award because the damages may have been based on some services provided by the plaintiff's wife. *Id.* at 54, 398 N.E.2d at 752.

future benefit, and where the attorney has a close relationship of trust and confidence with the settlor, the attorney has an affirmative obligation to assure that the settlor fully understands the nature of the attorney’s benefit and the nature and legal effect of all provisions of the instrument. It further held that the failure to fulfill that affirmative obligation was a sufficient ground for a rescission of the instrument on the basis of mistake, that is, a misunderstanding by the settlor of the legal effect of the instrument.

The principal operative facts in *Pfeifer* were as follows. Minney Hey was an elderly immigrant, with little or no business training, who relied fully on professionals for investment and business decisions. She exhibited a propensity over the years for making and changing her estate plan, usually remembering charities and various relatives and other individuals who from time to time performed services for her. Over the years, most of her relatives died or became estranged, except for her nephew, Sidney Pfeifer. For some time, Minnie had not been close to Sidney because of her dislike for his wife. During the ten years after Sidney and his wife separated, Minnie gradually grew closer to Sidney and began to rely heavily on his business and investment judgment. Their personal relationship grew to the point of her making substantial gifts of property to him from time to time. Although Sidney was an attorney, Minnie relied upon him not so much for legal advice as for assistance in managing her investments.

In 1960, at the age of 86, while at a vacation lodge recuperating from an injury, and apparently at Sidney’s behest, Minnie transferred a substantial portion of her assets to herself and Sidney as trustees of an irrevocable trust prepared by one of Sidney’s attorneys. By its terms, she retained a life income interest and gave the remainder to Sidney. In three successive years, supplementary trust agreements were executed, which added essentially all of Minnie’s remaining intangible property to the 1960 trust.

In 1966, Sidney created the Sidney B. Pfeifer Foundation, Inc., a private foundation to benefit the performing arts, and executed a will leaving his entire residuary estate in trust to Minnie for life, and the remainder,

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1. *Id.* at 583, 402 N.E.2d at 92.
2. *Id.* at 590, 402 N.E.2d at 96.
3. *Id.* at 563, 402 N.E.2d at 82.
4. *Id.* at 564-67, 402 N.E.2d at 83-84.
5. *Id.* at 563-64, N.E.2d at 82.
6. *Id.* at 567-68, 402 N.E.2d at 84.
7. *Id.* at 577-79, 402 N.E.2d at 89-90.
8. *Id.* at 567-68, N.E.2d at 84.
10. *Id.* at 568-69, 402 N.E.2d at 85.
11. *The trust contained a right for Minnie to redirect the remainder interest to other heirs-at-law.* *Id.* at 569, 402 N.E.2d at 85. Since all of her other living heirs were estranged, *id.* at 563-64, 402 N.E.2d at 82, it was unlikely that this right would ever be exercised. The alleged draftsman of the trust suggested that the purpose of the reserved power was to avoid a completed gift for gift tax purposes. *Id.* at 569, 402 N.E.2d at 85.
12. *Id.* at 569, 402 N.E.2d at 85.
one-half to a close friend and one-half to the Foundation.\textsuperscript{14} He also executed and funded a revocable trust reserving the income to himself for life and then to Minnie for life, with the remainder to the Foundation.\textsuperscript{13} At the suggestion of one of Sidney's attorneys, a new trust agreement for Minnie was drawn up to replace the 1960 trust.\textsuperscript{16} The 1966 trust was almost identical to the 1960 trust, except that in the event Sidney predeceased Minnie, the property was to be paid to the Foundation.\textsuperscript{17} There was conflicting evidence concerning the extent to which Sidney explained the terms of the 1960 trust to Minnie, and the extent to which a bank trust officer asked by Sidney to handle the execution of the 1966 trust explained its terms to Minnie.\textsuperscript{18} There was no suggestion that any attempt was made to conceal any aspect of either instrument.\textsuperscript{19}

Shortly after Sidney's death in 1967, Minnie became distraught about her financial affairs, asserting that she had never intended to give up ultimate control of her assets.\textsuperscript{20} On the advice of counsel, she executed purported amendments to the trust which, if valid, would have eliminated the remainder gift to the Foundation in favor of relatives.\textsuperscript{21} She also executed a new will to the same effect.\textsuperscript{22}

Determined to rescind the 1960 and 1966 instruments, Minnie executed an affidavit outlining the events leading up to the execution of both.\textsuperscript{23} In the affidavit she alleged that she did not understand the 1960 and 1966 documents to be trusts, and that she did not understand that by executing and transferring her property to the trusts she was thereby alienating her power to dispose of her property as she should wish.\textsuperscript{24} Based on that affidavit, she instituted a proceeding in the probate court seeking a determination of the invalidity of the 1960 and 1966 trusts.\textsuperscript{25} Three days later Minnie died, and the case was pursued by her executor.\textsuperscript{26}

The probate court found that Sidney had induced Minnie to execute the trust without a full understanding of its legal effect and, therefore, ruled

\textsuperscript{14} Id. at 570, 402 N.E.2d at 85.
\textsuperscript{15} Id.
\textsuperscript{16} Since Minnie and Sidney were the only interested persons in the first trust, the attorneys and the court apparently assumed that the irrevocable trust could be terminated and replaced by their joint action. Id. at 570, 402 N.E.2d at 86. IV A. Scott, The Law of Trusts § 338 (3d ed. 1967).
\textsuperscript{18} Id. at 576-81, 402 N.E.2d at 89-91.
\textsuperscript{19} Id. at 583, 402 N.E.2d at 92.
\textsuperscript{20} Id. at 571, 402 N.E.2d at 86.
\textsuperscript{21} Id. at 558 & n.1, 572, 402 N.E.2d at 79 & n.1, 86.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 572, 402 N.E.2d at 86.
\textsuperscript{24} Id.
\textsuperscript{25} Id. In the alternative, she requested a declaration that the trust amendments were valid, id., a point the court did not have to reach. Id. at 590, 402 N.E.2d at 96.
\textsuperscript{26} Id. at 572, 402 N.E.2d at 86-87. The successor trustees of Minnie's trust submitted their rights to the court, id. at 592, n.14, 402 N.E.2d at 97, n.14 and the suit was defended solely by the Foundation.

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that the trust was void.27 There was no allegation of incapacity at the time of execution of either trust and the case was not decided on the ground of undue influence.28 Moreover, as the Appeals Court emphasized, the probate court’s factual findings fell short of showing fraud or deceit on the part of Sidney.29 The executor’s sole argument on appeal was that the trust was voidable based on the law of mistake.30 The Appeals Court held that the probate court was justified in finding grounds for rescission of the 1960 and 1966 trusts on the basis of mistake.31 It upheld factual findings that the instruments were executed without the understanding that their legal effect was to alienate the powers Minnie had previously enjoyed in her individual capacity to control and dispose of the trust assets as she might wish.32 The court understood the crucial factual finding in the case to be that neither Sidney nor the advisors he provided for Minnie adequately explained to her the fact that the 1960 and 1966 trusts were irrevocable.33 Because misunderstanding of legal effect in and of itself is not a ground for rescission, the court’s holding required an elaborate analysis of Sidney’s relationship with Minnie.

The Appeals Court’s analysis began with the proposition that a voluntary trust completely established with no power of revocation cannot be revoked by the settlor without proof of mental unsoundness, mistake, fraud or undue influence.34 All of these grounds, except mistake, were foreclosed by the probate court’s findings. Under settled principles of Massachusetts law, mere misconception of the legal effect of clear language in an instrument is not grounds for rescission.35 Where an individual holding a fiduciary relationship to the settlor induces the settlor’s action and stands to benefit thereby, however, and where the rights of innocent third parties have not intervened, the instrument can, according to the Appeals Court, be

27 Id. at 558, 402 N.E.2d at 79.
28 Id. at 583, 402 N.E.2d at 92.
29 Id.
30 Id. In addition, the Foundation argued as a procedural matter that the Appeals Court should make its own findings of fact, rather than give any weight to the trial judge’s findings. Id. at 559, 402 N.E.2d at 80. The premise for this challenge was the Foundation’s claim that the trial judge had “mechanically adopted” the plaintiff’s proposed findings of fact. Id. The Appeals Court determined that the trial judge’s findings were not to be set aside unless clearly erroneous. Id. at 574, 402 N.E.2d at 88. Concluding that the trial court’s reliance on the plaintiff’s prepared narrative did not constitute such an error, the Appeals Court decided to accord the trial judge’s factual findings their customary weight on appeal. Id. at 576, 402 N.E.2d at 89.
31 Id. at 590, 402 N.E.2d at 96.
32 Id. at 583, 402 N.E.2d at 92. The court specifically stated that its holding was not grounded on fraud, deceit or undue influence and that the facts would not support a finding of any of those grounds. Id.
33 This finding was in dispute, but the Appeals Court in essence held that an adequate evidentiary basis existed to support the probate court’s conclusion. Id. at 582-83, 402 N.E.2d at 91-92.
34 Id. at 583, 402 N.E.2d at 92.
voided where the fiduciary failed to make the settlor fully aware of the effect. Three related doctrines contributed to the court’s finding: the general standards of conduct in the attorney-client relationship, the less strict criteria established for the attorney who is a friend or family member of the client, and the emerging fiduciary standards governing cases where a settlor has become dependent in fact upon another person’s judgment. The court began its analysis with the law governing business transactions between attorney and client. The cases uniformly hold that the attorney must not only refrain from any misrepresentation or concealment of any material facts in such dealings, but must use active diligence to assure that his client is fully informed of the nature and effect of the transaction proposed and the nature and effect of the attorney’s own rights and interest in the subject matter. Furthermore, the attorney in this position must ensure that his client either has independent advice in the matter, or else receives from the attorney the same advice he would have expected to give had the transaction been one between his client and a stranger.

