

**What is a trust?**

**What do I need to know about  
the Mass. Uniform Trust Code?**

**What do I need to know about  
trust cases in the Probate and  
Family Court?**

**TIMOTHY D. SULLIVAN, ESQ.  
ANDOVERLAW, P.C.**

- A trust is an arrangement, usually in a written document, whereby a person, often referred to as the donor or settlor, transfers property to another person or institution, the trustee, to hold for the benefit of a third person or group of people, the beneficiaries. The trust itself can contain provisions, rules and powers, but it relies upon the law in statutes and cases for interpretation.

The Boston Trustee by Thomas E. Bator and Heidi A. Seely,  
David R. Godine, pub. 2015

# The Evolution of Trusts

- Trusts are not universally recognized around the world
- Trusts are a creature of English Law
- Trusts were always 'for the benefit' of someone
- Trusts were not always 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 to O, the *feefor to uses*, to A, the *feoffee 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

use, feoffment to uses

feoffor to uses

feoffee to uses

Cestui que use

## Modern Term

trust

settlor/grantor/trustor

trustee

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 *feoffee to uses* (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

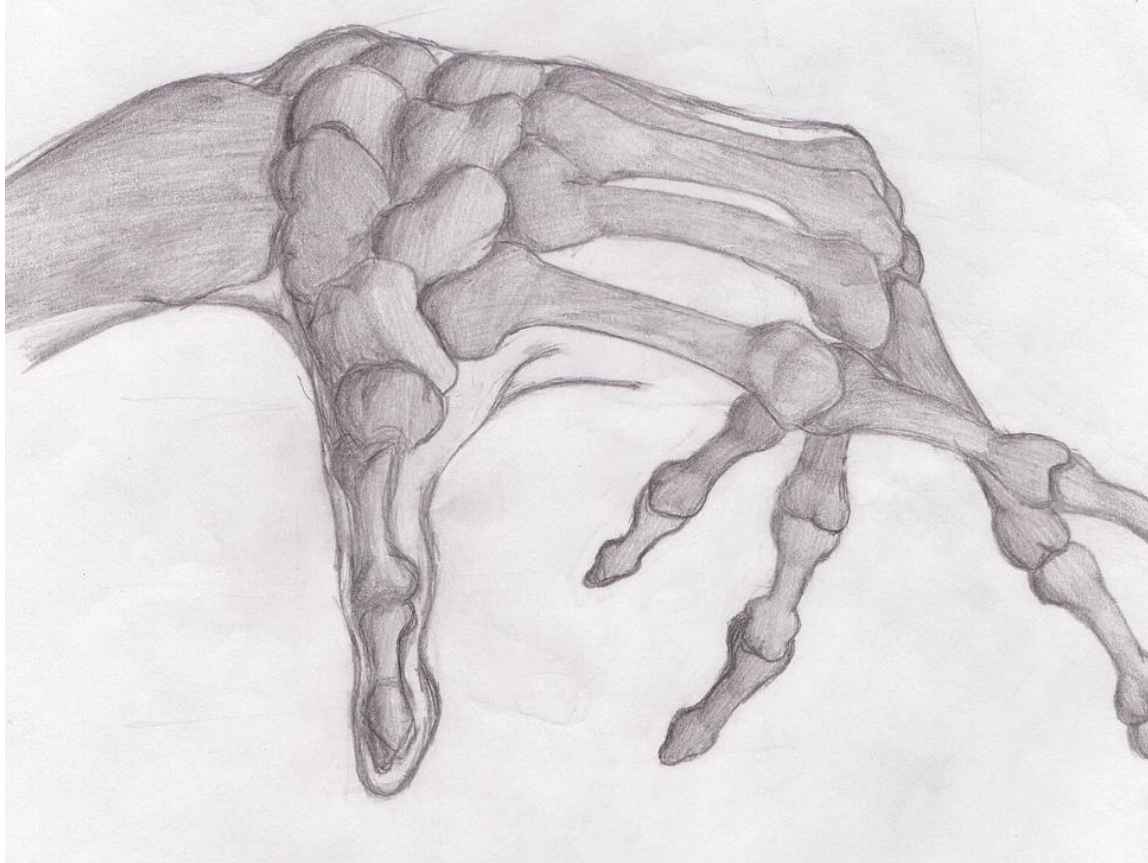
# COMMON LAW V. STATUTORY LAW

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.

