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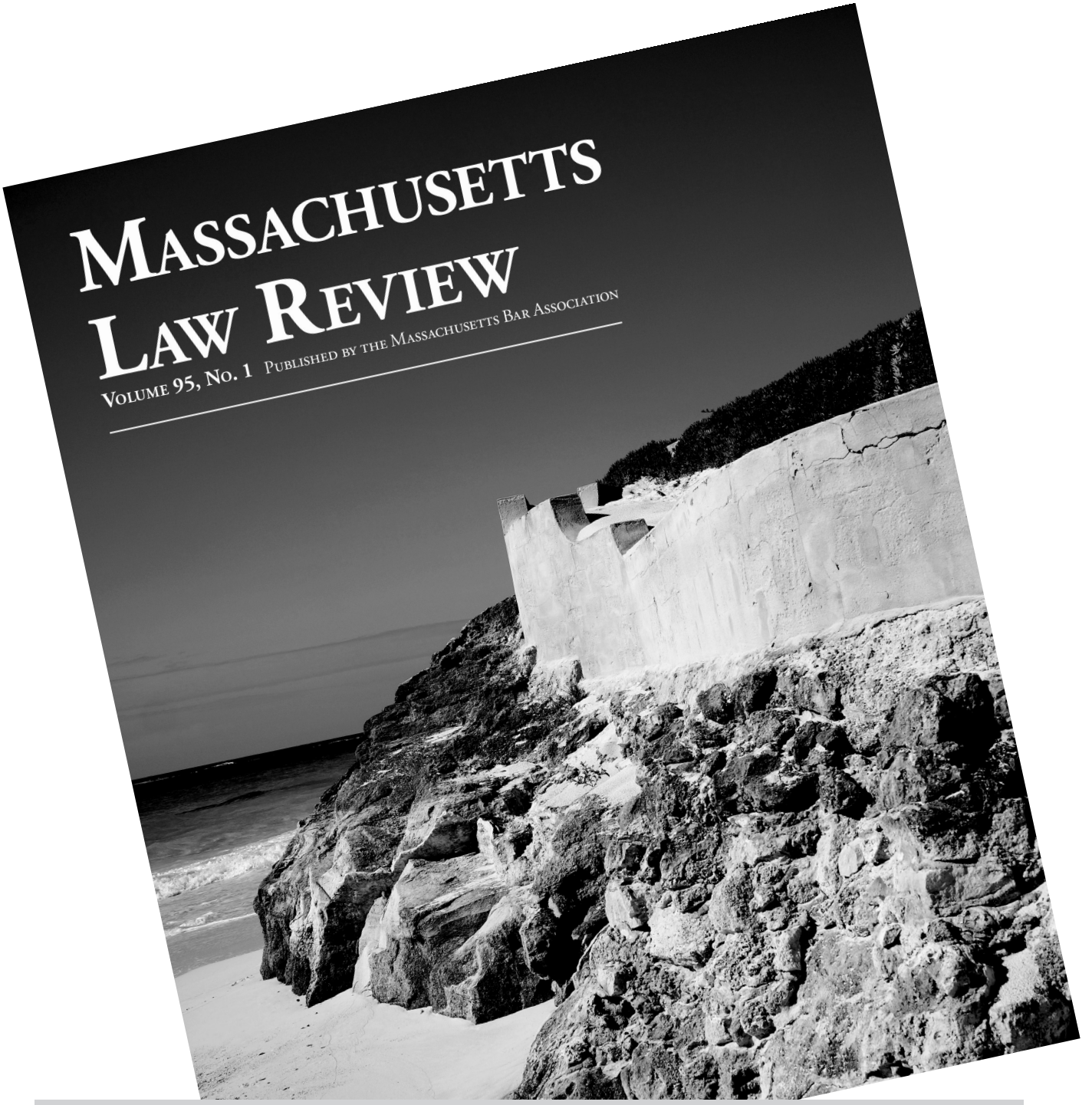

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IN THIS ISSUE

CORRECTION: In the print version of *Massachusetts Law Review* Volume 96, No. 1, the authors' names were inadvertently omitted from the Case Comment and Book Review. Daniel Marx authored the Commonwealth v. Walczak case comment. Dean Andrew Mazzone authored the book review of *Saving Justice: Watergate, the Saturday Night Massacre, and Other Adventures of a Solicitor General*, by Robert H. Bork (Encounter Books, 2013).

