

# **EVOLUTION OF MASSACHUSETTS TRUST LAW**

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# Where did Trusts come from?

- Trusts are not universally recognized around the world
- Trusts are a creature of English Law
- Trusts were always 'for the benefit' of someone
- Trusts have not not always been for the benefit of the beneficiary



## 13<sup>th</sup> Century Franciscan Friar

- Could not own property
- Could have 'Friends'

# USE = TRUST

- “Because the friars were forbidden to own property, benefactors conveyed land to friends of the friars, to hold for the use of the friars. O, owner of Blackacre, would *enfeof* A and his heirs to hold *to the use* of the friars. By means of this transfer, the legal fee simple passed from O, the *feefor to uses*, to A, the *feeoffee of uses*, who held it for the benefit of the *cestui que use*, the mendicant order. The *cestui que use* took possession of Blackacre, but legal title was held by A.”

• Jesse Dukeminier & Robert H. Stikoff, *Wills, Trusts, and Estates* (9<sup>th</sup> ed. 2013)

# From the Use to the Trust

## Original Term

## Modern Term

use, feoffment to uses

trust

feoffor to uses

settlor/grantor/trustor

feoffee to uses

trustee

Cestui que use

beneficiary

# TAX AVOIDANCE

Land passed to the oldest son, under the rule of primogeniture. But, the passing was subject to feudal death taxes, or *feudal incidents* payable to the king.

As *uses* (trusts) survived the death of the original owner and survived the *feeoffee to uses* (the trustee) there was a dramatic decline in taxes.



**KING HENRY THE VIII**

1535

Wanted the Money !

# Statute of Uses

- Pressured by Henry VIII, Parliament adopted the Statute of Uses in 1535.
- Legal title went from the *feoffee* of uses (trustee) to the *cestui que use* (beneficiary).
- When the beneficiary died, the king was paid his due.



# LAWYERS TO THE RESCUE



BIRTH OF THE TRUST  
(Pre-UTC)

# COMMON LAW V. STATUTORY LAW

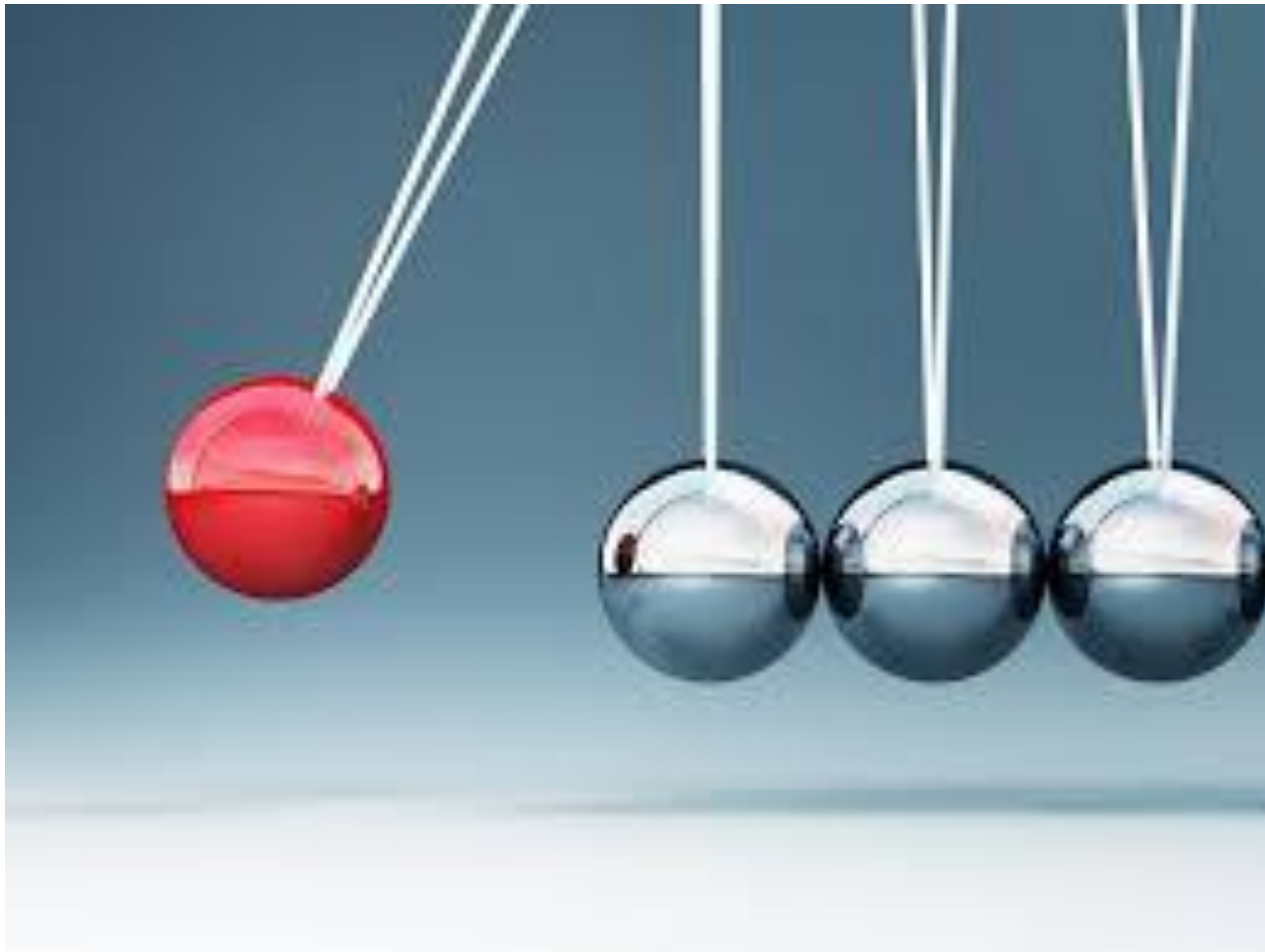
Law comes from two sources. Most people think of Statutes and Regulations promulgated by Congress, or in this case the Parliament. Congress makes the law and the Courts interpret the statutes and regulations.