Courts also act under the principle 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 found loopholes. As a result the courts eventually decided if the *feoffee to uses (trustee)* had active duties to perform, beyond simply holding title, the Statute of Uses did not apply.

Thus, the the Courts of Chancery began to recognize a new (legal) form of use – the Trust.



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

The most significant result of this shift in the law was that trusts became a tool of the settlor (or grantor) whose power was exercised by the trustee.



## **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**

**The beneficiary became a begger.**





# **STATUTE OF LIBERTY**

**The Uniform Trust Code shifts trusts back to where they began. Trusts are now for the benefit of the beneficiary – not for the trustee – not even for the settlor.**





Lady Liberty Breaks the  
Chains of Slavery.

# WHAT IS THE MUTC

- THE MASSACHUSETTS UNIFORM TRUST CODE IS A SIMPLE, COMPREHENSIVE MANUAL GOVERNING THE LAW OF TRUSTS.
- IF THE CODE DOES NOT DIRECTLY ADDRESS AN ISSUE, COMMON LAW REMAINS IN PLACE. BUT, FOR THE MOST PART, COMMON TRUST ISSUES ARE NOW GOVERNED BY A STATUTE.
- THUS, EQUITY CASES HAVE BEEN SUBSTANTIALLY REDUCED.

# WHAT IS EQUITY?

- “JUSTICE ADMINISTERED ACCORDING TO FAIRNESS AS CONTRASTED WITH THE STRICTLY FORMULATED RULES OF COMMON LAW.”
- “EQUITY ADOPTS AND FOLLOWS THE RULES OF LAW IN ALL CASES TO WHICH THOSE RULES MAY, IN TERMS, BE APPLICABLE.”

• *BLACK'S LAW DICTIONARY, FIFTH EDITION.*

- In short, if a statute directly addresses the problem, or if a 'black letter' principle of common law directly addresses the law, the statute or rule must be followed.
- In 'grey' areas, a Probate and Family Court judge may use her equitable powers to 'do what is right' and 'achieve justice'.

# AREAS OF CHANGE RESULTING FROM THE MUTC

- 1) The MUTC organizes the law of trusts into one sourcebook (statute) making it much easier to find the law and to determine rights, powers and duties. Most cases will now be addressed under the law.
- 2) The MUTC provides a default set of trust terms to fill in where imperfect drafting fails.

- 3) 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.
- 4) 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.

# WHAT IS A TRUST?

- “A RIGHT OF PROPERTY, REAL OR PERSONAL, HELD BY ONE PARTY FOR THE BENEFIT OF ANOTHER.”

- *Black’s Law Dictionary, Fifth Edition*

# TRUST NAMES

- Before discussing different types of trusts, it is important to understand that many of the names in the title of trusts vaguely, imperfectly, or sometimes just plain inaccurately describe the trust below the title.
- **NEVER BELIEVE A TITLE WHEN DETERMINING WHAT KIND OF TRUST YOU ARE REVIEWING.**



# COMMON TRUST PURPOSES

- Management of assets for the benefit of someone who is less than skilled at asset management.
- Tax avoidance or reduction.
- Privacy.
- Creditor protection.
- Benefits qualification (think Medicaid).
- Management and Distribution of Charitable Bequests.

# TRUST REQUIREMENTS

- A trustee: one who manages property in fulfilment of trust purposes.
- A beneficiary(ies) or lawful purpose.
- Real or personal property which is 'held in trust' or managed.