The same standard of attorney conduct applied, according to the court, to an attorney dealing with the client in relation to the creation of a trust. Sidney, the probate court held, failed to make absolutely clear to Minnie his interest and that of his Foundation, and failed adequately to assure that she understood the fact that her disposition of assets was irrevocable. Sidney’s conduct therefore could not stand if measured simply by the standard imposed for attorney-client business dealings.

Because Sidney was acting in effect as Minnie’s attorney, the analysis would seem to end here. The court, however, was troubled because Sidney was a close friend and relative, as well, and, therefore, a natural object of Minnie’s bounty. In such a case a lesser, not greater, standard of fiduciary conduct seems to apply:

But it is not invariably true that, when an attorney performs a legal service for another, a strict attorney-client relationship exists. Not infrequently an attorney will draft a will or do estate planning.
work for a relative or close friend and associate; and in such a case, if
the attorney or a member of his immediate family is named as a
beneficiary, a court called upon to examine the transaction, although
it may suggest that the better practice would be for an independent
attorney to do such work . . ., and although it may state that such a
transaction should be viewed with great circumspection, . . . will not
apply to such a transaction the presumption of impropriety which is
applied when dealing with one whose fiduciary status is un-
complicated by ties of blood, marriage, or close friendship. 44

The difference between pure attorney-client cases and “friend or family”
cases, according to the court, is that in the strict attorney-client case it can
reasonably be presumed that the relationship influenced the transaction. 45
The policy of the law favors the fiduciary’s duty of loyalty and discourages
business or donative transactions which inure to the fiduciary’s personal
benefit. 46 On the other hand, where there is a relationship of family or
friendship, gifts or other acts of generosity are natural and to be expected;
therefore, the reason for the presumption of impropriety dissolves. 47
Because Sidney was Minnie’s next-of-kin and heir presumptive, the court
reasoned that there could be no presumption of impropriety. 48 Absent other
factors the lesser fiduciary standard would apply.

The “friend or family” cases were not dispositive either, however, as
to the applicable fiduciary standard. Sidney’s relationship to Minnie
transcended a simple friend or family situation. It was also one of
dependency—a relationship of trust and confidence. Where an individual
has achieved such a close relationship of trust and confidence with a donor
that the donor was in fact dependent on the other’s judgment in business af-
fairs and property matters, fraud or undue influence can arise easily. 49 Ac-
cording to the court, these cases forbid the abuse of such a relationship to

45 Id. at 588, 402 N.E.2d at 95.
46 Id.
47 Id. See also Butler v. Gleason, 214 Mass. 248, 101 N.E. 371 (1913); Woodbury, 141 Mass.
329, 5 N.E. 275 (1886). During the Survey year the Appeals Court affirmed in a rescript the
rescission of a deed where the elderly grantor was accompanied to an attorney’s office and in
1767, 1768, 409 N.E.2d 1322, 1323. The court’s action was based on the grounds of undue in-
fluence supported by the failure by one in a position of trust and confidence to assure full
understanding of the adverse legal consequences. Id., 409 N.E.2d at 1323-24.
the implicit limitation in the earlier cases that the draftsman not be favored over other heirs.
Although Minnie’s other heirs were estranged, some mention of the absence of normal or
logical gifts to Minnie’s friends would have been appropriate in the court’s analysis.
49 Id. at 589, 402 N.E.2d at 95 (citing Stetson v. French, 321 Mass. 195, 199, 72 N.E.2d 410,
the personal advantage of the other party.\textsuperscript{50} In addition, the court held, such a relationship carries with it the same positive obligations to explain to the donor the interests involved, and the legal effect of the donor's actions, as exists in the case of the pure attorney-client relationship.\textsuperscript{51}

Sidney was a close personal confidant of Minnie, upon whom she relied almost exclusively for judgment in business and property affairs.\textsuperscript{52} Therefore, the court concluded, notwithstanding his friendship or family ties, he undertook as a matter of law an obligation not only to refrain from concealing the legal effect of the trust documents from Minnie, but also to exercise active diligence to assure she was fully aware of the irrevocable nature of those acts which would inure ultimately to his benefit or that of his Foundation.\textsuperscript{53} Because the probate court had found facts sufficient to indicate that Minnie was not fully advised of the effect of the trusts, Sidney breached his fiduciary duty to Minnie to assure that she did so understand the facts.\textsuperscript{54} Because the lack of understanding was found to be based on such breach of fiduciary obligation and because only Sidney and his successor in interest, the Foundation, would benefit thereby, the document was properly voided on the grounds of mistake.\textsuperscript{55}

The court's analysis is clear and needs little elaboration. The analysis is not entirely novel,\textsuperscript{56} but most cases involving fiduciary overreaching or nondisclosure turn on undue influence directly,\textsuperscript{57} and none have gone to such lengths first to avoid a finding of undue influence and then to weave its very principles back into the law of mistake. Fundamental to a finding on either ground is the existence of the requisite relationship of trust and confidence,\textsuperscript{58} or some de jure fiduciary relationship, and proof that concealment, overreaching or nondisclosure led to a material misunderstanding.\textsuperscript{59} One practical result of the \textit{Pfeifer} approach, therefore, may be to encourage more litigation by donors where the stigma of such a suit may have deterred prospective plaintiffs from litigation against relatives or close friends on the grounds of fraud or undue influence. "Mistake" does not carry the negative implication of "fraud".

\textit{Pfeifer}, it should be noted, also affirmed the probate court's disallowance of counsel fees to the defendant Foundation.\textsuperscript{60} The Founda-
tion argued that it should have been awarded counsel fees under section 39B of chapter 215 of the General Laws, which allows the probate court discretion to award fees in matters involving interpretation of an instrument or fiduciary's duties. The trust problem was, according to the court, caused by Sidney's misconduct, and because the Foundation was Sidney's successor in interest, it was chargeable with Sidney's culpability. In such a case, the court found, the probate court could properly disallow fees.

In addition to the direct implications of *Pfeifer*, a matter of equal concern to attorneys, is the related ethical problem associated with attorney involvement in matters of this sort, especially in estate planning. The rules of professional conduct applicable to Massachusetts attorneys raise direct ethical concerns for attorneys preparing legal instruments for clients which even modestly benefit the attorney, except at best in "exceptional circumstances." *Pfeifer* adds to this concern as the indirect benefit considered there falls within the sweep of the ethical problem. The trend has been toward more restrictive limits on interested attorney involvement even in "friend or family" cases. Indeed, the proposed ABA Model Rules of Professional Conduct prohibits a draftsman from accepting any gift, except where the client and attorney are relatives.

The thrust of *Pfeifer* and these developing ethical trends suggest that an attorney in Massachusetts should, at least in non-family situations, decline any gift beyond a token remembrance in a legal instrument he is preparing. If the client insists on making the gift, another attorney should be asked to prepare the instrument. *Pfeifer* and its predecessors indicate that the instrument will be open to attack for rescission, especially if the client decides later to change his mind, on the simple grounds that ample explanations were not given as to the legal effect. Such instruments will also be easy prey to attack by disgruntled heirs. Moreover, under emerging ethical norms, the attorney opens himself up to disciplinary inquiry.

Practitioners might also note that *Pfeifer* contains a veritable treatise of Massachusetts case law on the interrelationship between fiduciary responsibility and the inducement of execution of an instrument, to be commended to anyone concerned with the responsibilities of an attorney or other de facto or de jure fiduciary to those relying on him for advice.

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61 M.G.L. c.215, § 39B.
63 Id. at 592-93, 402 N.E.2d at 97.
66 ABA Ethical Consideration 5-5. For a discussion of the "exceptional circumstance" rule, see ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, INFORMAL OPINION No. 1145 (1970) (involving an attorney preparing a will for his spouse). For an extensive discussion of the ethical problem, see State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963).
67 State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963); INFORMAL OPINION No. 1145, supra note 66.
68 ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (PROPOSED FINAL DRAFT, May 30, 1981), Rule 1.8(c).
§ 7.3 Trusts and Wills — Interrelated Instruments Interpreted Together — Discretion of Trustees to make Payments to Estate. During the Survey year, the United States Court of Appeals for the First Circuit advanced the developing concept in Massachusetts law that interprets fiduciaries’ discretionary powers to achieve desired tax consequences. In *State Street Bank and Trust v. United States*, the First Circuit, applying Massachusetts law, held that an apparently discretionary power of the trustee to transfer property to a decedent’s estate for payment of charitable legacies under her will in fact mandated the transfer of such property where the assets of the estate were insufficient for that purpose, where the will and trust were concurrently executed as part of an integrated plan, and where the decedent had evidenced in the will a strong desire that the legacies be paid. Absent such a ruling, the charitable deduction would have been lost.

Under section 2055 of the Internal Revenue Code of 1954, an estate is entitled to a deduction for the amount of gifts passing from a decedent to or for the use of a qualified charity. The deduction is disallowed, however, if the transfer to the charity is dependent "upon the performance of some act or the happening of a precedent event in order that it might become effective . . . unless the possibility that the charitable transfer will not become effective is so remote as to be negligible." If a charitable transfer is made under the discretionary powers of a trustee, therefore, the deduction will be disallowed.

In *State Street* the decedent had executed simultaneously a will and a revocable trust, naming State Street Bank and Trust Company both co-executor (with a nephew) of the will and sole trustee of the trust. The will made various charitable bequests, and the residue was divided among several relatives. The trust provided that after the decedent’s death, the trustee was authorized to pay any debts, expenses or death taxes of the decedent or her estate, and to pay any legacies included in the decedent’s will, with “absolute discretion,” after considering the assets in the estate, to determine whether any such items would be paid from the trust. After these payments, if any, were made, the trust property was to be divided in the same manner as provided in the residuary clause of the will.