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Bullfinch Square in Cambridge comprises the Registry of Deeds and Probate Court (1896), the Clerk of Courts Building (1889), the Third District Court Built (1931) and the Middlesex County Courthouse (1814-1816), designed by noted architect Charles Bulfinch. The original courthouse was given by Andrew Craigie as part of a scheme to develop the then rural East Cambridge. Cover photo by Roger Michel.

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The Massachusetts Uniform Trust Code: Context, Content, and Critique

By Courtney J. Maloney, Esq. & Professor Charles E. Rounds, Jr

Courtney J. Maloney is an estate planning and probate associate at Brenda G. Levy Associates, LLC in Boston, Massachusetts.

Charles E. Rounds Jr. is a professor of law at Suffolk University Law School; an academic fellow of The America College of Trust and Estate Counsel; and a co-author, with his son, of Loring and Rounds: A Trustee's Handbook. His practice specialty is fiduciary litigation consulting.

I. Introduction

The provisions of the Massachusetts Uniform Trust Code ("MUTC"), generally effective July 8, 2012, are set forth in chapter 203E of the Massachusetts General Laws. The MUTC is a version of the Uniform Trust Code ("Official UTC"), which was drafted by the National Conference of Commissioners on Uniform State Laws.[1] In 2000, the Conference approved and recommended for enactment the Official UTC in all the states.

In 2005, an ad hoc committee was formed in Massachusetts to review the Official UTC for possible enactment in Massachusetts. The Ad Hoc Massachusetts Trust Code Committee (the "Committee") included representatives of the bar from private practice, financial institutions, and private trustee offices, and met on a monthly basis from March, 2005 through February, 2008, to study the Official UTC and determine if Massachusetts should adopt it, or some version of it. The MUTC is the product of those deliberations. It regulates only express common law trusts of a donative nature (hereinafter "covered trusts"). Most provisions of the MUTC are applicable to all trusts created before, on, or after the effective date of July 8, 2012, except as follows:[2]

- section 112, which provides that the rules of construction applicable to wills will be applicable to all trusts, is only applicable by its terms to a revocable trust created or amended by a settlor after the effective date of the MUTC;[3]
- section 408(h), which deals with a trust for care of an animal, and provides that in the event of a trust for the benefit of an animal, the measuring lives for the rule against perpetuities will be based on the life of the beneficiary animal, will not apply to trusts created before the effective date of the MUTC;[4]
- section 502(a), which provides that a spendthrift provision will only be valid "if it restrains both voluntary and involuntary transfer of a beneficiary's interest," will not apply to trusts created before the effective date of the MUTC;[5]
- section 602(a), which provides that a trust is deemed revocable unless the terms of the trust expressly provide that the trust is irrevocable, will not apply to trusts created before the effective date of the MUTC;[6] and
- section 703(a), which provides that co-trustees who are unable to reach a unanimous decision may act by majority decision, will not apply to trusts created before the effective date of the MUTC.[7]

The purpose of this article is to contextualize the MUTC, that is to say, explain how the MUTC intersects with the Massachusetts common law of trusts in all its vastness, as well as explain its location in the constellation of Massachusetts statutes (including the Massachusetts Uniform Probate Code[8] ("MUPC"), still very much in force), that deal directly or indirectly with the trust relationship. To that end, a summary of the key provisions of the MUTC has

1. The Official UTC is available at http://www.uniformlaws.org/shared/docs/trust_code/UTC_Final_rev2014.pdf

2. For commentary, effective date provisions, and the exceptions to the effective date, see Report of the Ad Hoc Massachusetts Uniform Trust Code Committee (updated post-enactment), available at http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/upc/mutc-ad-hoc-report.pdf.

