

2022 REBA Annual Meeting & Conference: *When Estate Planners and Real Estate Lawyers Don't Speak the Same Language*

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This program will review a number of topics that are common to both estate planning attorneys and real estate attorneys, but do not necessarily mean the same thing to each and have different implications.

- Powers of Attorney
- Life Estates and Allocation of Sale Proceeds
- Trusts, including:
 - Nominee Trusts and Reporting of Sale Proceeds
 - Trustee Certifications vs. Trustee Certificates under M.G.L. c. 184, § 35 vs. Trustee Certificates under M.G.L. c. 203E, § 1013
 - Self-Dealing
- Intestate Estates and Informal Probate
- Deeds of Distribution
- Estate Taxes and Reliance upon an Affidavit of No Estate Tax Due under M.G.L. c. 65C

POWERS OF ATTORNEY

- M.G.L. c. 190B, §§5-501 to 5-507
- Can be transaction specific
 - Form 10 – General Power of Attorney for Representing Seller
 - Form 11 – Limited Power of Attorney for Representing Seller at Closing
- Original Power of Attorney must be recorded or filed

Think beyond the present moment and anticipate the needs of the parties...

- Is the Principal's express intent that the Power of Attorney (POA) shall not be affected by the subsequent disability or incapacity of the Principal? AKA is it DURABLE?
- Does the POA name a successor/alternate Attorney in Fact (AIF)?
- Does the POA authorize AIF to delegate?
- Does the POA authorize AIF to act in a fiduciary capacity for the Principal?
- Does the POA authorize the AIF to sell, borrow, mortgage?
- Is the AIF the spouse/child of the Principal?
- Does the POA authorize self-dealing? Does the POA authorize gifting?
- Is there a non-revocation affidavit recorded with the documents being executed under POA in a current transaction?
 - M.G.L. c. 190B, § 5-505 – Affidavit by AIF stating that they did not have actual knowledge of termination or revocation, or of Principal's death is conclusive proof of the non-revocation or non-termination of the POA
 - REBA Form 1
- Does the AIF have the requisite knowledge to make affidavits on behalf of the Principal?
 - REBA Form 11A

Grantor Clause: title remains in Principal therefore Grantor/Mortgagor is the Principal

Mary Doe
NOT

John Doe, Attorney in Fact for Mary Doe

Execution: Principal's "Signature"

John signs Mary's name
Remainder can be printed or in
John's handwriting

/s/ Mary Doe
by John Doe her Attorney in Fact
under Power of Attorney,
recorded with (Registry of Deeds)
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Acknowledgement:

- Compliance with M.G.L. c. 222, § 15 or substantial equivalent
- AIF is the one who personally appears
- Voluntary Act/Free Act and Deed of Principal
- Defective acknowledgement cured after 10 years under M.G.L. c. 184, § 24 (not Registered Land) or within those 10 years by an affidavit by the notary public pursuant to M.G.L. c. 183, § 5B (*Bank of America, N.A. v. Casey*, 474 Mass. 556 (2016))

LIFE ESTATES

When Conveying:

- Life tenant must join in the deed or mortgage as Grantor/Mortgagor
- Affidavit by Remaindermen certifying that life tenant is still alive is needed when:
 - Purchaser is taking title subject to the life tenant's interest AND
 - Property is registered land
- Life tenant's interest has value
 - Valuation:
 - MassHealth – Social Security Administration Life Estate and Remainder Interest Table
(<https://secure.ssa.gov/apps10/poms.nsf/lnx/0501140120>)
 - Income/Estate Taxes - IRS actuarial tables prescribed under 26 U.S.C. § 7520 (<https://www.irs.gov/retirement-plans/actuarial-tables>)
 - 1099-S reporting of sale proceeds issued to BOTH life tenant and remaindermen.