§ 7:3 1 634 F.2d 5 (1st Cir. 1980).
2 As a general rule, state law defines rights and obligations inuring to taxpayers in various transactions, while federal law ascertains the tax implications of those rights and obligations. Helvering v. Stuart, 317 U.S. 154, 161-62 (1942); Morgan v. Commissioner, 309 U.S. 78, 80-81 (1940); see Commissioner v. Estate of Bosch, 387 U.S. 456, 462-66 (1967).
3 634 F.2d at 11.
4 I.R.C. § 2055.
5 I.R.C. § 2055 (a) (2).
7 634 F.2d at 7, 10 n.7.
8 Id. at 7.
9 Id. at 7-8.
10 Id. at 7.
the decedent’s death substantially all of her assets had been transferred to
the revocable trust so that the probate estate was nearly insolvent, and the
trustee exercised its authority to pay the charitable legacies of the will from
the trust assets.\textsuperscript{11}

The Internal Revenue Service disallowed the charitable deduction for the
legacies on the ground that at the time of the decedent’s death there had
been more than a negligible possibility that the trustee would not exercise its
discretion to make the payments,\textsuperscript{12} even though the trustee in fact had made
the payments. The United States District Court for the District of
Massachusetts upheld the disallowance,\textsuperscript{13} but on appeal the First Circuit
reversed.\textsuperscript{14}

The First Circuit noted that the decedent had clearly demonstrated in her
will that the charitable gifts were of high priority in her estate plan by
carefully delineating not only the amounts to pass to charity, but also their
specific purposes.\textsuperscript{15} The gifts followed a history of charitable giving by her
and by her late husband.\textsuperscript{16} Because her will and trust must be read together
to ascertain her intent, the court reasoned, the priority expressed in her will
must be read into the trust as well to interpret her intentions as to the scope
of the powers of the trustee.\textsuperscript{17} The Court noted favorably an affidavit, filed
by a former vice-president of the trustee bank, stating that his own inter­
pretation of the discretionary provision was that the trustee only had the
power to choose between funding the gifts with estate assets or with trust
assets.\textsuperscript{18} Based on these factors, the estate argued, and the Court specifically
agreed, that a professional trustee in Massachusetts under such cir­
cumstances would have an obligation to pay the charitable legacies when the
estate had insufficient funds, and that a failure to do so would be a breach
of the trustee’s fiduciary duty.\textsuperscript{19} In addition, the First Circuit noted that in
the only other discretionary powers given the trustee, that of making
payments to the settlor during her lifetime, the trustee was required to ob­
tain prior approval of the settlor’s nephew.\textsuperscript{20} The Court felt that it was ut-

\textsuperscript{11} Id.
\textsuperscript{12} Id. at 7-8.
\textsuperscript{13} State St. Bank & Trust v. United States, 80-1 U.S. Tax Cas. ¶ 13, 350.
\textsuperscript{14} 634 F.2d at 11.
\textsuperscript{15} Id. at 8.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 10. The Court cited Persky v. Hutner, 369 Mass. 7, 336 N.E.2d 865 (1975), as
authority for this proposition. Persky v. Hutner, however, turned on external manifestations
of the decedent’s intent. Id. at 15-16, 336 N.E.2d at 869-70. The case of First Nat’l Bank of
appear, however, to be proper and sufficient authority for the court’s logic. See Stewart and
Babson, Trusts and Estates, 1979 ANN. SURVEY MASS. L., § 3.3 at 51-56.
\textsuperscript{18} 634 F.2d at 8-9. It is unclear how much weight the Court gave or should have given to
such an affidavit.
\textsuperscript{19} Id. at 9.
\textsuperscript{20} Id. at 10 n. 7.
terly improbable that the decedent intended the trustee to have the actual discretion to decide whether charitable legacies would be paid without having imposed at least a similar precaution. The Court therefore held that the probability of the trustee’s not making such payment was remote, and that the deduction was improperly disallowed.

The Court’s reasoning stems from two lines of Massachusetts authority. The first establishes that where a decedent has an interrelated will and inter vivos trust, both will be read together in order to ascertain the intention of the decedent with respect to either instrument.

The second is the growing line of Massachusetts cases interpreting will and trust powers so as to carry out intentions expressed in the instrument as a whole to qualify for favorable tax results apparently contemplated by the grantor or testator. Specifically, the court cited Worcester County National Bank v. King and Woodberry v. Bunker. Worcester County read into an apparently unlimited power to allocate receipts or disbursements between principal and income a standard requiring only that the fiduciary only use informed judgment and good faith in ascertaining proper allocations. Woodberry interpreted an apparently unlimited power to invade principal for “comfortable support, medical or nursing care, or other purposes which seem wise to my trustee,” as imposing a requirement that the trustees only invade principal to preserve the standard of living to which the beneficiaries were accustomed prior to the settlor’s death. Both decisions saved an otherwise disallowable charitable remainder deduction, and the Court similarly saved the deduction in State Street using the same doctrine.

The trust law logic of State Street cannot rightly be limited either to charitable dispositions or to tax motivations. A testator’s expressed intention to carry out objectives or priorities either limits fiduciary powers under the will and related trust or not. Non-charitable specific legatees, for example, by law, and therefore by implied testator intent, are to have priority at least over residuary legatees. Unless State Street is to be limited to its facts, its logic might apply as well to discretions in the trust to satisfy such legacies, especially where the trust passes to substantially the same beneficiaries as the residuary legatees, and especially if the legacies are accompanied by expressions of fondness or appreciation for services.
should the absence of simultaneous execution really change the result. If a will is executed some time after the trust, even perhaps naming different charities or other specific legatees, there is no logical reason why such a will ought not also impliedly limit the discretions of the trustee where the will and trust still fit together as part of a unified plan.

The logic of State Street arguably could apply as well to a trustee’s discretion to pay assets to the estate for payment of debts or administration expenses where the decedent directs in the will that such items be paid. Such an interpretation might have relevance for estate tax deductibility, or where creditors for one reason or another may not be able to proceed directly against the trust. Finally, trustees must satisfy debts or expenses where the will directs payment, even though the related trust makes such payments discretionary, some property otherwise free from estate or inheritance tax might be exposed to such taxes as a result.

While the foregoing might carry State Street beyond its intended effect, especially given the peculiar facts of the case, cases such as State Street carry a warning. Draftsmen must plainly specify the extent to which trustees have the discretion to or are required to pay over property to the estate where any provisions in that regard are to be inserted in a trust. At a minimum, if the payment of legacies or debts and expenses are directed under the will, the priority of the decedent must be ascertained at the drafting stage, and the trust must make it clear whether or not the trustee is obligated to make payments to the estate where the probate assets are insufficient.

§ 7.4 Standing to Challenge Will, Appointment of Executor and Exemption from Sureties on Bond — Suitability of Executor. The Massachusetts Appeals Court heard two cases during the Survey year involving appeals from proceedings for petitions for probate of wills and appointment of executors. In Gay v. Richmond, the court held that a creditor of the testator has standing to challenge the appointment of an executor on the basis of competency and suitability, and that both a creditor and a legatee have a "Certain administrative expenses may be disallowed if, in effect, they exceed the probate estate. I.R.C. § 2053 (c) (2).

[1] See State St. Bank & Trust Co. v. Reiser, 7 Mass. App. Ct. 633, 389 N.E.2d 768 (1979), which allowed decedent’s creditors to reach revocable trust assets after the decedent’s death but only where the decedent had control over the assets during lifetime. Id. at 638-39, 389 N.E.2d at 772. Certain assets flowing to such a trust, such as life insurance proceeds, are likely immune to the reach of Reiser. See Stewart and Babson, Trusts and Estates, 1979 ANN. SURVEY MASS. L. § 3.1 at 40-47. Combining Reiser with State Street, creditors might argue that the trustee must pay assets over to the estate to satisfy their claims because of the direction by the decedent to pay debts, which direction takes priority over other dispositions. Cf. First Nat’l Bank of Mount Dora v. Shawmut Bank of Boston, N.A., 1979 Mass. Adv. Sh. 1329, 389 N.E.2d 1002 (extrinsic evidence admissible to resolve conflict between will and trust instrument regarding liability for payment of estate and inheritance taxes in action by executors of estate against trustees).
right to be heard on the question of whether the executor may be exempt from sureties on his bond. In *Lindsey v. Ogden*, the court analyzed the factors necessary under Massachusetts law to determine whether the executor named in the will was suitable to serve as such. These two cases provide some guidelines to the practitioner regarding the procedural and substantive issues that may arise in challenges to the suitability of a named executor.

In *Gay*, the testatrix had named her sister-in-law, Pauline Richmond, executrix and had given her a $5,000 legacy and the residue of her estate. Mrs. Richmond, a sister-in-law of the testatrix by her first marriage, petitioned the probate court for the probate of the will. Appearances were filed by several individuals. Motions to strike these appearances for lack of standing were allowed. The court denied a motion to stay the proceedings pending appeal and admitted the will to the probate. Richmond was appointed executrix, without sureties on her bond. Appeals were taken from the allowance of the motions to strike.

Before proceeding to the issue of standing of the creditors and legatees, the court disposed of the appeal of Mrs. Ruth Gay, the sister-in-law of the testatrix by a second marriage. Mrs. Gay based her claim of standing on the theory that she was the true sister-in-law of the testatrix and, therefore, had been named in the will. The court dealt with this challenge in a perfunctory fashion, finding no ambiguity on the face of the will, and agreeing with the judge below that Mrs. Gay was "really reaching" in making her claim.