3. MUTC §112 (2012).

4. *Id*. §408(h).

5. *Id*. §502(a).

6. *Id*. §602(a).

7. *Id*. §703(a).

8. The MUPC can be found at Mass. Gen. Laws ch. 190B.

been provided, identifying the numerous traps that the codification has set for the unwary settlor, trust scrivener, and trustee. Features that could be adverse to the interests of beneficiaries are identified as well. For the purposes of this article the term common law means the common law as enhanced by equity.

II. No Two State Trust Codes are the Same

Versions of the Official UTC have been enacted in 25 jurisdictions (Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming). It is becoming increasingly evident that all this codification is perversely causing the law of trusts to become less uniform nationally. Indeed, the National Conference of Commissioners on Uniform State Laws had at one time maintained a running state-by-state inventory of deviations from the Official UTC titled "Significant Differences in States' Enacted Uniform Trust Code."[9]

States adopting the Uniform Trust Code are "encouraged" to reenact their versions of the Uniform Prudent Investor Act as Article 9 of the Uniform Trust Code. The Massachusetts Prudent Investor Act, approved December 4, 1998, however, remains a freestanding codification.[10] A 2011 article in the American College of Trust and Estate Counsel Journal discusses the substantial heterogeneity that prevails today in trust investment law, notwithstanding the wholesale enactment of versions of the Uniform Prudent Investor Act, whether as Article 9 of the Uniform Trust Code or as a freestanding body of legislation.[11]

III. Much Massachusetts Common Law of Trusts remains independent of the MUTC

While the MUTC has been advertised as a centralized repository of Massachusetts trust law doctrine, nothing could be further from the truth. The territory of the Massachusetts common law of trusts is vast, virtually limitless. The MUTC merely stakes out the occasional lot within that vast expanse. The practitioner who fails at the outset to conduct a general common law analysis of the rights, duties, and obligations of the parties to a particular trust relationship does so at his peril. Here is just some of the trust-related common law doctrine that has been untouched by the MUTC:

- The express trust relationship itself is not even defined by the MUTC.
- Express trusts of a "non-donative nature" are not even regulated by the MUTC.
- Implied-by-law trusts are not regulated by the MUTC, such as the following:
  - constructive trusts;
  - resulting trusts; and
  - purchase money resulting trusts.
- There is much critical common law doctrine pertaining even to covered trusts that has not been codified by the MUTC:
  - With the exception of some doctrine pertaining to the reserved right of revocation, the equitable power of appointment doctrine has generally not been codified.[12]
  - Equity maxims as applied to trusts are not codified.
  - The common law *cy pres* doctrine applicable to charitable trusts is not codified.
  - Traditional laches principles still govern (1) covered trust reformation actions and (2) restitutionary actions for the unjust enrichment of parties to the covered trust.
  - Not all the common law duties of the trustee are acknowledged, including the critical duty of a trustee to defend the trust.
  - Not all the common law powers of a trustee are stated, such as the power to decant.[13]
  - The Massachusetts common law doctrine that notice to the successor trustee of a predecessor's breach of trust is deemed notice to the beneficiary for purposes of running the applicable statute of limitations against the predecessor has been neither repudiated nor codified.
  - The trust counsel-trustee agency relationship is not codified.[14]
  - Not all of the equitable remedies for common law breaches of trust are acknowledged.
  - Unitrust conversions are still governed by equitable principles.
  - Applicability of the "common law" statute of uses to certain covered trusts is not addressed.
  - Restraint on alienation doctrine in the trust context is not codified.
  - The common law component of the Massachusetts Statutory Rule Against Perpetuities applicable to covered trusts is not codified.[15]

9. It no longer does so, but it does maintain an inventory for four states (Michigan, Vermont, North Dakota and Arizona), available on the Internet at <http://uniformlaws.org/Shared/Docs/UTC%20Chart%20MI%20VT%20ND%20AZ.pdf>.