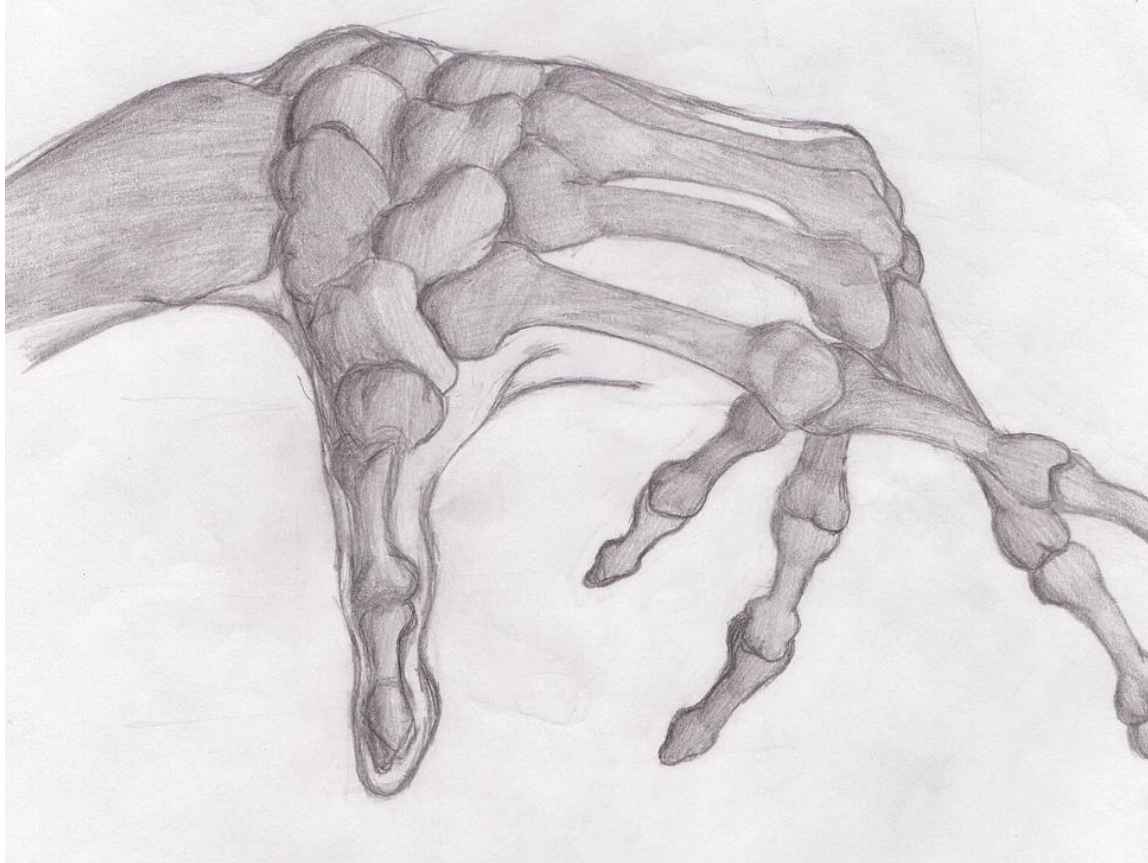
But, Courts also act under the principles of equity. Equity arises from the English Courts of Chancery. The Chancellor was “the keeper of the king’s conscience”.