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2 Id. at 443-45, 400 N.E.2d at 1327-28.
4 Id. at 1246-56, 406 N.E.2d at 705-11.
6 Id. at 441-42, 400 N.E.2d at 1326.
7 Id. at 441, 400 N.E.2d at 1326.
8 Id. at 441, 400 N.E.2d at 1326.
9 Id. at 441-2, 400 N.E.2d at 1326.
10 Id. at 442, 400 N.E.2d at 1326.
11 Id.
12 Id., 400 N.E.2d at 1326-27.
13 Id., 400 N.E.2d at 1327. Ordinarily a legatee under a will has no standing to challenge the probate of the will as the executor represents the will and legatees. Old Colony Trust Co. v. Bailey, 202 Mass. 283, 290, 88 N.E. 898, 900 (1909). Where it appears that the adverse interests of the legatees warrants a hearing of the different contentions that could be made under the will, the court in its discretion may permit the legatee to be heard. Id. Mrs. Gay’s daughter, who was a legatee, also based a claim for standing on adverse interests of the legatees. 1980 Mass. App. Ct. Adv. Sh. at 443 n.2, 400 N.E.2d at 1327 n.2. The daughter’s claim depended upon the success of her mother’s argued construction of the will. Id. The court rejected, Mrs. Gay’s contentions; therefore, her daughter’s argument failed. Id.
14 Id. at 442, 400 N.E.2d at 1326-27.
15 Id. at 443, 400 N.E.2d at 1327. The absence of any ambiguity on the face of the will precluded the introduction of extrinsic evidence to determine its meaning. See Mahoney v. Grainger, 283 Mass. 189, 192, 186 N.E. 86, 87 (1930).
The other claims had more merit, however, as they were raised by creditors of the testatrix. Because it was of no concern to the creditors whether the decedent died testate or intestate, the court observed they had no standing to challenge the allowance of the will. As creditors, however, they did have standing to challenge the appointment of the executor and could raise questions concerning the executor’s competence and suitability. In this case, however, the creditors’ claims of potential conflicts of interest on the part of Mrs. Richmond were not sufficient, if proved, to reject the appointment at the named executrix.

On the question whether the executrix could be exempt from giving a surety on her bond, the court concluded that both the creditors and the legatee, so long as the legacy had not yet been paid, had the right to be heard. Because they had not been given this opportunity, the court vacated the motions to strike and allowed motions to be made in the probate court on the limited issue of exemption from sureties. The probate of the will and the appointment of the executrix still stood.

Gay apparently is the first reported case where the court has recognized specifically the standing of a creditor to challenge the competence and suitability of the executor. Furthermore, although there is specific statutory authority which grants a creditor of the testator an opportunity to “show cause” why an executor ought not to be exempt from sureties on the bond, this decision seems also to be the first to give the same right to a legatee whose legacy has not yet been paid. The Gay opinion therefore expands the class of those who have standing to challenge the appointment of an executor.

The court dealt with the substantive issue of the suitability of an executor in Lindsey v. Ogden. In that case, the son of the testatrix filed objections
to the allowance of the will and to the appointment of the testatrix' attorney, who had been named in the will as executor. By the agreement of all interested parties, the attorney was appointed special administrator. The son then petitioned the court for his removal. The court denied the petition, admitted the will to probate and appointed the attorney executor of the will. The son appealed both the appointment of the attorney as executor, and his continuation as special administrator, to the Appeals Court.

Under section 4 of chapter 192 of the General Laws, the probate court will appoint the individual named in the will as executor upon four conditions. The individual must accept the office and post bond within thirty days of the allowance of the will. The individual must be legally competent and finally, the individual must be "suitable." The requirement of "suitability" has generated a number of cases. The 'suitable' executor has been defined as follows:

a fitting person having regard to the special conditions of each estate and those interested in it as creditors, legatees, and next of kin. Suitableness is capacity founded on the innate and acquired qualities of the particular person in his relation to the situation of the estate to be administered, and to those directly and indirectly to be affected by the settlement of the estate. Attention may be given to personal characteristics and to all the other causes, not easily susceptible of enumeration, rationally affecting a judicious selection.

As the quotation indicates, the criterion of suitability incorporates a wide range of factors.

240 Mass. 514, 138 N.E. 6 (1922). He was also a beneficiary of the trust to which the residue of the estate passed. See 1980 Mass. App. Ct. Adv. Sh. at 1247 n.4, 406 N.E.2d at 706. As such, he might also have had standing to object to the allowance of the will. Cf. Azarian v. The First Nat. Bank of Boston, 1981 Mass. Adv. Sh. 1066, 1068 (beneficiaries of trust to which residue of estate passed entitled to object to allowance of executor's accounts under certain circumstances). Lindsey does not disclose whether the son was a direct legatee under the will. If so, under certain circumstances, he might have been able to object to the allowance of the will. See Conley v. Fenelon, 266 Mass. 340, 344, 165 N.E. 382, 384 (1929).

28 Id. at 1244, 406 N.E.2d at 704.
29 Id. at 1244, 406 N.E.2d at 704.
30 Id. at 1244, 406 N.E.2d at 704.
31 G.L. c. 192, § 4.
33 G.L. c. 192, § 4.
34 See cases cited in 1 G. NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS § 46 (4th ed. 1958).
Even though similar qualities determine suitability whether the fiduciary seeking appointment is an executor or administrator, the probate court has less discretion when considering the suitability of a named executor. As the choice of the testator, one commentator has noted, the named executor has "a better prima facie standing than one upon whom the law accidentally casts the right to be appointed administrator." The Supreme Judicial Court explains this distinction as a result of the difference between applying the suitability standard to one individual, named in the will, and applying it on a comparative basis to a number of individuals who could serve as administrators.

In Lindsey, the court underscored the importance of this role of discretion in the suitability issue. The court pointed out that because a testator is entitled to have his estate administered by the person whom he selected, there must be a "pretty strong objection" to refuse the appointment. The court reviewed several challenges to the appointment of the named executor and denied them all. In Lindsey, the son first had been represented by the attorney-executor who upon undertaking the representation of the decedent, terminated the attorney-client relationship with the son. Several of the son's objections appeared to be based on this earlier relationship.

The first point was based on the allegation that the estate plan prepared by the attorney-executor resulted in unanticipated adverse tax consequences to the son and in other ways did not serve the son's interests. The court found that the estate plan was in keeping with the decedent's directions, that it had her informed approval, and that it was "farfetched" to suggest that the attorney was unsuitable because he recommended amending the decedent's estate plan. The use of information gained from the attorney's earlier representation of the son served as the basis of two other contentions. In one, the son claimed the attorney had undermined the son's relationship with the decedent. The court concluded that this was not the...
case. 47 In the other charge, the son claimed that the attorney had "switched sides" and used confidential information about the son in preparation of the decedent's estate plan. 48 Observing that it was not unusual to have the same attorney represent the beneficiaries and the testatrix, the court held that there was no evidence that the attorney-client relationship had been breached. 49 The court specifically found that because of the probate court's authority to supervise fiduciary activity, there was no merit to the claim that a conflict would occur in having one attorney serve in the capacities of special administrator, executor and trustee. 50

An allegation that the attorney was engaged in the unauthorized practice of law was dismissed as frivolous. 51 The court gave serious attention, however, to the claim of a "deficiency in character and credibility" based on the attorney's handling of a particular matter for a corporation with operations in Chile. 52 The attorney had appeared before the Securities and Exchange Commission, which was investigating the corporation for possible illegal payments. 53 The probate court had determined that the attorney had never been cited for improper conduct by any agency of the United States, of the Chilean government or by any bar association, and that his role failed to demonstrate "present unsuitability to serve as executor." 54 The Appeals Court upheld the finding. 55

Finally, the son challenged the attorney's handling of certain Swiss bank accounts on the grounds that the son should have been made aware of their existence at an earlier time so that he could have instituted litigation to protect the decedent's estate and to determine ownership of the accounts. 56 The court dismissed this claim, upholding the probate court's determination that no purposeful concealment had occurred and that a proper investigation into ownership had occurred. 57 The Appeals Court also stated that the

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48 Id.
49 Id. at 1249, 406 N.E.2d at 707. Conflicts of interest between the executor in his fiduciary capacity and in his individual capacity may be sufficient reason not to appoint a named executor, Cogswell v. Hall, 183 Mass. 575, 67 N.E. 638 (1903), or to remove the individual as executor, Quincy Trust Co. v. Taylor, 317 Mass. 195, 197, 57 N.E.2d 573 (1944); Putney v. Fletcher, 148 Mass. 247-48, 19 N.E. 370 (1889).
50 1980 Mass. App. Ct. Adv. Sh. at 1249-50, 406 N.E.2d at 707-08. Both the special administrator and the executor have an affirmative duty to account to the probate court. G.L. c. 206, § 1. No such obligation is imposed upon the trustee of an inter vivos trust, but the probate court may hear matters involving such trusts under its equity jurisdiction. G.L. c. 215, § 6.
52 Id. at 1251-52, 406 N.E.2d at 708-09.
53 Id. at 1251, 406 N.E.2d at 708.
54 Id. at 1252, 406 N.E.2d at 709.
55 Id.
56 Id. at 1252-53, 406 N.E.2d at 709.
57 Id. at 1254, 406 N.E.2d at 709-10. The issue of concealment "was also implicated" in the claim against the attorney for his refusal to turn over his notations and other "work product" involved in analyzing the Swiss bank accounts. Id. at 1254-56, 406 N.E.2d at 710-11.
son could either institute separate proceedings on this issue or it could challenge the attorney's account as special administrator.\textsuperscript{58}

The lengthy discussion in \textit{Lindsey} concerning various challenges to the suitability of the attorney to serve as executor underscores the difficulty a claimant has in sustaining a challenge to the appointment of an executor who has been named in the will. The probate court's discretion in the matter is relatively narrow. \textit{Lindsey} suggests that only relatively egregious conduct may be held to overrule a testator's choice.