10. Mass. Gen. Laws ch. 203C. There are no provisions in Article 9 of the MUTC, it being reserved "for future use."

11. Trent S. Kiziah, *Remaining Heterogeneity in Trust Investment Law after Twenty-Five Years of Reform*, 37 ACTEC L.J. 317 (2011).

12. MUTC §602. A Uniform Statutory Powers of Appointment Act is on the Uniform Law Commission's drawing board.

13. *See* Morse v. Kraft, 466 Mass. 92 (2013) (explaining that a trustee of a certain discretionary trust had implied common law and equitable decanting authority).

14. For a general discussion of the attorney-client agency relationship from the common law perspective, *see* Charles E. Rounds, Jr., *Lawyer Codes are Just about Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust, and Property Principles that Regulate the Lawyer-Client Fiduciary Relationship*, 60 Baylor L. Rev. 771 (2008).

15. MUPC §2-901.

- ¤ The procedural mechanics of assigning/reaching equitable interests under covered trusts are not codified.
- ¤ Breach-of-trust damages computation methodologies are not codified.
- ¤ The doctrine of the bona fide purchaser in the trust context is not codified.
- ¤ The merger doctrine is only partially codified.
- ¤ The spendthrift doctrine only partially codified.
- ¤ A trustee's common law right, if any, to submit an internal trust dispute to arbitration is not codified.[16]
- ¤ The common law rules of construction applicable to covered trusts (as opposed to MUPC rules of construction applicable to such trusts) are not codified.
- ¤ The reasonableness of a trustee's compensation is determined under common law principles, subject to terms of the trust.[17]
- ¤ In a pour-over situation, the personal representative is generally accountable to the trustee, not the trust beneficiaries.[18]

IV. Much pre-existing Massachusetts Statutory Law Applicable to Covered Trusts is Neither Repealed nor Folded into the MUTC

Numerous statutes codifying aspects of the Massachusetts common law of trusts have neither been repealed nor folded into the MUTC, and thus remain on the books. The following statutes remain in full force and effect, notwithstanding the MUTC's enactment:

- Antilapse doctrine made applicable to equitable interests under covered trusts.[19]
- The statute of frauds applicable to the entrustment of land.[20]
- The general statute of limitations for breaches of fiduciary duty by trustees.[21]
- The procedural mechanics of exercising equitable testamentary powers of appointment.[22]
- The Massachusetts Prudent Investor Act:[23]
  - ¤ codifies trust investment protocols;[24]
  - ¤ creates a sole benefit of the beneficiary default principle;[25] and
  - ¤ bestows primary liability on a trustee's duly-appointed agents.[26]
- The Massachusetts Principal and Income Act ("MUPIA").[27]
- Although the MUTC codifies the right of the post-mortem creditor of the settlor of a revocable covered trust to gain access to the trust property, the procedures that must be followed by the creditor in order to do so are set forth elsewhere, namely in the MUPC.[28]
- MUPC statutory rules of construction applicable to covered trusts deferred to by the MUTC.[29]
- Disclaimer doctrine in the covered trust context.[30]
- Statutory Rule Against Perpetuities applicable to equitable interests under covered trusts.[31]
- Statutory substitute for the Doctrine of Worthier Title in context of equitable interests under covered trusts.[32]
- The statutory default meaning of terms "per stirpes" and "by right of representation" in context of equitable interests under covered trusts.[33]
- The statutory interest rate on equitable damages for breach of trust.[34]
- Notice of breach of fiduciary duty in context of a holder in due course applicable to trusts under the Uniform Commercial Code.[35]
- Process for securing the rights of a judgment creditor to the debtor's entrusted land against bona fide purchasers and other such competing claimants.[36]
- Statutory regulation of charitable trusts:
  - ¤ statutory presumption of general charitable intent;[37]