The purpose of the Statute of Uses was to abolish uses. But, good lawyers find loopholes. As a result courts eventually decided if the *feoffee to uses* had active duties to perform, beyond simply holding title, the Statute of Uses did not apply.

The result was the Courts of Chancery began to recognize a new (legal) form of use – the Trust.

# The Trust World Began to Tilt





## **The Dead Hand of the Settlor**

If the Trustee has duties, he must get instruction on those obligations from someone. The instructions come from the Settlor. Hence, the birth of the dead hand of the Settlor.



## **TRUSTEE POWERS**

Under the Dead Hand of the Settlor Theory, the All Powerful Trustee looked to the intent of the Settlor to exercise broad powers.



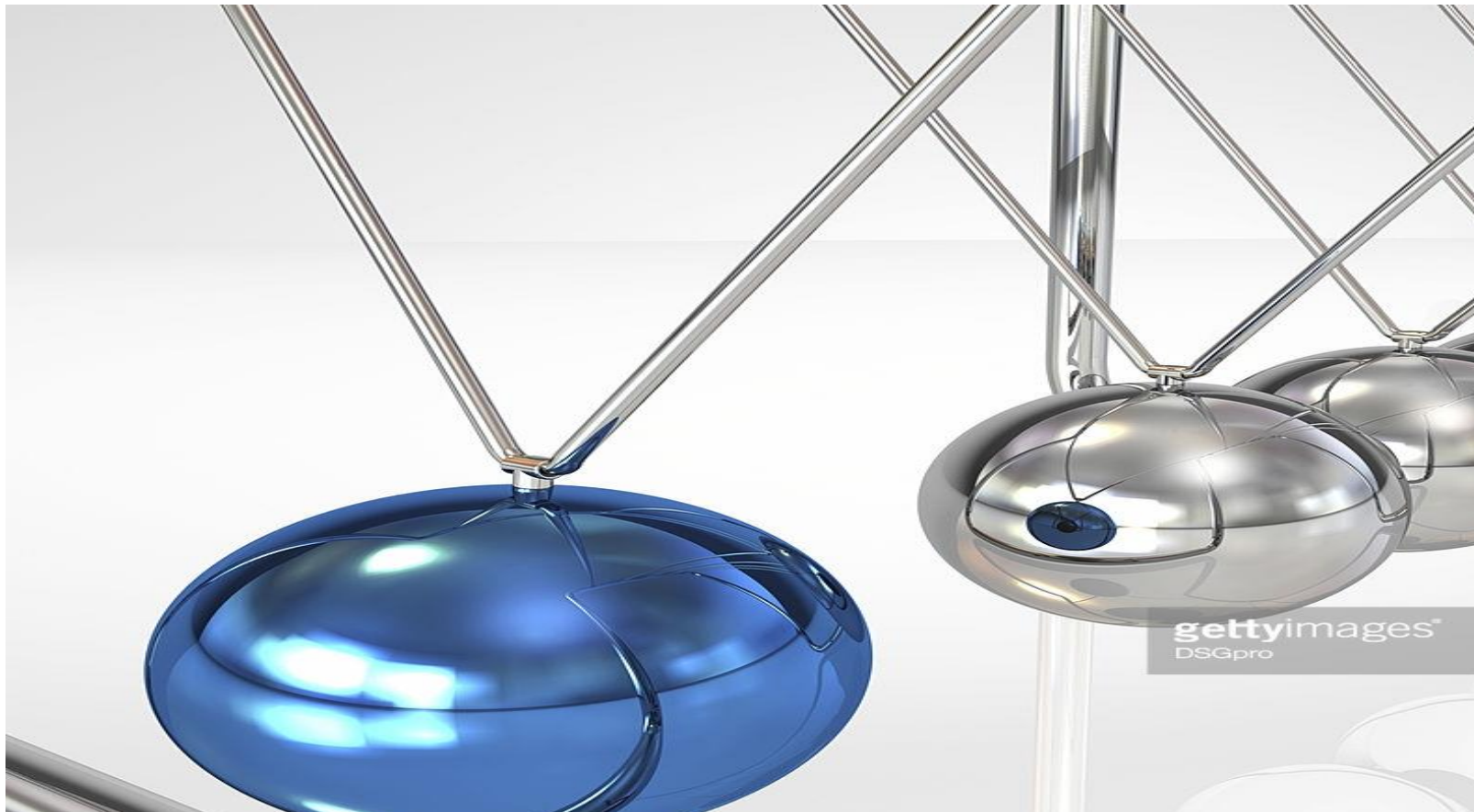
## **BENEFICIARY**

Our poor 'beneficiary' became a beggar!



# The Pendulum Swings Back

## Beneficiaries Reclaim Their Rights





2001

## RESTATEMENT OF TRUSTS THIRD

[T]he question whether or not a beneficiary has a property interest and not merely a *chose in action* should be answered in the affirmative.

The beneficiary of a trust has a property interest in the subject matter of the trust. He has a form of ownership. He has much more than a mere claim against the trustee, a mere chose in action

- It must be remembered, however, that the chancellors at the beginning gave him no more than a claim against the trustees, and only gradually gave him proprietary rights. The growth of the trust has been a process of evolution. ....