\textbf{§ 7.5 Beneficiaries' Power over Trust Principal — Limited Interests — Classification as General Powers of Appointment.} During the \textit{Survey} year, Massachusetts law governing the scope of powers which a beneficiary has over trust property survived two efforts by the Internal Revenue Service to classify such powers as general powers of appointment for estate tax purposes. In \textit{Garfield v. United States,}\textsuperscript{1} The United States District Court for the District of Massachusetts held that a decedent who was beneficiary and co-trustee of a trust did not, under Massachusetts law, have the right to participate in distribution decisions beneficially affecting himself.\textsuperscript{2} He, therefore, did not possess a general power of appointment over the trust property for federal estate tax purposes.\textsuperscript{3} In \textit{Brantingham v. United States},\textsuperscript{4} the United States Court of Appeals for the Seventh Circuit considered a testamentary trust created by a Massachusetts decedent, that gave a beneficiary the power to invade corpus as she might deem necessary for her "maintenance, comfort and happiness."\textsuperscript{5} The court held that the power was limited, under Massachusetts law, by a standard sufficiently ascertainable to preclude the power from being characterized in the beneficiary's estate as a general power of appointment.\textsuperscript{6}

Under section 2041 of the Internal Revenue Code of 1954,\textsuperscript{7} the federal gross estate of a decedent includes the value of all property over which the decedent has at the time of his death a general power of appointment.\textsuperscript{8} The

\textsuperscript{58} \textit{Id.} at 1254, 406 N.E.2d at 710. Presumably the son could also challenge the first executor's account on the theory that the executor should have gone against the special administrator to collect all the assets. \textit{See} Brackett v. Fuller, 279 Mass. 62, 180 N.E. 664 (1932); 3 G. \textit{Newhall, Settlement of Estates and Fiduciary Law in Massachusetts,} § 470 (4th ed. 1958).

\textsuperscript{1} \textit{Id.} at 85,893.

\textsuperscript{2} \textit{Id.}

\textsuperscript{3} \textit{Id.}

\textsuperscript{4} \textit{631 F.2d 542 (7th Cir. 1980)}.

\textsuperscript{5} \textit{Id.}

\textsuperscript{6} \textit{Id.}

\textsuperscript{7} I.R.C. § 2041 (1976).

\textsuperscript{8} The power must be created after October 21, 1942. I.R.C. § 2041(a)(2). Property is also includible where such powers have been released in certain ways. \textit{Id.} Powers created on or before October 21, 1942 generally must be exercised before the property is includible. I.R.C. § 2041(a)(1).
Code defines a general power of appointment as a power which is exer­
cisable in favor of the decedent, his estate, his creditors or the creditors of
his estate. One exception to this definition is a power to consume, invade,
or appropriate property for the benefit of the decedent which is limited by
an "ascertainable standard relating to the health, education, support or
maintenance of the decedent." 10

*Garfield* and *Brantingham* address separately two basic tests for a general
power of appointment. *Garfield* considers whether the power of appoint­
ment was actually held by the decedent; 11 *Brantingham* considers whether
the power was limited by an ascertainable standard relating to the health,
education, support or maintenance of the decedent. 12 These issues depend
on state law, not on federal law. 13 In both cases, the courts relied principally
on the 1977 case of *Dana v. Gring*, 14 an important Supreme Judicial Court
decision which addressed both issues.

In *Dana v. Gring*, the Supreme Judicial Court determined whether cer­
tain property should be included in a trust beneficiary's gross estate for
federal tax purposes. 15 One of the trustees, the decedent’s daughter, was
also the principal beneficiary of the trust. 16 The terms of the trust instru­
ment regarding powers to distribute principal included the following provi­
sion:

> I further authorize my Trustees at any time that my said daughter
> may request, or without such request when the other Trustees may
deem it advisable, 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 desirable for the purpose of contributing to the reasonable welfare
> or happiness of my said daughter or of her immediate family. 17

Estate tax liability depended in part upon whether this language permit­
ted the beneficiary to control the distribution of trust principal to herself. 18
The Court relied on the general rule that absent an expressed contrary intent
in the instrument, a trustee—beneficiary normally may not participate in
decisions regarding distributions of principal to herself. 19 Consistency with

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9 I.R.C. § 2041(a)(1).
10 I.R.C. § 2041(b)(1)(A).
11 80-2 U.S. Tax Cas., at 85,893.
12 631 F.2d at 547.
13 Helvering v. Stuart, 317 U.S. 154, 162 (1942); see Commissioner v. Estate of Bosch, 387
U.S. 456, 462-66 (1967). The domicile of the decedent at death would be the appropriate state's
law to apply, in the absence of a designation by the testator of some other state. RESTATEMENT
MASS. LAW, § 10.8 at 236-38.
16 Id. at 112, 371 N.E.2d at 757.
17 Id. at 111 n.2, 371 N.E.2d at 756 n.2.
18 Id. at 115-16, 371 N.E.2d at 759.
19 Id. at 118-19, 371 N.E.2d at 761 (citing G. BOGER TRUSTS § 129 (2d ed. 1965)).
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this principle favored interpreting the references to "other Trustees" and "said Trustees" in the distribution power as excluding the beneficiary from such decisions. The Court concluded, as a factual matter, that the distribution power expressed no contrary intent, and therefore held that the beneficiary could not participate in decisions regarding the distribution of principal to herself.

The second major factor determining tax liability in Dana v. Gring was whether the "reasonable welfare or happiness" language in the trust instrument created a limited standard relating to health, education, support or maintenance, or an effectively unlimited standard dependent on subjective desires. The Court held that the word "happiness" had to be viewed in the context of the entire trust instrument, which revealed a clear concern for preserving the trust fund for the settlor's issue. The indications the Court relied upon were the limitation of the class of eligible appointees to issue, the naming of issue as takers in default of appointment, and a spendthrift clause. With the power of distribution so viewed, the trustees could not distribute trust principal to the life beneficiary by reason of her subjective desires alone. Rather, the trustees' discretion was limited to the amounts necessary to maintain the life beneficiary according to her standard of living before she became a beneficiary of the trust. The Court concluded, therefore, that the power to invade principal was restricted by an objective and ascertainable standard.

Garfield and Brantingham dealt separately with both aspects of Dana v. Gring. In Garfield, a settlor created a trust for the benefit of the decedent and his issue during the decedent's lifetime, with the decedent and an independent third party as trustees. The trust in pertinent part stated:

During the lifetime of the decedent, the trustees shall make such payments from the income or principal of the trust fund as they may in their discretion deem advisable to the said decedent as well as to each of his issue as may from time to time be living. At all times one of the trustees shall be an independent person having no interest in this trust fund.

The Internal Revenue Service included the trust property in decedent's gross estate as general power of appointment property and assessed an additional

20 374 Mass. at 119, 371 N.E.2d at 761.
21 Id.
22 Id. at 116, 371 N.E.2d at 759.
23 Id. at 117, 371 N.E.2d at 760.
24 Id.
25 Id. at 117-18, 371 N.E.2d at 760.
26 Id. at 118, 371 N.E.2d at 761 (citing Woodberry v. Bunker, 359 Mass. 239, 268 N.E.2d 841 (1971)).
27 374 Mass. at 120, 371 N.E.2d at 761.
28 80-2 U.S. Tax Cas. at 85,891-92.
29 Id. at 85,892.
The decedent's executor paid the tax, filed a refund claim which was denied, and then filed suit for a refund in the district court. The key issue was whether the decedent, as trustee-beneficiary, had the power at his death to pay principal to himself. If he did, under prevailing state law, he would have a general power of appointment. Consequently, under federal law, the power would properly be included in the gross estate for federal tax purposes.

The Court cited Dana v. Gring as controlling whether the trustee-beneficiary could participate in decisions concerning distribution of principal to himself. The Court interpreted Dana v. Gring as requiring a clear provision in the trust instrument permitting the participation of the beneficiary-trustee in decisions affecting distributions to himself. Absent such a clear provision, such participation was prohibited. Although the instrument at issue in Garfield directed the "trustees" to make payments to the decedent, the instrument also provided that one trustee must at all times be a disinterested person. The Court concluded that the trust's requirement that a disinterested person always serve as trustee was far more significant than the use of the generic plural "trustees." Furthermore, the Court observed, the disinterested trustee requirement connoted an intention to secure favorable tax consequences which would be obviated if the beneficiary could participate. The Court, therefore, held that under con-
trolling Massachusetts law, the decedent was not permitted to participate in
distribution decisions involving himself and could not be deemed to have a
general power of appointment.40

Although Garfield does not appear to add any particular insight into
Massachusetts law, cases such as Garfield could have practical conse­
quences beyond favorable tax results. There may be reasons why a settlor
might want certain persons to participate in decisions or might want more
than one person to participate in certain decisions. Tax cases such as Gar­
field will frustrate these desires if draftsmen do not specify in instru­
ments whether an “interested” trustee is precluded from participating in certain
kinds of decisions. Such decisions are not limited to distribution decisions,
but would include boilerplate powers such as lending, allocation of receipts
between income and principal, using income or principal for the purchase
of life insurance on the life of the beneficiary-trustee, or election of benefits
under retirement or other benefit plans. Thus, it is incumbent upon the
draftsman to explain those limitations to the settlor and to explain the
importance of such limitations on the beneficiary’s participation. What could
be a useful tax result in one trust could be entirely adverse to a grantor’s
desires in another.