When Conveying (cont'd)

- Deceased life tenant
 - Proof of death recorded (see REBA TS 71)
 - 26 U.S.C. § 2036 –Retained life estate interests are includable in the gross estate of the decedent
 - If life estate was reserved by the grantor, record Massachusetts and Federal Estate Tax Release and/or Affidavit of No Estate Tax under M.G.L. c. 65C, § 14(a) (see REBA Form 32 and 32A)

TRUSTS

Nominee Trusts

Trustee Certificates

Self-Dealing

- AKA Realty Trusts
- In order to deal with the trust estate, the Trustee must be directed by beneficiaries.
- Beneficiaries are named on a separate, usually unrecorded, Schedule of Beneficial Interests
- Are Nominee Trusts “true” trusts? **NO, ITS AN AGENCY RELATIONSHIP**
 - Medallion Realty Trust, 120 B.R. 245 (D. Mass. 1990) (beneficiaries are partners in a general partnership)
 - Apahouser Lock & Security Corp v. Carvelli; 26 Mass. App. Ct. 385 (1988)
 - Roberts v. Roberts, 419 Mass. 685 (1995)
 - Penta v. Concord Auto Auction, 24 Mass. App. Ct. 635 (1987)
 - Goodwill Enterprises, Inc. v. Kavanagh, 95 Mass.App.Ct. 856 (2019)
 - Guilfoil v. Secretary of the Executive Office of Health and Human Services, SJC-12922 (2021)

WOULD MUTC APPLY?? NO

- MUTC – Massachusetts Uniform Trust Code – M.G.L. c. 203E
 - Effective July 8, 2012
 - § 102 – “This Chapter applies to express trusts, charitable or noncharitable, of a **donative nature** and trusts created pursuant to judgment or decree that requires the trust to be administered in the manner of said express trusts.”

BUT . . .

- *In the Matter of the MacMackin Nominee Realty Trust*, 95 Mass. App. Ct. 144 (2019)
 - Nominee Trust established using same language as REBA Form 20 was found to be an express trust of a donative nature and therefore MUTC applies

TAKEAWAY:

POSSIBILITY OF MUTC APPLYING AND BEING ABLE TO RELY
UPON MUTC PROVISIONS

Issues:

- Appointment of Successor Trustee(s): if no specific person is identified, appointment by Beneficiaries
- Termination: title vests in Beneficiaries or Trustee(s) must distribute trust property to Beneficiaries
- Schedule of Beneficial Interest is not recorded
 - Who has the original?
 - Is it lost?

Trustee Certificates: M.G.L. c. 184, § 35 Trustee Certificate

- Used as proof of existence of a **non-testamentary trust** to avoid an indefinite reference under M.G.L. c. 184, § 25 (See REBA TS 53)
 - Executed under the **penalties of perjury**
 - Made by a **Trustee of Record**
 - **Identifies Trustee(s) and/or Beneficiaries**
 - **Authority of the Trustee(s) to act** with respect to real estate
 - Existence or nonexistence of “condition[s] precedent” or **other matters “germane to the affairs of the trust”**
 - **Binding on all Trustee(s) and the Trust estate** in favor of a purchaser/third party relying in good faith
 - **Most recently recorded** in the Registry where the land lies **controls**
- Land Court **Guideline 52** – certificates used on a transactional basis may not be used for subsequent transactions unless earlier certificate provides that parties interest in the title to the property may rely on the continuing existence of the trust until a later certificate establishes the termination of the trust.
- REBA Form 35

Trustee Certificates: M.G.L. c. 203E, § 1013 Trustee Certificate

- Evidence of existence of the trust provided by the Trustee to someone other than a beneficiary in lieu of providing the entire trust.
- Used commonly for personal property and to provide to financial institutions.
- May contain the following information:
 - Existence of trust and date trust instrument was executed;
 - Identity of the settlor;
 - Identity and address of the currently acting trustee;
 - Powers of the trustee;
 - Revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- Authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
- Trust's taxpayer identification number; and
- Manner of taking title to trust property.
- **May attach copies of excerpts from Trust and later amendments showing who has been designated as Trustee and the Trustee's power to act.**
- **Use to establish a Trustee of Record pursuant to TS 68.**

Trustee Certifications (Nominee Trust Certifications)

- Trust Certifications
 - Trust is still in full force and effect;
 - Hasn't been modified, amended, terminated or revoked.
- Nominee Trust Certificates
 - Identifies Trustees;
 - Trust is still in full force and effect;
 - Statement of direction by Beneficiaries (identifies price, property);
 - Status of Beneficiaries (of full age and competent);
 - Trust must allow for conclusive reliance upon certification by Trustee.