- Restatement of Trusts Third
- Vol. 2, Chapter 10, §49 (2001)

# Massachusetts Uniform Trust Code (2012)



- A fitting symbol of the statute which frees our beneficiaries.



Lady Liberty Breaks the  
Chains of Slavery.

- THE MOST FUNDAMENTAL CHANGE IN LAW CREATED BY THE UNIFORM TRUST CODE IS THAT TRUSTS HAVE GONE BACK TO THEIR ORIGINAL PURPOSE.
- TRUSTS ARE FOR THE BENEFIT OF BENEFICIARIES .

BUT....

AS WE WILL DISCUSS THE POWER STRUGGLE  
BETWEEN SETTLORS, TRUSTEES AND  
BENEFICIARIES CONTINUES.

THAT BALANCING OF POWERS WILL BE THE  
THEME OF THIS DISCUSSION

- The MUTC gives beneficiaries new rights including the right to notice, reasonable accounting, and for lack of a better term, decent service from the trustee.
- The MUTC substantially reduces the role of the Court, especially in testamentary trusts. Open access to the Court is available when necessary. But, lifelong Court 'oversight' and interference is gone.

- BENEFICIARIES, PARTICULARLY BENEFICIARIES ACTING WITH THE SETTLOR, CAN OFTEN TREAT THE PROPERTY AS THEIR OWN.
- THE SETTLOR OF A REVOCABLE GRANTOR TRUST MAY TREAT THE PROPERTY AS OWNED PERSONALLY – AND IGNORE THE TRUST OR TRUSTEE. §603



# Article Four

- § 411 Modification or Termination of a non-charitable irrevocable trust by consent
  - a) By court order, if the **settlor** and all beneficiaries consent - EVEN IF TERMINATION OR MODIFICATION IS INCONSISTENT WITH A MATERIAL PURPOSE.