Brantingham v. United States41 involves the more interesting aspect of
Dana v. Gring: whether a decedent who admittedly holds a power to invade
principal is nonetheless limited by an ascertainable standard relating to the
health, education, support or maintenance of the decedent. Brantingham
involved not a trust, but a life estate in property, although the same tax
standards apply.42 The decedent’s husband, who died a resident of
Massachusetts, had left his property as follows:

I hereby give, devise, and bequeath unto my children, share and share
alike, per stirpes, all of my property and estate of whatsoever kind or
nature, now or hereafter acquired, subject, however, to the life use
thereof, which I hereby give unto my wife [the decedent] and as such
life user, my said wife shall have and is hereby given the uncontrolled
right, power and authority to use and devote such of the corpus
thereof from time to time as in her judgment is necessary for her
maintenance, comfort and happiness.43

The Internal Revenue Service determined that the value of the property
remaining at the decedent’s death should be included in her estate for federal
estate tax purposes because her power to invade corpus was a general power

found in power to invade principal for beneficiary’s reasonable welfare or happiness)). See also
cases cited in Stewart and Babson, Trusts and Estates 1979 ANN. SURV. MASS. LAW § 3.3, at
51-56.

40 80-2 U.S. Tax Cas. at 85,893.
41 631 F.2d 542 (7th Cir. 1980).
42 I.R.C. § 2041(b)(1)(A).
43 631 F.2d at 543.
of appointment.44 The government’s position was upheld by the United States District Court for the Northern District of Illinois, and the executor appealed to the Seventh Circuit.45

The taxpayer’s arguments in Brantingham were based on the government’s previous actions regarding the property. Upon the death of the decedent’s husband, the government had disallowed the marital deduction for the same power of appointment on the grounds that the surviving spouse did not have an unlimited power of appointment.46 According to the taxpayer, the Internal Revenue Code sections governing the marital deduction and general powers of appointment must be read interdependently.47 Alternatively, the taxpayer argued, the government was estopped from asserting the tax in second estate given the government’s position in the first estate.48 The Court summarily rejected both arguments.49

Although the taxpayer did not argue on appeal that the decedent’s power was limited by an ascertainable standard,50 the Court noted a footnote in the government’s brief which mentioned the exception, analyzed that issue, and found in favor of the taxpayer on that basis.51

The government’s footnote essentially argued that the inclusion of the word “happiness” in the power went beyond the statutory limitation of health, education, support or maintenance, and that the word connotes a highly subjective standard.52 The Court disagreed, looking to old

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44 Id. at 544.
45 Id.
46 Id. at 543.
47 Id.
48 Id. at 544-45.
49 Id. at 545. The interdependency argument was rejected primarily because there was no evidence of legislative intent to interpret the two sections hand in hand. Id. The court rejected the estoppel argument on the basis of lack of evidence of reliance on the government’s previous action. Id.

The taxpayer’s position is difficult to support. I.R.C. § 2056(b)(5) provides a specific exception to the rule denying the marital deduction in the case of certain terminable interests if the surviving spouse is absolutely entitled to all of the income and has the power during lifetime or at death to appoint the entire interest to the spouse or the spouse’s estate, which power is “exercisable by such spouse alone and in all events.” I.R.C. § 2056(b)(5) (1976). The purpose of § 2056(b)(5) is to allow qualification for the marital deduction of a practical equivalent of outright ownership where non-tax practical interests might argue for managed or non-probate dispositions. See 4 A. CASNER, ESTATE PLANNING 1521 (4th ed. 1980). Any limits on the ability to exercise the power will cause loss of the deduction. Treas. Reg. § 20.2056(b)(5)(g). I.R.C. § 2041 includes in the decedent’s estate any property over which the decedent has any power to benefit himself, which power is held alone or with others not having an adverse interest, unless the power is limited by the specified kind of ascertainable standard. I.R.C. § 2041; see text and notes at notes 7-10 supra. While the taxpayer’s argument has some equitable appeal, the statutory language simply does not support a finding that any power too limited to meet an “in all events” test under section 2056 is by definition limited enough to be a “health, education, support or maintenance” standard for § 2041 purposes.

50 631 F.2d at 545.
51 Id. & n.3.
52 See 631 F.2d at 547. The government’s position had specific support in the tax regulations, which provide that “[a] power to use property for the comfort, welfare, or happiness of
Massachusetts case law and to the more recent decisions of *Woodberry v. Bunker* and *Dana v Gring*. This review revealed to the Court "that any interest to which the decedent places limitations on the spouse's power of appointment is considered by the [Massachusetts] courts as a limited interest."

Relying primarily on *Dana v. Gring*, the court inspected the decedent's will in *Brantingham* and found an intention to preserve the principal of the estate for the decedent's children. Indeed, the will made a gift to the children, providing for only a life estate in the widow. The context in which the power existed was, in the Court's view, indistinguishable from that in *Dana v. Gring*, and it accordingly held that there was "no doubt" that the ascertainable standard exception to the general power of appointment rule would apply to such language. As a result, the Court held that the corpus of the life estate was erroneously included in the life beneficiary's gross estate.

*Brantingham* may represent the government's last attempt to distinguish, for federal estate tax purposes, the "happiness" standard under Massachusetts law from the "ascertainable" standard under section 2041. In *Brantingham*, the federal government could not prevail on this argument in a non-Massachusetts federal court, with a regulation directly on point, the holder of the power is not limited by the requisite standard." Treas. Reg. § 20.2041-1(c)(2). See *Merchants Nat'l Bank of Boston v. Commissioner*, 320 U.S. 256 (1943) which held that a happiness standard, coupled with language requesting liberal application of the trustee's discretion in favor of the life beneficiary, was too subjective to qualify as an ascertainable standard. *Id.* at 263.

Examples of older cases holding that broadly drafted clauses created only limited interests under Massachusetts law include: *Nunes v. Rogers*, 307 Mass. 438, 439, 30 N.E.2d 259, 260 (1940) ("with power to sell, mortgage, or otherwise dispose of so much of ... [the] estate as in her judgment shall be necessary for her comfortable support and maintenance"); *Homans v. Foster*, 232 Mass. 4, 5-6, 121 N.E. 417, 418 (1919) ("with the full power to dispose of the whole or any part of said property by deed or otherwise if he may deem it conducive to his comfort so to do"). The Court found that the precedent of *Dana v. Dana*, 185 Mass. 156, 157, 70 N.E. 49, 50 (1904) ("power ... to sell and dispose of any or all of [the principal] at her pleasure and discretion ... for her own comfort and happiness without accountability to any person whomsoever" held a general power of appointment) had "not been adhered to" by the Massachusetts cases. 631 F.2d at 546-47. The Court also discussed *Pittsfield Nat'l Bank v. United States*, 181 F. Supp. 851 (D. Mass. 1960), where a decedent had the right to "all or such part of the principal of same as he may from time to time request, he to be the sole judge of his needs." 181 F. Supp. at 852. The district court in that case had found an ascertainable standard based on the word "needs." *See Id.* at 854.

53 Examples of older cases holding that broadly drafted clauses created only limited interests under Massachusetts law include: *Nunes v. Rogers*, 307 Mass. 438, 439, 30 N.E.2d 259, 260 (1940) ("with power to sell, mortgage, or otherwise dispose of so much of ... [the] estate as in her judgment shall be necessary for her comfortable support and maintenance"); *Homans v. Foster*, 232 Mass. 4, 5-6, 121 N.E. 417, 418 (1919) ("with the full power to dispose of the whole or any part of said property by deed or otherwise if he may deem it conducive to his comfort so to do"). The Court found that the precedent of *Dana v. Dana*, 185 Mass. 156, 157, 70 N.E. 49, 50 (1904) ("power ... to sell and dispose of any or all of [the principal] at her pleasure and discretion ... for her own comfort and happiness without accountability to any person whomsoever" held a general power of appointment) had "not been adhered to" by the Massachusetts cases. 631 F.2d at 546-47. The Court also discussed *Pittsfield Nat'l Bank v. United States*, 181 F. Supp. 851 (D. Mass. 1960), where a decedent had the right to "all or such part of the principal of same as he may from time to time request, he to be the sole judge of his needs." 181 F. Supp. at 852. The district court in that case had found an ascertainable standard based on the word "needs." *See Id.* at 854.

56 631 F.2d at 546.
58 631 F.2d at 547.
59 *Id.*
60 *Id.*
61 *Id.*
62 I.R.C. § 2041(b)(1)(A). See text and notes at notes 7-10, supra.
against a taxpayer who did not even actively contest the issue on appeal.  

The Brantingham court did not address the validity of regulation section 20.2041-1(c)(2) which specifically disallows the "happiness" standard.  

Although cases such as Morgan v. Commissioner and Helvering v. Stuart hold that in tax cases state law governs as to what rights exist and federal law governs the taxability of such rights as so defined, none have invalidated otherwise properly adopted regulations. It might be argued that the regulation, as applied to Massachusetts estates and trusts, is internally inconsistent, and that therefore the benefit of the doubt should be given the taxpayer. Regulation section 20.2041-1(c)(2) states that "[a] power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard." That regulation goes on, however, to give as an example of a power which is limited by the requisite standard a power of exercisable for the holder's "support in his accustomed manner of living." Since under cases such as Dana v. Gring, standards such as "comfort, welfare or happiness" seem to allow distributions only for the preservation of an accustomed manner of living, the first portion of the regulation might have to yield to the second. Absent such logic, Brantingham could be viewed as an expansion of the Morgan doctrine that allows state interpretations to overrule properly enacted regulations.