# Trustee's Duties

- Duty of Loyalty
- Duty to Exercise Reasonable Care and Skill
- Duty to Give Personal Attention
- Duty to Keep and Render Accounts

- Duty to Provide Information
- Duty to Take and Keep Control of the Trust Property
- Duty to Keep Trust Property Separate
- Duty to Enforce Claims
- Duty to Defend the Trust
- Duty to Make Trust Property Productive
- Duty of Impartiality

- *Borrowed from Understanding and Using Trusts, Eric Hayes, et al, MCLE 2005*

# TRUST CATEGORIES

- Testamentary Trust: A trust which is found in a will. This type of trust does not exist until the Will is allowed, the trustee is appointed and the trustee accepts the trust. Traditionally, testamentary trusts remained under the jurisdiction of the probate court until final settlement was allowed. Pre-MUPC trusts mostly still follow this rule. Post MUPC trusts do not.

- Inter Vivos Trusts are set up during lifetime outside of the will. These need trustee, beneficiary and corpus. But, very often, the corpus is initially nominal (\$1). It is merely a statement that corpus exists in order to meet the basic requirement.
- In most cases, these trusts are favored by estate planners for reasons of privacy, reduced notice requirements, and easier management following death.

# COMMON TRUST TYPES AND/OR PURPOSES

# FAMILY TRUST

- This is perhaps the most abused and misleading trust name. In general, a family trust should manage trust property for the benefit of the family.



# Family Trust for Young Family

- A basic family trust for a young family would provide the money necessary to raise the children.
- It would be funded at the death of the second to die of the parents (or today often at the death of a single parent).
- It would provide for expenses during minority and education expenses. Remaining principle would generally be distributed in thirds at ages 25, 30 and 35.

# Older Family / Tax Based Family Trust

- Often a 'Family Trust' will be designed to provide income, and to the extent possible, control to the surviving spouse with the balance to go to the children. These trusts will often have two or three subtrusts and will allocate money at the death of the first to die to protect his/her estate (death) tax credits, provide income to the surviving spouse, leave the surviving spouse varying amounts of control and eventually get money down to the children.

# Dynasty Trusts

- These trusts will be domiciled in another state, but may well appear as the beneficiary of a larger Massachusetts estate and may be a form of ‘family trust’. They are generally funded with very large amounts of money with purposes intended to last for a long time (maybe forever) and to impose the grantor’s values and desires on multiple generations.

# Trusts as Tax Avoidance Vehicle

- Massachusetts has an estate tax on estates over \$1,000,000. The Federal Estate Tax is on estates over \$5,430,000.
- Tax rates in Massachusetts are relatively low, ranging from about 6% to 16% (on estates over \$10,040,000. However, the arcane way estate taxes are calculated creates a bubble as high as 30% on estates between \$1,000,000 \$1,200,000.

Federal estate tax rates are generally 40%. But, when you add in Mass. tax, this can be as high as 56% of the tax. Thus, for those with larger estates, tax planning makes a lot of sense.

# Privacy

- The terms, and even the existence of an inter vivos trust are generally not available to the general public. Thus, the trust can be used to conceal the true facts of a testamentary disposition. As an example, my Will might divide all my property equally between my children. But, if most of my property is in a trust that excludes the 'bad child', I have avoided making a gift I do not want to make without embarrassing the family.

# Nominee Trusts

- Frequently named Real Estate Trusts, these trusts were designed for privacy. The basic authority of the trustee is listed in the public part of the trust. Generally, this is recorded at the Registry of Deeds. However, the true owner is listed on a Schedule of Beneficiaries that is not recorded. The beneficiaries control the trustee in these trusts. They are the true owner.

# Nominee Trusts (cont.)

- These trusts were often used to act as a front end to another trust.
- In fact, Nominee trusts are not true trusts. The Supreme Judicial Court has declared they are closer to agency agreements.
- In 2003, M.G.L. c. 184, §35 made the recording of a trustee certificate rather than an entire trust legal. This has substantially reduced the need for these instruments. Nevertheless, they continue to be used.



# Doctrine of Merger

- The Doctrine of Merger provides that where the legal owner and the equitable owner (beneficiary) are identical, the trust ceases to exist and the property is owned by the individual.
- Nominee trusts were frequently used just to disguise ownership. Thus, it is not unusual to see the trustee and beneficiary be the same person. In those cases, there is no further trust.