# Article Four

- § 411 Modification or Termination of a non-charitable irrevocable trust by consent
  - b) By consent of all beneficiaries consent, if the court finds no material purpose will be violated.

# Article Four

- § 411 Modification or Termination of a non-charitable irrevocable trust by consent
  - c) By court order, even if not all beneficiaries consent, if the court finds it could have been modified or terminated with assent of all beneficiaries and the beneficiary who doesn't consent will be adequately protected.

# MODIFICATION AND TERMINATION OF TRUST

- § 412 Because of unanticipated circumstances or inability to effectively manage trust
  - a) court may modify or terminate if circumstances were not anticipated by the settlor and modification will further the purposes of the trust
    - Modifications or terminations should, to the extent practicable, be in accordance with the settlor's intent
  - b) court may modify administrative terms if continuation on existing terms would be impracticable or wasteful or impair admin

# MODIFICATION OR TERMINATION OF TRUST

- § 414 Uneconomic Trust
  - a) After notice to qualified beneficiaries a trust of less than \$200,000 may be terminated as too small
  - b) a court may modify or terminate a trust or remove trustee and appoint a different trustee if the value of the trust is insufficient to justify costs (even if over \$200,000)
  - c) upon termination, trustee to distribute in a manner consistent with purposes

# Article Four

- § 415 Reformation to correct mistakes
- The court may reform the terms of a trust, even if unambiguous, conform to the settlor's intention if it is proved by clear and convincing evidence that the settlor's intent or the terms of the trust were affected by a mistake of fact or law, whether in the expression or inducement.

# DECANTING

- § 417 Combination and division of trusts  
Trustee may combine or divide trusts if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trusts.

In the *Kraft* case, the SJC decided that decanting was, under certain circumstances, allowable. But, trusts drafted after that case should have a decanting clause.

# TRUSTEE POWER WITH HELP FROM THE DEAD HAND





- *Kraft explains* the concept of decanting trusts. "The sole and disinterested trustee of an irrevocable trust could distribute the trust property in further trust for the benefit of the beneficiaries without their consent or approval, and without the consent or approval of a court, where the trust's broad grant of almost unlimited discretion evidenced the settlor's intent that the disinterested trustee have the authority to do so; further, there was no need to appoint a guardian ad litem in the matter."

- Morse v. Kraft, 466 Mass. 92 (2013)

The Court allowed Robert Kraft's children to seize control of and modify the interests of his grandchildren. Certainly, controlling millions of dollars has a tendency to control the putative beneficiaries.

Query: What about beneficiary rights? Why were the grandchildren not separately represented??

# CREDITOR RIGHTS

IF A BENEFICIARY HAS PROPERTY RIGHTS,  
WHY SHOULDN'T HIS JUST DEBTS BE PAID OUT  
OF HIS PROPERTY?

# Article Five

- § 505 Creditor's claim against Settlor
  - 1) Revocable trusts are always exposed.
  - 2) If irrevocable, creditor may reach maximum which may be distributed to, or for the benefit of the settlor. (Does not apply to a clause limited to reimbursing the settlor for taxes on trust income.)
  - 3) After death, the property of a trust that was revocable at settlor's death can be reached by creditors or used to pay funeral and statutory spousal and children's allowances.

# WHO IS A “CREDITOR”



# THE WIFE



# CHILDREN



# NURSING HOME





# What can they reach?

A creditor, with Court approval, can reach and attach any present or future distribution that the beneficiary can demand.

MUTC §501

A spendthrift provision shall be valid only if it restrains both voluntary and involuntary distributions.

MUTC §502

A creditor may reach any distribution which is due, regardless of whether it has been paid.

MUTC §506

# REVOCAABLE TRUSTS

- § 602 Revocation or Amendment of Revocable Trust

- *Changes presumption. If trust does not state it is revocable or irrevocable, it is now revocable by settlor*

## § 603 Settlor powers; powers of withdrawal

- If settlor can revoke, he has a non-lapsing power of withdrawal.

- Trustee duties are only to settlor, not beneficiaries.