The principles of Brantingham and Dana v. Gring cannot be limited to estate tax cases. Their logic applies equally to the income tax consequences to the grantor of a trust where he has reserved the power to distribute corpus to an income beneficiary or where a non-independent trustee has powers to distribute income among beneficiaries. Both powers must be limited to a similar ascertainable standard to assure income taxation to the beneficiary, not to the grantor or trustee.

Finally, Brantingham and its line of cases carry serious fiduciary limitations on trustees' powers over distributions. Given such interpretations, standards such as "comfort, maintenance, support and happiness" cannot be included lightly in a trust instrument. Under this developing law, such

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63 See text and note at note 50, supra.  
64 Treas. Reg. § 20.2041-1(c)(2). See note 52 supra.  
65 309 U.S. 78 (1939).  
67 See text and note at note 13, supra.  
68 Treas. Reg. § 20.2041-1(c)(2).  
69 Id.  
70 See text and notes at notes 23-26 supra.  
71 See Treas. Reg. § 1.674(b)-1(b)(5)(iii) which taxes income to the grantor if he has distribution powers under a "happiness" standard.  
72 See Treas. Reg. § 1.674(d)-1, referring to Treas. Reg. § 1.674(b)-1 for definition of an ascertainable standard.
§ 7.6 TRUSTS AND ESTATES

standards may well limit the trustees' ability to make distributions except to maintain the previously existing standards of living, at least where the rest of the trust instrument indicates a decedent's intent also to preserve the fund for the benefit of an issue. Trustees also confront the determination of whether sufficient preservation language exists. Most trusts have the kinds of items courts have seized upon to find such a preservation intent, such as limited powers of appointment, identification of takers in default and spendthrift clauses. Where the tax result is not necessary or is subsidiary to dispositive desires, the draftsman must assure for trust law purposes that the appropriate liberality exists so that appreciating assets may be used to increase a beneficiary's standard of living. Most grantors or testators probably would be surprised to learn that this would not be the case. If the tax purposes predominate, the emphasis must be on sufficient language indicating that a primary goal is preservation of the estate for the remaindermen. Settlors in the tax-dominated situations must also be made aware of the fiduciary limitations which the achievement of favorable tax results carry with them.

§ 7.6 Illegitimate Children — Rights to Inherit from Father — "Child" under Social Security Act — Legislation. Under the common law, an illegitimate was nullius filius with no rights of inheritance whatsoever. Under Massachusetts laws, however, an illegitimate child historically had a statutory right of inheritance from his mother and maternal ancestors, although common law prohibited inheritance from legitimate siblings or collaterals of the mother. Massachusetts began to grant rights of inheritance from the father to illegitimates in 1832 and gradually expanded those rights until 1943, when section 7 of chapter 190 was last amended. After the 1943 amendment, the illegitimate's right of inheritance from his

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31 See text and note at note 24 supra.
2 G.L. c. 190, § 5 (R.L. 133, § 3).
4 By the Acts of 1832, c. 147, inheritance was permitted between (1) an illegitimate whose parents intermarried and whose father acknowledged the child as his; and (2) the legitimate children of the same parents.
3 The statute was amended six times to enlarge rights of illegitimates whose parents intermarried and whose fathers acknowledged them as their children. R.S. 1836, c. 61, § 4; Acts of 1853, c. 253; G.S. 1860, c. 91, § 4; F.S. 1882, c. 125, § 5; R.L. 1902, c. 133, § 5; Acts of 1925, c. 281, § 3. For example, in 1836, an illegitimate was first granted the possibility of inheriting from his father. R.S. 1836, c. 61, § 4. Then, by the Acts of 1853, an illegitimate was considered, after intermarriage and acknowledgment, legitimate for all purposes. Acts of 1853, c. 253. See Monson v. Palmer, 90 Mass. (8 Allen) 551, 553-55 (1864).
2 Acts of 1943, c. 72, § 1, added to chapter 190 the provision for acknowledgment of an illegitimate through a paternity proceeding under G.L. c. 273. Section 7 was substantially revised later in the Survey year. See discussion at note 51 infra.
father and his paternal ancestors or collaterals was restricted to situations when the father had married the illegitimate's mother and either had acknowledged the child or had been adjudicated the child's father in a paternity suit. The statutes granting inheritance rights traditionally have been construed strictly, and the common law remains in force except as changed by statute. Several United States Supreme Court decisions in the past decade have mandated increased scrutiny, however, of statutes limiting the rights of illegitimates. During the Survey year, both the judiciary, relying in part upon these Supreme Court cases, and the legislature modified the archaic restrictions on the rights of illegitimate children by expanding their inheritance rights.

The first development was in Lowell v. Kowalski, in which an illegitimate child challenged the intermarriage requirement of section 7 of chapter 190 of the General Laws on the ground that the requirement unconstitutionally impaired the inheritance rights of a child whose father had acknowledged her but had not married her mother. The Supreme Judicial Court upheld the challenge and struck down the intermarriage requirement as a violation of article I of the Declaration of Rights of the Massachusetts Constitution. The Court upheld the other two alternative conditions for inheritance, that is, that the father acknowledge his child or that there be an adjudication of paternity. Within two months of the decision in Lowell, the legislature amended section 7 to eliminate intermarriage as a precondition of inheritance and to provide certain requirements for a child to claim

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7 G.L. c. 190, § 7 (Acts of 1943, c. 72, § 1).
9 Sanford v. Marsh, 180 Mass. 210, 211, 62 N.E. 268, 268 (1902). See Plymouth v. Hey, 285 Mass. 357, 189 N.E. 100 (1934) (grandparents of an illegitimate are not "kindred" liable for his support); King v. Dolan, 255 Mass. 236, 151 N.E. 109 (1926) (an illegitimate can not be a pretermitted heir); Gritta's Case, 236 Mass. 204, 127 N.E. 889 (1920) (an illegitimate is not a "child" for purposes of the workmen's compensation law).
10 The United States Supreme Court invalidated state statutes restricting rights of illegitimates, as these statutes were found in violation of the equal protection clause of the fourteenth amendment. New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (family assistance); Gomez v. Perez, 409 U.S. 535 (1973) (right to support by father); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (workmen's compensation); Levy v. Louisiana, 391 U.S. 69 (1968) (wrongful death). The only Massachusetts case to date involving equal protection arguments has been Hanson v. Markham, 371 Mass. 262, 356 N.E.2d 702 (1976) (G.L. c. 191, § 20, the pretermitted heir statute). Prior to the Survey year, however, the Massachusetts Appeals Court had intimated that the earlier version of section 7, restricting illegitimates' right to inherit, might be unconstitutional. Nickerson v. Fiduciary Trust Co., 6 Mass. App. Ct. 317, 320 n.2, 375 N.E.2d 357, 359 n.2 (1978).
12 Id. at 1250, 405 N.E.2d at 141.
13 Id. at 1244, 405 N.E.2d at 137. The Court stated that, if it were called upon to decide the issue under the Fourteenth Amendment to the United States Constitution, it likely would have found the intermarriage requirement violative of that provision as well. Id. at 1245-46, 405 N.E.2d at 138 (citing Lalli v. Lalli, 439 U.S. 259 (1978)).
14 Id. at 1250, 405 N.E.2d at 141.
inheritance rights through adjudication of paternity. The third development in the Survey year was *Wrenn v. Harris*, in which the United States District Court for the District of Massachusetts, applying the "acknowledgment" test of section 7, held that an illegitimate was a "child" entitled to surviving child's benefits under the Social Security Act.

In *Lowell*, an illegitimate brought an action in the probate court seeking a declaratory judgment that she was the daughter of the decedent-intestate and was entitled to take a share of his estate as an heir. The probate court found that the decedent was the father of the plaintiff, but that the plaintiff's parents had never married, and that there had never been an adjudication of paternity. The parties stipulated that the father had acknowledged in conversation and in writing that he was the plaintiff's father. Despite the decedent's acknowledgement of paternity, the probate court held that the plaintiff was not entitled to take from her father's estate pursuant to section 7 of chapter 190. That court also held that section 7 did not abridge any of the plaintiff's constitutional rights under article 1 of the Declaration of Rights of the Massachusetts Constitution or under the fourteenth amendment to the United States Constitution.

The Supreme Judicial Court granted direct review of the plaintiff's appeal on the Court's own motion.

Rejecting a strained interpretation to save the constitutionality of the statute, the Supreme Judicial Court chose to analyze the statute on constitutional grounds with a view toward saving those portions of the statute which could withstand scrutiny. The Court cited two Supreme Court cases involving statutes whose requirements were only slightly different from those of section 7. In *Trimble v. Gordon*, the Supreme Court invalidated an Illinois statute that required both intermarriage and acknowledgement. 1980 Mass. Adv. Sh. at 1244, 405 N.E.2d at 137.

1 Acts of 1980, c. 396, § 7 was approved on July 7, 1980, and became effective ninety days later on October 5, 1980.

16 Id. at 227 (construing 42 U.S.C. § 416(h)(2)(A)).


18 Id.

19 Id. at 1243-44, 405 N.E.2d at 137.

20 Id. at 1244, 405 N.E.2d at 137.

21 Id.

22 Id.

23 Id.

24 Id. at 1244-45, 405 N.E.2d at 138. "Violence to the plain words" of the statute was done, the Court said, by the administratrix of the father's estate, by the Attorney General and by the probate court, all of whom had argued that the statute required either "intermarriage and acknowledgment" or "adjudication" as the separate avenues for inheritance by illegitimates. Id.

25 Id. at 1246, 405 N.E.2d at 138-39. The Court opined that if it considered § 7 on federal equal protection grounds, the Court expected that the requirement of intermarriage as a precondition to parental acknowledgment would be unconstitutional and that the requirement of acknowledgment of paternity alone might be an acceptable condition. Id.