# Creditor Protection

- Trusts are frequently used to avoid paying creditors. These trusts are called 'spendthrift trusts'. As a general rule, if the money was never yours, then a trust with you as a fully discretionary beneficiary may not be invaded to pay your creditors. If the trust was funded with your money, the trust can probably be reached by your creditors.

- Some states have recently adopted very strong creditor protection laws. Others have gone the other way with less creditor protection.
- Creditors may be treated differently depending upon the class of creditor (public policy suggesting that child support and certain taxes to be 'supercreditors').
- This area of law is very much in flux with a recent Appeals Court decision, upending trust law as we knew, currently pending in the SJC.

# MEDICAID QUALIFYING TRUSTS

- The general concept is that the parent puts her assets into a trust more than five years prior to entering a nursing home. The parent retains income from the trust and irrevocably gives up the remainder. If a house is in the trust, the elder gets to live there forever. But, it eventually goes to the children.
- These trusts are under increasingly severe attacks both in the courts and through legislative efforts. by DMA as it seeks to increase revenues.

# Special Needs Trusts

- ‘Self Settled Trusts’: Federal Law allows the funding of a trust for the benefit of a disabled person, with that person’s money, under certain specific conditions. The trust must be set up by a court, guardian or parent, certain age requirements apply, the trust can be used for the benefit of the disabled person. But, payments may not be made directly to the person. The state must be repaid its Medicaid expenses out of any remaining trust balance upon death.

# Special Needs Trusts

- Third party settled: Often called ‘Supplemental Needs Trusts’, these trusts make funds available, at the discretion of the trustee, to improve the life of a disabled person. Usually the trustee will buy something for the disabled person, but will not give them cash. These are often set up by a parent during estate planning. As long as they are properly administered, they provide a better life for the disabled person without interfering with government benefits.

# POOLED TRUSTS

- These are typically small trusts, too small for standard trust administration expenses. The plan administrators have gone through an application and approval process at the state level under Federal law. They offer professional administration with very low minimum costs and allow for the possibility of aid to the disabled person beyond the principle donated. Because of remainder charges by the underlying charity and estate recovery from the state, there is nothing left after the death of the disabled person dies.

# Charitable Trusts

- Often someone will want to support a favorite charity for many years following their death. Charitable trusts serve this purpose.
- It is not uncommon to see charitable bequests in the form of straight gifts, or even extended commitments arise out of trusts formed for other purposes. In addition, there are various techniques which combine charitable giving with tax savings which are used for larger estates.



MUTC as a Manual of Trust Law

- The ways trusts are used for tax planning are beyond the scope of this presentation. But, in general, the value of the interest a beneficiary has in the trust is reduced by means of reducing his/her theoretical access to and control over the trust property by techniques like dividing present and future interests, giving control over the property to others, etc.

# Article One

- § 101 – Title
- § 102 – Scope – Applies to Donative Trusts not Business Trusts
  - Express trusts
  - Charitable trusts
  - Non-Charitable Trusts of a Donative Nature

# Article One

- § 103 Definitions

## Qualified Beneficiary

- A beneficiary who, on the date the beneficiary's qualification is determined:
  - (i) is a distributee or permissible distributee of trust income or principal; or
  - (ii) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

# Article One

- § 104 Knowledge – When is one charged with having notice of a fact or event?
  - 1) Actual knowledge
  - 2) received a notice or notification
  - 3) from the facts and circumstances, should had reason to know.

An organization has knowledge when it is received by an employee having responsibility to act for the trust.

(Telling the janitor in a bar doesn't count ;)

# Article One

- § 105 Terms of the Trust Generally apply.

## Mandatory Rules:

- 1) requirements of creating a trust
- 2) duty of trustee to act in good faith
- 3) lawful purpose
- 4) power of the court to terminate or modify a trust
- 5) effect of spendthrift provision and rights of certain creditors under article 5

# Article One

## (§ 105, mandatory rules)

- 6) Court retains power to order a bond.
- 7) Court may be brought in to review trustee compensation as unreasonably high or low.
- 8) Drafting attorney may not put in exculpatory clauses relieving him. Regardless of trust terms trustee liable for bad faith or reckless indifference.
- 9) Trustee remains personally liable for torts, deliberate misrepresentation or bad faith.