16. MUTC §816(23) grants the trustee of a donative-type express trust the *power* to "resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration or other procedure for alternative dispute resolution." The preliminary question of whether the trustee would have the right to do so in a given situation is not addressed in the MUTC. Whether the trustee would have such a right in a given situation is determined by common law principles, and possibly the provisions of the Massachusetts Uniform Arbitration Act for Commercial Disputes, Mass. Gen. Laws ch. 251.
17. MUTC §708.
18. In re Claflin, 336 Mass. 578 (1958).
19. MUPC §2-707.
20. Mass. Gen. Laws ch. 203, §1 (2012).
21. Mass. Gen. Laws ch. 260, §11 (2012).
22. MUPC §2-608.
23. Mass. Gen. Laws ch. 203C (2012).
24. *Id.* §2.
25. *Id.* §6.
26. *Id.* §10.
27. Mass. Gen. Laws ch. 203D (2012).
28. MUPC §3-803(b).
29. MUTC §112.
30. MUPC §2-801.
31. *Id.* §2-901.
32. *Id.* §2-711.
33. *Id.* §2-709.
34. Mass. Gen. Laws ch. 231, §6H (2012).
35. Mass. Gen. Laws ch. 106, §3-307 (2012).
36. Mass. Gen. Laws ch. 223, §67 (2012).
37. Mass. Gen. Laws ch. 12, §8K (2012).

- ¤ statutory limitation on the liability of trustees of charitable trusts;[38]
- ¤ the Attorney General's statutory duty to oversee charitable trusts and the Attorney General's statutory grant of authority and standing to seek their enforcement in courts;[39] and
- ¤ statutory discretion in the Attorney General to conduct investigations of misapplication of charitable trust funds or breach of trust.[40]

- The Massachusetts Uniform Arbitration Act may or may not regulate the arbitration of internal trust disputes, but the MUTC does not.[41]
- No further inquiry rule inapplicable to the investment of fiduciary funds in the trustee's proprietary mutual funds.[42]
- The statutory right, if any, of a conservator or guardian of a trust settlor to exercise a reserved right to revoke the trust not in the MUTC.
- Professional trustee statutory consumer disclosure statement.[43]
- Access of creditors to life insurance proceeds postmortem.[44]
- Judicial allocation of attorneys' fees among the participants to a trust dispute.[45]

V. The Structure of the Massachusetts Uniform Trust Code

The MUTC replaces neither the general principles of equity applicable to Massachusetts covered trusts nor the Massachusetts general common law of trusts itself.[46] It only makes certain doctrinal modifications. This section catalogs those modifications and explains the doctrinal context of each in a format that we hope is practitioner-friendly.

A. Types of trusts not covered

The MUTC exempts express trusts of a non-donative nature from its purview.[47] Presumably the exemption would cover most nominee trusts whose shares of beneficial interests vest *ab initio*, the express trust that terminates in favor of the settlor's probate estate, the revocable inter-vivos trust whose sole purpose is property management, the non-commercial trust whose purpose is to secure property rights, and the non-commercial trust whose purpose is to securitize property rights. The MUTC expressly exempts procedural equitable remedies, such as the constructive trust and the resulting trust, as well as trusts that are instruments of commerce, such as the Massachusetts business trust.[48]

B. Only type of trust covered is "the express trust of a donative nature"

While the Official UTC covers all express trusts, the focus of the MUTC is much narrower.[49] It captures just the "express trust of a donative nature," which we are calling for purposes of this article the "covered trust."[50] The revocable donative-type trust; the irrevocable donative-type trust; the charitable trust; and certain non-common-law trust arrangements that are creatures of the MUTC, specifically the purpose trust and animal trust; are the major categories of covered trust.