Land Court Guideline 51. Trusts: Conveyances to Trustees

- **Deeds**, mortgages and other instruments that convey title to a trustee or trustees may be accepted for registration **only when accompanied by the trust instrument or a certificate pursuant to G.L. c. 184 § 35, except:**
 - **(a)** if the **trust instrument or certificate is recorded or filed** for registration in another registry district or registration district in the Commonwealth, an attested copy of the trust instrument or certificate may be presented as an alternative to the original trust instrument, together with a certificate by an attorney, or given under oath by the trustee, certifying that the instrument or certificate of which the attested copy is provided is current, in force, and not the subject of any recorded amendment; or
 - **(b)** if the trust instrument or certificate is recorded or filed for registration in the same registry district, the filed document (or the recorded land record of it) may be shown as an alternative to the original trust instrument. The instrument of conveyance must have as grantees, mortgagees or other benefitted parties one or more trustees who are shown of record by the trust instrument or certificate to be trustees of the trust.

Land Court Guideline 52. Trusts: Conveyances By Trustees

- Conveyances by Trustees of a nominee trust are acceptable if
 - **(1) the instrument of conveyance is authorized by the terms** of the registered or recorded (previously or simultaneously) trust instrument or certificate given pursuant to G.L. c. 184 § 35, **and (a) a Trustee's Certificate** in substantially the form appended hereto as Exhibit A or Exhibit B is submitted, **or (b) the instrument of conveyance itself contains all such matters required to be set forth in a Trustee's Certificate; or**
 - **(2) Land Court approval has been obtained.**

Guideline 53 Trusts: Trustee's Deed for Nominal Consideration

- **Requirements:**
 - A trustee's deed containing a recitation of nominal consideration may be accepted for registration without prior Land Court approval when accompanied by a trustee's certificate, if authorized by the trust, or a certificate pursuant to G.L. c. 184 § 35, signed by at least one of the trustees, **certifying that all the beneficiaries who are natural persons are of full age and are competent and that all of the beneficiaries have assented to the conveyance for nominal consideration**
 - The requirements of this guideline address only the issue of a deed reciting nominal consideration; the requirements of other guidelines relating generally to instruments executed by trustees also must be satisfied.

- Remember to **read the Trust!!**
- Trustee Certificates should always contain **Jurats, not Acknowledgements.**
- Use the appropriate **REBA forms** whenever possible.
- Must be executed “**under the penalties of perjury.**”
- **Don’t contradict** the terms of the Trust instrument.
- Sole Trustee cannot be Sole Beneficiary – merger of legal and equitable title.
- Think about having **more than one Trustee** for continuity of authority.
- Include **Successor Trustee provisions** in M.G.L. c. 184, § 35 Trustee Certificates.
- M.G.L. c. 184, § 35 Trustee Certificates **MUST** be signed by a **Trustee “of record.” Review TS 68!!!**
- Obtain **Authorization and Direction of Beneficial Interest Holders** for your file.

- Think ahead and include more than just bare minimums in M.G.L. c. 184, §35 Trustee Certificates:
 - Include certification and third-party conclusive reliance language from Trust.
 - What happens upon termination of the Trust?
 - Self-dealing?
 - Delegation of Trustee powers to someone other than a co-Trustee (POA)?
 - Identify the beneficiaries??

- Violation of the Duty of Loyalty
- Defined under MGL c. 203E, § 802
 - ... a **sale, encumbrance or other transaction** involving the investment or management of trust property **entered into by the trustee for the trustee's own personal account** or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests shall be **voidable** by a beneficiary affected by the transaction . . . [emphasis added]
- § 802(c) - Presumed to be self-dealing if sale, encumbrance or other transaction involves:
 - Trustee's spouse
 - Trustee's descendants, siblings, parents or their spouses
 - Agent or attorney of the trustee; or
 - Corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

- Problem – sale, encumbrance or transaction is voidable by the affected beneficiary
- Regardless of price paid (*Vinal v. Gove*, 275 Mass. 235 (1931))
- What are the solutions? M.G.L. c. 203E, § 802(b)(1) through (5) and REBA TS 23
 1. Recorded trust or M.G.L. c. 184, § 35 Trustee Certificate expressly authorize self-dealing, OR
 2. Court of competent jurisdiction authorizes or ratifies the deed; OR
 3. Beneficiary does not commence suit contesting the transaction within the time allowed under c. 203E, § 1005; OR
 - TS 23 – within 3 years from the recording of the deed and no adverse claim on record
 4. Beneficiary consents, ratifies the transaction or releases the Trustee; OR
 - TS 23 – and trust does not contain spendthrift provisions and consent/ratification recorded
 5. Transaction involves a contract entered into prior to person becoming Trustee.
 6. TS 23 – recorded trust or M.G.L. c. 184, § 35 Trustee Certificate recites that third parties may conclusively rely upon instruments or documents executed by such trustees as being duly authorized.