# Article One

- § 106 – Common Law of Trusts, Principles of Equity (Common law supplements the Code.)
- § 107 – Reserved



# § 108 Principal Place of Administration

- a) Where designated in Instrument
  - If a trustee has a principal place of business or residence there.
  - If all or part of the administration occurs there.
- ***b) Trustee may transfer principal place of administration.***
- c) Notice to qualified beneficiaries required 60 days before transfer.
- d) If qualified beneficiary objects to transfer, transfer would require a court order.

# Article One

- § 109 Methods and Waiver of Notice
  - Generally any method reasonably suited to the circumstances is acceptable. *However, electronic delivery is not specifically endorsed.*
  - § 110 Others treated as Qualified Beneficiaries
    - certain charitable interests
    - persons appointed to enforce an animal or purpose trust

# § 111 Non-Judicial Settlement Agreements

- “Interested Persons” – those whose consent would be required in order to achieve a binding settlement, if approved by the Court – may enter into an agreement involving a trust.
- Agreements must not violate a material purpose of the trust and must consist of terms and conditions which could be approved by the court.

# Matters which may be resolved by Non-Judicial Settlement Agreement

- 1) Interpretation of terms and construction of trust.
- 2) Approval of trustee's account.
- 3) Direction to trustee to refrain from an act or to grant a trustee a necessary or desirable power.
- 4) Resignation or appointment of a trustee and determination of trustee compensation.

- 5) Transfer of a trust's principal place of administration.
- 6) Resolution of liability of trustee for an action related to the trust.

*Any interested person may request that a court approve a non-judicial settlement agreement to determine whether representation was adequate of whether the terms and conditions are those which a court could have approved.*

# Article One

- § 112 Rules of Construction
- § 113 Qualification of foreign trustee.

# Article Two

## JUDICIAL PROCEEDING

§ 201 Role of the Court in Administration of Trust

In and Out, Court service on demand

# Article Two

## § 202 Jurisdiction over trustee and beneficiary.

- a) A trustee submits personally to the jurisdiction of the Massachusetts Courts, in any matter related to the trust, when he accepts appointment as trustee of the Massachusetts trust.
  
- b) A beneficiary of a trust with its principal place of administration in Mass. is subject to jurisdiction in matters related to the trust.
  
- c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary or other person receiving property from the trust



# Article Two

§ 203 Trust proceedings; dismissal of matters relating to foreign trusts.

A Mass. Court will not normally entertain litigation in foreign trust matters where not all interested persons will be bound.

# Article Two

## § 204 – Venue

Trial Court of the County where the principal place of administration is located.

- 1) usual place of business of corporate trustee if one corporate trustee
- 2) usual place of business or residence of professional trustee
- 3) usual place of business or residence of any co-trustee as agreed upon.

# Article Two

§ 205 Petition for transfers of trust property the disposition of which depends upon the death of an absentee.

Provides procedure for getting a court to declare a missing person dead for trust purposes. (5 years)

# Article Three

## VIRTUAL REPRESENTATION

Virtual representation is a change which came with the Massachusetts Uniform Probate Code. Article Three's sections allow for unrepresented parties to be represented in non-judicial settlement agreements and judicial hearings, without the expense of separate counsel or guardian ad litem under certain circumstances.

# Article Three

- § 301 Representation: basic effect
  - a) notice to virtual representative binding upon principal
  - b) consent of virtual representative binding upon principal
  - c) virtual representative may represent a settlor who lacks capacity
  - d) A settlor may not represent a beneficiary with respect to modification or termination of the trust.