# Duties and Powers of Trustee

- § 801 Duty to Administer trust
  - Must be administered in good faith in accordance with trust terms and purposes and in the interest of the beneficiaries.
- § 802 Duty of Loyalty
  - a trustee must administer trust solely in the interests of the beneficiary (Settlor ??????)
  - No significant change in law. But, the section provides a detailed outline of permitted and prohibited acts.

# REMOVAL OF TRUSTEE

Prior to the UTC, trustees had a property interest in their positions. They could, and regularly did, defend their tenure by charging the trust their legal fees.

Article 706 allows the beneficiaries to petition the court for removal of the trustee, if they can show that removal is in the best interests of the beneficiaries and it does not violate a material purpose of the trust. The trustee has no standing to object.

- § 808 Powers to direct
  - a) while the trust is revocable, the trustee may follow a direction of settlor contrary to the terms of the trust
  - b) If someone other than the settlor has a power to direct, the trustee shall act in accordance with the direction unless contrary to trust terms
  - c) a person with a power to direct is a fiduciary and shall be liable for breaches of fiduciary duty

# § 813 DUTY TO INFORM AND REPORT

- a) Trustee must keep qualified beneficiaries reasonably informed about administration and promptly reply to reasonable requests for information.
  
- b) Trustee must inform beneficiary, in writing, within 30 days of the trust becoming irrevocable or the trustee acceptance of the trust of the trustee's name and address.

# § 813 DUTY TO INFORM AND REPORT

- c) Trustee must provide an account at least annually to distributees and permissible distributees and any qualified beneficiary who requests it. Section details requirements of account.
- d) A beneficiary may waive accounting – but – that does not relieve the trustee from accountability or liability for matters the account would have disclosed.

# WHOSE MONEY IS IT ?

## *Pfannenstiehl v. Pfannenstiehl*

475 Mass. 105 (2016)

Wealthy father settles a fully discretionary trust for his “issue”. One child, the defendant in a divorce case before Judge Ordonez, has a wife and two children. The facts are sympathetic to the wife, she quit her military career early, she is raising a Downs Syndrome child, she has learned to enjoy an affluent lifestyle.



Son receives significant regular distributions prior until just before the divorce.

Clearly, the settlor wanted to benefit 'blood' not ex-wives.

Trust has a spendthrift clause.

# Divorce Law

Divorce law allows the Court to divide “all property to which a party holds title, however acquired” *William v. Massa*, 431 Mss. 619 (2000) interpreting MGL c. 208 §34.

The trial judge found that even though the trustees could not be compelled to distribute under trust law, she could divide the property and compel distribution.

The Family Court and the Appeals Court focused on what they considered the equitable result.

They attempted to take the money, or charge the beneficiary with taking the money, even though the beneficiary had no right to either principle or income.

The SJC essentially said you can take anything and everything he has. But, he does not have and has no legal right to demand the corpus of the trust.

# Medicaid/MassHealth

Medicaid is a welfare program. The Federal Government sets out the conditions (statute and regulations) upon which it will give the States money for the program.

Within guidelines, the State gets to establish its regulations.

The government may, as a matter of grace, give the applicant money if the applicant meets certain guidelines.

# THIS IS NOT TRUST LAW

## SPENDTHRIFT CLAUSES DON'T WORK

### “ANY CIRCUMSTANCES TEST”

*[I]f there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual [beneficiary]. 42 USC 1396(d)(3)(B)(i)*

# Doherty v. Director of Medicaid

74 Mass. App. Ct. 439 (2009)

Balancing between the Settlor's intent to not pay the nursing home and the beneficiary's right of access to the property.

Here the Settlor and the income (principal ?) beneficiary were both Muriel Doherty.

The trust was structured as an income only irrevocable trust. As income was available to beneficiary (nursing home resident) the income is available to the creditor (nursing home).

But, the Settlor got a little greedy. She wanted to keep her cake and eat it too.

# Bad Cases Make Bad Law

- Muriel Doherty retained a limited power of appointment to descendants and siblings.
- The trust could accumulate money for Muriel's 'future needs' without regard to the interests of the remaindermen. (Query: if distribution to, or for Muriel was impossible, why would we accumulate for her 'future needs'.

