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Estate Planning and Compliance Under a New Paradigm... A Look Back & A Look Forward

Massachusetts Uniform Trust Code
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I. Notifications & Reports Required

Article 1

Section 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 1

Section 105. Default and mandatory rules

- (a) Except as otherwise provided in the terms of the trust, this chapter shall govern the duties and powers of a trustee, relations among trustees and the rights and interests of a beneficiary.
- (b) The terms of a trust shall prevail over any provision of this chapter except:
- (1) the requirements for creating a trust;
 - (2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;
 - (3) the requirement that a trust have a purpose that is lawful and not contrary to public policy;

- (4) the power of the court to modify or terminate a trust under sections 410 to 416, inclusive;
- (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust, as provided in article 5;
- (6) the power of the court under section 702 to require, dispense with or modify or terminate a bond;
- (7) the power of the court under subsection (b) of section 708 to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;

(8) the effect of an exculpatory term under section 1008;

(9) the rights under sections 1010 to 1013, inclusive, or a person other than a trustee or beneficiary; and

(10) the power of the court to take such an action and exercise such jurisdiction as may be necessary in the interests of justice.

COMMENT

In general, the rules of the Code are default rules, subject to modification by the settlor in the instrument. However, this section identifies certain provisions of the Code that are mandatory. The Committee deleted from this section subsections (8) and (9) which would have prevented a settlor from relieving a Trustee of notice and information requirements found in Section 813. The Committee also deleted references to limitations periods and subject matter jurisdiction of the court.

Open Question: Are so-called “quiet trusts” permitted in Massachusetts?

Article 8

Section 813. Duty to inform and report

- (a) A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust. Unless unreasonable under the circumstances, a trustee shall promptly respond to a qualified beneficiary's request for information related to the administration of the trust.

- (b) Within 30 days after acceptance of the trust or the trust becomes Irrevocable, whichever is later, the trustee shall inform, in writing, the qualified beneficiaries of the trustee's name and address. The information shall be delivered or sent by ordinary first class mail.

(c) A trustee shall send an account to the distributees and permissible distributees of trust income or principal and to other qualified beneficiaries who request it, at least annually and at the termination of the trust. The account of trust income and principal may be formal or informal, but shall include information relating to the trust property, liabilities, receipts and disbursements, including the amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.

(d) A beneficiary may waive the right to a trustee's account of trust income or principal or other information otherwise required to be furnished under this section. A beneficiary, with respect to future accounts and other information, may withdraw a waiver previously given. A waiver of a trustee's account or other information shall not relieve the trustee from accountability and potential liability for matters that the account or other information would have disclosed.

COMMENT

The Committee substantially pared down the notice and information provisions of this section, and initially deleted the requirements that a trustee (1) notify qualified beneficiaries within 30 days of appointment and (2) furnish a copy of the trust instrument on request. However, because the Probate Code was subsequently enacted and contained provisions similar to those the Committee deleted from Section 813, the Committee reconsidered its position and chose to add paragraph (b) (as modified) to the section. That paragraph requires notice to qualified beneficiaries within 30 days of appointment (or when the trust becomes irrevocable), but the notice need contain only the name and address of the trustee. Although the Committee did not restore the requirement that the trustee furnish a copy of the trust instrument upon request, the Committee recognizes that such a requirement is implicit in the language of paragraph (a) absent unusual circumstances or a prohibition in the trust instrument itself.

Subsection (d) permits a beneficiary to waive the right to an account, and a waiver previously given may be withdrawn. The Committee added a provision to clarify that a waiver does not relieve the trustee from accountability and potential liability for matters the account or other information would have disclosed.

II. Irrevocable Trusts Can Now Be Amended & Virtual Representations Facilitate Settlement Agreements

Article 1

Section 111. Non-judicial settlement agreements

- (a) For purposes of this section, “interested persons” shall mean persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.
- (b) Except as otherwise provided in subsection (c), interested persons may enter into a binding non-judicial settlement agreement with respect to any matter involving a trust.
- (c) A non-judicial settlement agreement shall be valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.

(d) Matters that may be resolved by a non-judicial settlement agreement shall include:

- (1) the interpretation or construction of the terms of a trust;
- (2) the approval of a trustee's report or accounting;
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- (4) the resignation or appointment of a trustee and the determination of a trustee's compensation;
- (5) transfer of a trust's principal place of administration; and
- (6) liability of a trustee for an action relating to the trust.

(e) Any interested person may request that the court approve a non-judicial settlement agreement to determine whether the representation, as provided in article 3, was adequate and to determine whether the agreement contains terms and conditions the court could have properly approved.

COMMENT

This section of the Code encourages the non-judicial resolution of disputes. Such a resolution, however, may only include terms and conditions that a court could approve. For example, a nonjudicial settlement may not be used for an action otherwise illegal, or to terminate a trust in a manner not authorized by the Code. **If there are minors and others who cannot participate, it will be possible to use the virtual representation procedures of Article 3 to achieve the Agreement. Subsection (d) is a non-exclusive list of matters which may be agreed to in a non-judicial settlement agreement.** The section does not precisely define the “interested persons” whose consent is required to achieve a binding agreement, but the trustee’s consent would ordinarily be required.

III. Virtual Representation - General

Article 3

Section 301. Representation: basic effect

- (a) Notice to a person who may represent and bind another person under this article shall have the same effect as if notice were given directly to the other person.
- (b) The consent of a person who may represent and bind another person under this article shall be binding on the person represented unless the person represented objects to the representation before the consent becomes effective.
- (c) Except as otherwise provided in section 602, a person who, under this article, may represent a settlor who lacks capacity may receive notice and give binding consent on the settlor's behalf.
- (d) A settlor may not represent and bind a beneficiary under this article with respect to the termination or modification of a trust under subsection (a) of section 411.

COMMENT

This section and the ones that follow provide virtual representation for notice and consent for both nonjudicial settlements and judicial proceedings. Virtual representation was a change in Massachusetts law brought with the Probate Code. These provisions are consistent with the laws of many other states and with the Probate Code. **In many instances the need for guardians ad litem will be eliminated.**

IV. Virtual Representation – Who Can Represent Who?

Article 3

Section 302. Representation by holder of general testamentary power of appointment

To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default or otherwise, are subject to the power.

COMMENT

This section deals with the power of a holder of a general testamentary power of appointment to bind permissible appointees and takers in default, absent a conflict of interest. Revocable trusts and presently exercisable general powers of appointment are covered by Section 603.

Article 3

Section 303. Representation by fiduciaries and parents

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- (1) a conservator may represent and bind the estate that the conservator controls;
- (2) a guardian may represent and bind the ward or protected person if a conservator has not been appointed;
- (3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) a trustee may represent and bind the beneficiaries of the trust;

(5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

(6) a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed.

COMMENT

The Committee believes that subsections (2) and (6) create powers that are new to Massachusetts law. Conservators may represent and bind minor wards (or guardians of minor wards if no conservator has been appointed), agents with authority may bind their principal, trustees may represent and bind the beneficiaries of the trust, personal representatives may represent and bind persons interested in the estate, and a parent may represent and bind the parent's minor or unborn child if no conservator has been appointed.

Article 3

Section 304. Representation by person having substantially identical interest

Unless otherwise represented, a minor, incapacitated or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

COMMENT

The Committee believes that Section 304 includes concepts that were new to Massachusetts law prior to the adoption of the Probate Code. This section provides for virtual representation of substantially identical interests. An older sibling can sign for minor siblings, for instance, or for a sibling whose identity or location is unknown. Once again, the conflict of interest limitation is an important safeguard.