# Article Three

- § 302 Representation by holder of general testamentary power of appointment
- § 303 Representation by fiduciaries and parents
- § 304 Representation by person having substantially identical interest

# Article Three

## § 305 Appointment of Guardian ad Litem

a) a court may appoint a GAL if virtual representation is inadequate.

b) the GAL may then act in both judicial and non-judicial proceedings

***c) In making decisions, the GAL may consider benefit accruing to the living members of the individual's family***

# Article Four

## Creation, Validity, Modification and Termination of a Trust

- § 401 Methods of creating a trust
  - 1) transfer property to trustee
  - 2) declaration by owner that he holds identifiable property as trustee; or
  - 3) exercise of power of appointment in favor of a trustee



# Article Four

- § 402 Requirements for creation
  - 1) settlor must have capacity
  - 2) settlor must intend to create a trust
  - 3) the trust as a definite beneficiary or is a:
    - a) charitable trust
    - b) trust for the care of an animal
    - c) purpose trust

# Article Four

- § 403 Trusts created in other jurisdictions
  - Generally ok
- § 404 Trust purposes
  - Must be legal

# Article Four

- § 405 Charitable purposes: enforcement
  - a) relief of poverty, education, religion, health, governmental, municipal
  - b) if no purpose or beneficiary designated and no means of selecting a beneficiary defined, a court may select
  - c) The settlor of a charitable trust may maintain a proceeding to enforce the trust

# Article Four

§ 406 Creation of trust induced by fraud, duress or undue influence.

A trust shall be void to the extent its creation was induced by fraud, duress or undue influence.

§ 407 Evidence of oral trust

The creation of an oral trust and its terms shall be established by clear and convincing evidence.

# Article Four

§ 408 Trust for care of an animal

New law!

This is a fairly large section, refer to it if drafting an animal trust.

# Article Four

- § 409 Non-charitable trust without an ascertainable beneficiary
  - This section authorizes ‘purpose trusts’ and is new. It is unclear how often or how they may actually be used at this time. But, for example, a trust that created a private park for a certain limited number of homeowners may be a purpose trust.

# Article Four

- § 410 Modification or termination of trust; proceedings for approval or disapproval
  - trust may be terminated if:
    - It expires by its terms
    - no purpose of the trust remains to be achieved
    - the purposes have become unlawful
    - the purposes are contrary to public policy
    - the purposes are impossible to achieve

# 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.
  - b) By consent of all beneficiaries consent, if the court finds no material purpose will be violated.
  - 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.

# Article Four

- § 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 recently decided that decanting was, under certain circumstances, allowable. But, trusts drafted after that case should have a decanting clause.

# Article Five

## Creditor's claims; Spendthrift and Discretionary Trusts

- § 501 Rights of beneficiary's creditor or assignee  
Creditor can reach and apply anything the beneficiary can demand.
- § 502 Spendthrift provision
  - *Change in Law: Spendthrift clause must prohibit both voluntary and involuntary transfers. (Current law a settlor could prohibit involuntary and allow voluntary.)*

# 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.

# Article Five

- § 506 Overdue distribution
  - Creditor may reach any distribution due under trust terms whether or not distribution is made.
- § 507 Personal obligations of trustee
  - Trust property is not subject to the personal obligations of the trustee, even if trustee is insolvent or bankrupt.

# Article 6

## REVOCABLE 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.



# Article Six

- § 604 Limitation on action contesting the validity of a revocable trust; distribution of property
  - a) Validity of trust revocable at settlor's death may be contested the earlier of
    - One year from the date of death
    - 60 days after trustee sends the person a copy of the trust and a notice informing him of the trust's existence, the trustee's name and address and the time allowed for commencing a proceeding.

# § 604 Statute of Limitations (cont)

- b) Upon death of settlor of a trust revocable until death the trustee may distribute without liability unless:
  - 1) The trustee knows of a pending judicial proceeding
  - 2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and the proceeding is commenced within 60 days after the notice.
  - 3) A beneficiary of a trust that is determined to have been invalid shall be liable to return any distribution received.

# Article Seven

## OFFICE OF TRUSTEE

- § 701 Accepting or declining trusteeship

Generally any act which indicates acceptance is sufficient. However, temporary steps to preserve property prior to acceptance may not constitute acceptance if rejection is made within a reasonable time.

# Article Seven

- § 702 Duty to provide a bond

This applies to testamentary trusts only.  
Generally, the Court has broad authority to determine what, if any, bond may be required.