The Court held that the statute was overbroad because it eliminated the possibility of a "middle ground between the extremes of complete exclusion and case-by-case determination of paternity." In *Lalli v. Lalli*, the Court upheld a New York state statute that required an adjudication of paternity as a prerequisite for inheritance. The Court found the statute to be a carefully considered legislative judgment of how to balance the inheritance rights of illegitimates with the prevention of mistake and fraud. The *Lalli* Court distinguished the New York statute from that invalidated in *Trimble* by noting that the New York statute did not consider the marital status of the parents and that the adjudication requirement was purely evidentiary.

The Supreme Judicial Court, however, while intimating that application of those cases might achieve an acceptable result, considered the Equal Rights Amendment of Article I of the Massachusetts Declaration of Rights to be of "controlling importance" and accordingly chose to analyze Section 7 under that provision. The Court held that the key issue in section 7 was the distinction between rights of inheritance from a mother and from a father. Such a distinction raised the possibility of an impermissible sex-based distinction under the Equal Rights Amendment. The analysis, according to the Court, required three steps: (1) does a classification based on sex exist; (2) is there a state interest compelling enough to permit such a classification; and (3) if so, is the statute drafted as narrowly as possible to achieve only that objective.

A classification based on sex existed, the Court found, for the simple reason that the statutory scheme distinguished between the rights of an illegitimate to inherit from the natural father and from the natural mother. The Court held that there was a state interest to justify some difference in treatment, given the greater difficulty of proving paternity than of proving maternity and the objective of avoiding fraudulent claims. The Court

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27 *Id.* at 772-73.
28 *Id.* at 771.
30 *Id.* at 274.
31 *Id.* at 267.
33 *Id.*
35 See *id.* at 1247, 406 N.E.2d at 139.
36 *Id.* at 1246, 1249, 405 N.E.2d at 139, 140.
39 *Id.* at 1248-49, 405 N.E.2d at 139-40.
40 *Id.* at 1248, 405 N.E.2d at 140.
41 *Id.* at 1249, 405 N.E.2d at 140. Other state interests found by the United States Supreme Court, but not enumerated by the *Lowell* Court, include establishing an orderly settlement of estates, *Lalli v. Lalli*, 439 U.S. 259, 268 (1978); *Trimble v. Gordon*, 430 U.S. 762, 771 (1977), and protecting the dependability of titles to property passing under intestacy laws. *Trimble v.*
held, however, that the intermarriage requirement was overly restrictive in meeting the state's objectives. Whole classes of illegitimates who otherwise could prove paternity beyond any possibility of fraud were foreclosed from inheriting from their fathers because of the intermarriage requirement. Since the distinction affected the inheritance rights of the children and, in its full breadth, was unsupported by a sufficient state interest, the Court concluded that the intermarriage requirement was unconstitutional. The Court upheld, however, the alternative of either acknowledgement or adjudication of paternity as legitimate methods of preventing fraud.

The Court's reasoning would be convincing as an equal protection analysis based on a distinction between the rights of legitimates and those of illegitimates, and such an analysis surely could have produced the same result. The Court's sex-discrimination analysis is strained, however, and it establishes a problematic precedent for Equal Rights Amendment analysis. Section 7 simply did not deny or abridge inheritance rights of any child based on his or her own sex — the gravamen of the Equal Rights Amendment. Male and female children are treated identically. The sex distinction found by the Court is almost abstract, that is, between a mother and a father as to distribution of their property under statutes of intestate succession. No real rights of the father or the mother are involved, however. The right of inheritance is one to receive property from an ancestor, not a right of the ancestor to give property in a particular way under the intestacy statutes. Thus, no sex-based distinction exists among those who stand to

Gordon, 430 U.S. 762, 771 (1977). The Supreme Court has rejected the argument that a statute requiring intermarriage as a condition for inheritance by an illegitimate from the father furthered a state's purported interest in promoting legitimate family relationships. Id. at 768 & n.13, 769 (1977). See also Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-76 (1972).


Id. at 1250, 405 N.E.2d at 141.

Id.

Id. The Court did suggest, however, that the statute might have been too restrictive if it had not allowed both options of proving paternity.


Mass. Const. art. 1, provides in part: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." The Court may view this language as going beyond the prevention of denial or abridgement of rights or privileges under the law. Such an expansive view would be beyond any known court-expressed theory of constitutional guarantees.

But see 1980 Mass. Adv. Sh. at 1247, n.7, 405 N.E.2d at 139 n.7, where the Court alludes in a footnote to the possibility of a third party enforcement theory, by which a child could assert his father's "right" to pass his estate through intestacy to his issue. Intestate, however, has never been viewed as a "right" of a decedent. Indeed, common law intestacy was viewed as a disgrace. B. LEACH, THE LAW OF WILLS 42 (2d ed. 1960). The laws of descent and distribution delineate the rights of heirs to property passing from an intestate. G.L. c. 190, §§ 1-8. The rights of the decedent are to defeat intestacy through a will, homestead or non-probate dispositions.

The third party enforcement theory would be a more defensible theory than the nexus analysis relied on by the Court, however, if one could establish a father's "right" to an intestate distribution scheme. There may be such a right if it would be unconstitutional to require
be injured, and the rights of persons who are subject to the sex-distinction are not affected. The constitutional infirmity found by means of this nexus between the rights of one group of persons and sex-based distinctions among another group of persons is not supported directly or analogously by any precedent found by the Court.49

The Court’s invitation to the legislature in Lowell to revise section 750 was followed two months later by the enactment of an amendment to the statute.51 An illegitimate and his issue now may inherit from and through the father if the father acknowledges paternity or if he is adjudicated the father.52 If the child is using adjudication to establish the right, he must, within the limitations period for bringing claims against an estate,53 either deliver an authenticated copy of a judgment rendered by a court of competent jurisdiction during the father’s lifetime to the executor or administrator of the father’s estate or commence an action in which the executor or administrator is a named party and in which paternity is ultimately proved.54 This new restriction appears likely to be upheld against constitutional challenge, as the restriction furthers the legitimate state interest in implementing the orderly settlement of the father’s estate, without unduly restricting an illegitimate’s rights.55

a father to write a will to achieve the same distribution as intestacy would give the mother’s property. For example, if a man’s intestate estate escheated while that of a woman passed to heirs, the man’s need to execute a will may be considered an impermissible imposition. In that case, third party enforcement by the decedent’s children of their father’s “right” to pass property to heirs might have some appeal.

49 Indeed, the simple expedient of making a will counteracts any different treatment under intestacy, and that is the right of the parent. That right is unaffected by section 7 of chapter 190.


51 Acts of 1980, c. 396, § 7 was approved on July 7, 1980, and became effective on October 5, 1980. In fact, the bills were being acted upon at the time of the Lowell decision. 1980 Mass. Adv. Sh. at 1251, n.10, 405 N.E.2d at 141, n.10. The statute also amended section 5 and rewrote section 6 of chapter 190, permitting an illegitimate to inherit through the collaterals of the mother. No change was made to the requirement that the parents intermarry in order for the illegitimate to be deemed legitimate for all purposes. G.L. c. 190, § 7.


53 The limitations period is nine months from the time the executor or administrator gives bond. G.L. c. 197, § 9.


The Court in *Lowell* refused to decide whether and to what extent it might be necessary to permit the illegitimate to prove paternity in the absence of the father's written acknowledgment, his sworn testimony, or an adjudication of paternity. The revised statute also is silent as to how to prove "acknowledgment." Later in the Survey year, in *Wrenn v. Harris* the United States District Court for the District of Massachusetts held that acknowledgment could be proven, under section 7 by evidence of informal acknowledgment by the father. The issue in *Wrenn* was whether an illegitimate was a "child" of a deceased wage earner and entitled to surviving child's benefits under the Social Security Act. One way to establish that status under the Social Security Act is to look to a state's intestacy laws. An illegitimate who is considered a "child" for purposes of inheriting personal property under a state's intestacy laws is deemed a "child" for purposes of the Social Security Act. The court noted that, under the amended intestacy law of Massachusetts, an illegitimate could inherit from his father, if the father had acknowledged the illegitimate. The court then reasoned that, since the statute was silent with respect to the permissible manner of acknowledgment, the legislature apparently intended to leave the matter to the courts.

Because the policy underlying the acknowledgment requirement was to avoid fraudulent claims, the court concluded that the type of acknowledgment necessary should be determined on a case-by-case basis. In determining whether the decedent in *Wrenn* had "acknowledged" the child within the meaning of amended section 7, the court considered several facts: that the father had acknowledged paternity orally to his sisters, his co-workers and the mother's family; that the mother consistently had referred to the decedent as the father to her social worker and to her mother; that the father's sisters had written to the mother referring to her son as their brother's child; and that the sisters had submitted affidavits supporting their brother's paternity. Based on these facts, the danger of fraud was

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18 Id. at 226.

19 Id. at 224.


22 503 F. Supp. at 225. The court based its holding on the newly revised section 7, even though it had been amended subsequent to the commencement of the suit. Id.

23 503 F. Supp. at 225. There had been no requirement of a writing under the old section 7 and none was read into the amended acknowledgment in version. Id. at 226.

24 Id. at 225-26.

25 Id. at 226.

26 Id.
minimal, and the court, in holding that the child could inherit as an "acknowledged" illegitimate son under amended section 7, found him to be a "child" of the deceased wage-earner and, consequently, entitled to surviving child's benefits.67

Thus, in summary, the rights of an illegitimate to inherit from his father were expanded during the Survey year. In order for the illegitimate to inherit, it is no longer necessary that the parents marry. The illegitimate must prove only that the father acknowledged paternity or that he was adjudicated the father. Moreover, acknowledgment need not be proven by a formal writing.

67 Id. at 227