PROBATE – REAL ESTATE

Intestate Estates and Informal Probate
Deeds of Distribution

- Massachusetts Uniform Probate Code (“MUPC”), G.L. c. 190B effective March 31, 2012, applies to decedents dying on or after March 31, 2012.
- The Code does not change the general rule **that real property vests in the heirs or devisees upon death** subject to the claims of a surviving spouse and the obligation to pay debts, claims, expenses of administration, and state and federal inheritance and estate taxes. *Lynde v. Vose*, 326 Mass. 621 (1951). See also G.L. c. 190B, §3-101; 1 BELKNAP, NEWHALL’S SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS §1:3 (5th ed. 1994).

- If decedent dies intestate:
 - Informal Probate Petition under §3-301 only addresses appointment of Personal Representative.
 - Formal Testacy Proceeding under §3-409 or Order of Complete Settlement under §3-1001 necessary to determine identity of heirs.

WHY IS THAT IMPORTANT?

Find out what the heirs intend to do with the property ...

- If the Personal Representative will be selling the real property, PR must obtain a license to sell under M.G.L. c. 202:
 - Decree for Sale of Real Estate within 1 year of the decedent's date of death, OR
 - Decree for Sale of Real Estate for the payment of debts, legacies and charges of administration
- If property is not being sold, and intent is for the heirs to retain ownership or for one to buy out the interest of the remaining heirs, how do we know who owns the property?

- **G.L. c.190B, § 3-906: Distribution in Kind; Valuation; Method**

(a) Except as restricted or otherwise provided for by will or order of the court, a personal representative may distribute assets of the estate in kind or partly in cash and partly in kind and pro rata or not pro rata at then current values as between distributees.

- **G.L. c.190B, § 3-907: Distribution in Kind; Evidence**

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

Issues:

- What is the meaning of “in kind”? Not defined under the Code.
 - “in kind” - made in a form other than money; made without conversion (as of assets) into money, as in an in-kind distribution of assets. (<https://www.merriam-webster.com/dictionary/in-kind>)
- The Land Court will not accept a Deed of Distribution.
 - Requires a Land Court Order on a Complaint for Certificate after Death (Method 2 under Memorandum Re: Land Court Guideline 14. Death: The Effect of Death upon Registered Land Titles (revised 10-2019)).
- Title Insurance Underwriters recommend not recording Deeds of Distribution, yet the statute requires a Deed of Distribution if there is a distribution “in kind”.
 - Deed of Distribution does not convey title but is merely a receipt.
 - M.G.L. c. 190B, § 3-908: Distribution; right or title of distributee
Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

ESTATE TAXES

- Federal Estate Tax Lien – IRC § 6324(a)(1)
 - Arises automatically at death if there is a tax liability
 - Lien upon the gross estate of the decedent
 - 10 years from date of death
 - REBA TS 3 – clear lien from title when:
 - Affidavit (see REBA form 32) recorded;
 - Recording of REBA form 32A affidavit with proof of payment of the amount shown on the tax closing letter, or tax closing letter shows no amount due;
 - Recording of REBA form 32A affidavit with proof of payment of the amount shown due, or if the amount shown due is zero, on an account transcript issued by the IRS showing transaction code 421 with “Closed examination of tax return” explanation;
 - Recording of IRS certificate of discharge/certificate of release or non-attachment of the lien; or
 - When non-probate property is transferred in an arm’s length transaction.

- Massachusetts Estate Tax Lien – M.G.L. c . 65C
 - Arises automatically at death
 - Lien upon the gross estate of the decedent
 - 10 years from date of death
 - REBA TS 24 – go directly to Paragraph 24.3
 - Land is free of the lien sooner than 10 years when:
 - Proof of payment of the amount shown due on the MA estate tax closing letter so long as:
 - the land is reported on the probate inventory OR
 - If non-probate property , there is documented evidence that the property was listed on the estate tax return;
 - Issuance of a Certificate Releasing Massachusetts Estate Tax Lien by the MA Commissioner of Revenue and recording of the same; or
 - Record affidavit (see REBA Form 32) that the decedent’s estate does not meet the “filing threshold” under c. 65C aka “does not necessitate the filing of a Massachusetts Estate Tax return”.