# Article Seven

- § 703 Co-trustees
  - a) May act by majority decision.
  - b) If a vacancy occurs, or a trustee is unavailable due to illness, disqualification or incapacity, the remaining trustee(s) may act for the trust.
  - c) A co-trustee shall participate unless unavailable do to absence, illness, legal disqualification (including conflict) or temporary incapacity.

# Article Seven

- § 703 Co-trustees (cont)
  - d) If a co-trustee is unavailable ... and prompt action is necessary to achieve trust purposes, the remaining trustee or trustees may act for the trust.
  - e) except as provided below, a trustee who does not join in an action of another trustee shall not be liable for the action
  - f) each trustee shall exercise reasonable care to:
    - 1) prevent a co-trustee from committing a breach of trust and
    - 2) compel a co-trustee to redress a breach of trust

# Article Seven

- § 704 Vacancy in trusteeship; appointment of successor
  - Vacancy occurs if:
    - 1) person designated as trustee rejects the trusteeship;
    - 2) person designated as trustee cannot be designated or does not exist;
    - 3) a trustee resigns;
    - 4) a trustee is disqualified or removed;
    - 5) a trustee dies; or
    - 6) a guardian or conservator is appointed for the trustee.

# Article Seven

- § 704 (cont.)
  - b) If 1 or more co-trustees remain in office no co-trustee need be appointed.
  - c) If a vacancy must be filled the following is the order of priority:
    - 1) successor designated in the trust;
    - 2) Person appointed by unanimous agreement of the qualified beneficiaries;
    - 3) or a person appointed by the court.



# Article Seven

- § Resignation of trustee

A trustee may resign:

1) upon a least 30 days notice to:

the settlor and co-trustees of a revocable trust;

or

the qualified beneficiaries and all co-trustees of any other trust

2) with approval of the court.

# Article Seven

- §706 Removal of Trustee
  - The court may remove a trustee for:
    - 1) Serious breach of trust;
    - 2) if a lack of cooperation among co-trustees substantially impairs administration of the trust;
    - 3) because of unfitness, unwillingness or persistent failure of trustee to administer the trust effectively;
    - **4) *there has been a substantial change of circumstances or removal is requested by all qualified beneficiaries and the court finds that removal of the trustees best serves the interests of all of the beneficiaries.***

# Article Seven

§ 707 Delivery of property by former trustee.

A trustee who has resigned or been removed must promptly turn over the trust property.

# Article Seven

## § 708 Compensation of trustee

- a) If the terms of the trust do not specify compensation, the trustee is entitled to reasonable compensation.
  
- b) If the terms of the trust specify compensation, a court may modify that if:
  - 1) the duties are substantially different than those contemplated ,or
  - 2) compensation specified would be unreasonably high or low.

# Article Seven

## § 709 Reimbursement of expenses

- a) A trustee is entitled to be reimbursed for:
  - 1) expenses properly incurred in administration;  
and
  - 2) expenses that were not properly incurred during administration of the trust, to the extent necessary to prevent unjust enrichment of the trust.
  
- b) A trustee is entitled to be repaid his loan to the trust with reasonable interest.

# Article Eight

## 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
  - No significant change in law. But, the section provides a detailed outline of permitted and prohibited acts.

# Article Eight

- § 803 Impartiality
  - Trustee must act impartially
- § 804 Prudent administration
  - Trustee must administer the trust prudently – See Prudent Investor Act, M.G.L. c. 203C
- § 805 Costs of Administration
  - Only appropriate and reasonable costs are chargeable.

# Article Eight

- § 806 Trustee skills
  - Trustee held to the level of his education/training
  
- § 807 Delegation by trustee
  - Trustee may delegate, but must be reasonable in delegation and in management of delegated duties



# Article Eight

- § 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

# Trustee must take reasonable steps to:

- § 809 Control and protection of trust property
- § 810 Recordkeeping and identification of trust property
- § 811 Enforcement and defense of claims
- §812 Collecting trust property

# § 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.

# Article Eight

- § 814 Discretionary powers; tax savings
  - Even if the trustee has broad discretion, and liberal waivers of liability, he must act in good faith and in the best interests of the beneficiary.
  - A trustee/beneficiary may only exercise discretionary powers to his benefit in accordance with an ascertainable standard.
  - If the trustee is limited by this standard, a court may appoint an independent to act or the remaining trustees may act on his behalf.
  - This section does not apply to the trustee of a trust for which the marital deduction was previously allowed.