The Court said “we remain unconvinced that Muriel’s niece and nephew are unable, in any reasonably foreseeable circumstance, to invade trust assets for Muriel’s benefit...”



“In our view, Muriel’s trust, as structured, allows the trustees a degree of discretionary authority that would, if sanctioned, permit Muriel to enjoy her assets, preserve those assets for her heirs, and receive public assistance.”

Doherty begins a line of cases which discuss the availability of assets to the beneficiary “under any circumstances”.

These cases tend to create confusion about trustee powers, trustee duties and the rights of beneficiaries and their creditors.

# HEYN V. DIRECTOR OF MEDICAID

*89 Mass.App.Ct. 312 (216)*

An Irrevocable Income Only Trust gave the trustee the ability to allocate between principal and income.

The trust also allowed the trustee to purchase an annuity as an investment.

The trust further allowed the trustee to substitute assets.

Finally, the grantor retained a limited power of appointment allowing a reallocation of the remainder interest among children.

Both the Hearing Officer and the Superior Court trial judge decided that the trustee could ignore his duty to the remaindermen, purchase an annuity, annuitize it and give all of the income to the income beneficiary.

Fortunately, the Appeals Court recognized that the trustee did not have that legal authority.

This was not a matter of discretion. The trustee lacked the legal authority to distribute corpus to the income beneficiary.

# Daley and Nadeau

v.

## Director of the Office of Medicaid

477 Mass. 188 (2017)

These were two separate cases which were consolidated for argument to the SJC.

In Nadeau, a lifetime use and occupancy provision in the trust was deemed by the Hearing Officer and Superior Court to expose the corpus.

In Daley, the remainder never made it into the trust. A life estate was all that was conveyed to the trust. The Hearing Officer and Superior Court nevertheless found the remainder was available.

# Good News/Bad News

The SJC found that 500 years of property law and trust law could not be ignored. The remainder interests were not available by reason of the occupancy clause or the life estate.

But, standard trust provisions, in this case a provision permitting payment of income tax obligations from corpus might make the amount of any potential income tax available.

Further, Nadeau retained a power to appoint principal to a non-profit.

The SJC remanded the case to consider whether this power may be sufficient to allow the applicant to appoint the trust corpus to pay a non-profit nursing home for his care.

Footnote 15 – in states that have enacted expanded estate recovery [think New Hampshire], remainder interests in trust are subject to recovery where a life estate has been retained in the deed.

# TAKE AWAY

Massachusetts is following the trend which places the beneficiaries of trusts in a position closer to an owner than to a supplicant.

But, with ownership comes exposure.

Query: When will we see a creditor trying to use the MUTC modification provisions as an end around the spendthrift positions.

Consider alternatives other than trusts and draft carefully.



# NEWS

TO PROBATE & ESTATE PRACTITIONERS OF THE NORFOLK, MIDDLESEX & SUFFOLK BAR:

The Probate & Family Court is piloting a Fiduciary Litigation Session (FLS), to be housed in the Norfolk Division, which will hear certain contested and complex probate matters. These matters include: will or PR appointment contests; contests over the actions of an estate or trust fiduciary (guardianships are not included); removals and successor appointments; instruction and declaratory judgment actions concerning trusts and estates; validity, reformation and construction of instruments; and partition actions. The session will accept cases from the Norfolk, Suffolk and Middlesex Divisions.

Justice Elaine M. Moriarty (ret) will be hearing all cases assigned to the FLS and the session will run 3 days weekly.

The Probate Court will soon be issuing a Standing Order detailing this pilot session and how matters may be assigned to it. In an effort to immediately assign cases for hearing in November, if you currently have a matter which meets the specifications above, the Court will accept for consideration an Assented to Motion to Schedule Status/Case Management Conference in the FLS. Such Motion may be emailed in .pdf format to Jennifer A. Maggiacomo, Esq. at [jennifer.maggiacomo@jud.state.ma.us](mailto:jennifer.maggiacomo@jud.state.ma.us) to be acted upon by the Justice currently assigned to the matter.