# Article Eight

- § 815 General powers of trustee
  - A general broad grant of power
- § 816 Specific powers of trustee
  - A default laundry list of powers which one might find in a well drafted trust.

# Article Eight

- § 817 Distribution on termination
  - Trustee may send beneficiaries a proposal for distribution on termination. If he does the right to object ends 30 days after
    - i) the beneficiary was informed of the right to object and the time allowed for objection, and
    - ii) the beneficiary was provided with sufficient material facts to evaluate the proposal.

# Article Nine

- No Article Nine – in the UTC it is the Uniform Prudent Investor Act.
- Mass already has it's version, the MUPIA.



# Article Ten

## LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

- § 1001 Remedies for breach of trust
  - Detailed list – nothing new

# Article Ten

- § 1005 Limitation on action against trustee  
*Claims barred*

*a) unless brought within 6 months of a final account, with adequate disclosure*

*- even if no full disclosure, claims are barred in 3 years if the beneficiary receives notice that it is a final account and is informed of the location and availability of the records.*

# Article Ten

- ***§ 1005 Claims barred***

***b) even if not barred by section (a), claims are barred in 3 years from the time the beneficiary knew or should have known of the existence of a potential claim for breach of trust***

***c) in any case, claims are barred in 5 years from the date of:***

- ***the removal, death, resignation of the trustee***
- ***Termination of the beneficiaries interest***
- ***Termination of the trust***

# Article Ten

- § 1006 Reliance on trust instrument
  - Reasonable reliance on trust instrument is a defense to breach of fiduciary duty.
- § 1007 Event affecting administration or distribution
  - A trustee is not charged with knowing something that he does not know as long as he takes reasonable steps to keep abreast of the facts (e.g. birth of a child, death, etc.)

# Article Ten

- § 1008 Exculpation of trustee
  - A term relieving the trustee of liability shall not be enforceable if:
    - 1) the trustee acted in bad faith or reckless indifference to the purposes of the trust or the interests of the beneficiaries
    - 2) it was inserted as the result of abuse by the trustee of a fiduciary or confidential relationship to the settlor.
  - Burden of proof is on the person drafting or causing trust to be drafted.

# Article Ten

- § 1009 Beneficiary's consent, release or ratification
  - Trustee is not liable for a breach of duty if beneficiary assents - unless the assent is the product of
    - Improper conduct by trustee or
    - The beneficiary did not know of the material facts related to the breach.

# Article Ten

- § 1010 Limitation on Personal Liability of Trustee
  - a) a trustee is not generally personally liable for contracts entered into in a disclosed fiduciary capacity
  - b) a trustee is not liable for torts committed administering the trust or arising out of trust ownership (including environment claims) unless the trustee is personally at fault

# Article Ten

- § 1011 Interest as general partner
  - Essentially mirrors § 1010 for the trustee's role, as fiduciary in a partnership.
  - If the trust is revocable, the settlor is personally liable on the trust's partnership interests as if the settlor himself were the general partner.



# Article Ten

## § 1012 Protection of Person dealing with trustee – Good Faith Standard

- a) A person, other than a beneficiary dealing with a trustee with apparent authority shall be protected as if the trustee had authority.
- b) A person, other than a beneficiary, is not required to inquire into the powers of the trustee or the propriety of their exercise.
- c) A person delivering assets to a trustee need not see to their proper application.

# Article Ten

- § 1013 Certification of Trust
  - A person, other than a beneficiary, may be furnished a certification of trust and not the trust itself.
  - This section details the requirements and contents of a trustee certificate.
  - This section relieves a person dealing in reliance upon such a certificate, in good faith, from liability.

**THE END**