i. Revocable covered trusts

When it comes to the rights, duties, and obligations of the parties, under the Massachusetts common law of trusts, the rules governing revocable covered trusts and irrevocable covered trusts substantially diverge. The MUTC breaks no new ground in this regard, except for the imposition of a default presumption of revocability.[51] By revocable trust the MUTC means a trust in which the settlor, and only the settlor, has a right of revocation, either expressly, or by implication, such as by the reservation of an untrammeled right to amend the trust or demand principal from the trustee.

a. Rules of construction only applicable to revocable covered trusts

MUTC section 112 purports to make rules of construction "that apply in the commonwealth to the interpretation of and disposition of property by will" applicable to a donative-type trust under which the settlor has reserved a right of revocation, and which was "intended to dispose of the settlor's property at death, whether under will or otherwise and whether the trust was funded at the time of the settlor's death." What is contemplated by the phrase "whether under will or otherwise" in this context, namely in a section devoted to the revocable inter-vivos trust, is unexplained. Could it have something to do with pour-overs? This mysterious language does not appear in the Official UTC.[52] The Massachusetts Uniform Probate Code has two instrument-construction segments in force and effect, one that applies only to wills (sections 2-601 to 2-610) and one that applies to wills "and other governing instruments" (sections 2-701 to 2-711). The comment to section 112 of the Official UTC proffers an explanation of the difference between a rule of construction and a constructional preference:

> A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoid [sic]

38. Mass. Gen. Laws ch. 231, §85K (2012), to the extent not preempted by the Federal Jones Act.
39. Mass. Gen. Laws ch. 12, §8 (2012).
40. *Id.* §8H.
41. *See generally* Mass. Gen. Laws ch. 251 (2012).
42. Mass. Gen. Laws ch. 167G, §3(11) (2012).
43. Mass. Gen. Laws ch. 203, §4B (2012).
44. Mass. Gen. Laws ch. 175, §125 (2012).
45. Mass. Gen. Laws ch. 215, §39B (2012).
46. MUTC §106.
47. *Id.* §102.
48. For a general discussion of the Massachusetts business trust, *see* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open-End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U J.L. & Bus. 473 (2007).
49. Official UTC §102.
50. MUTC §102.
51. *Id.* §602.
52. Official UTC §112.

illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms.[53]

b. Presumption of revocability of covered trusts

Under MUTC section 602, a settlor may revoke or amend the terms of a covered trust unless its terms expressly provide that the settlor may not do so. This revocability presumption applies only to trust instruments executed on or after July 8, 2012.[54] A trust instrument executed before that date is presumed to create an irrevocable trust, unless its terms expressly provide otherwise.

c. Rights and powers of settlor of revocable covered trusts

A settlor of full age and capacity of a revocable trust is considered to have all of the rights in the property in the trust as if he owned it outright and free of trust. A settlor of a revocable trust has the power to revoke the trust, and inherent in that power to revoke is the lesser power to amend the trust. The MUTC deviates from the Official UTC by requiring literal compliance with the procedures for revocation/amendment that are set forth in the trust.[55] The settlor also retains the right to control the equitable interests of the beneficiaries under the trust.[56]

Settlor's right to revoke or amend the trust personally or through agents and surrogates.

A settlor authorized to revoke a trust, or amend its terms, may do so by following procedures for revocation that are set forth in the terms of the trust. The Official UTC would enforce a revocation/amendment that substantially complies with the method of revocation/amendment specified by the settlor in the terms of the trust.[57] The MUTC, on the other hand, requires that there be literal compliance.[58] In the absence of a specified method for revocation/amendment in the terms of the trust, revocation/amendment may be effected by any method manifesting clear and convincing evidence of the settlor's intent to revoke/amend.[59] A settlor's powers with respect to revocation/amendment may be exercised by an agent of the settlor only if the agent is authorized by the terms of the trust *and* the terms of the agency to exercise those powers.[60]

The Official UTC's version of section 602, specifically section 602(f), provides as follows: "A [conservator] of the settlor or, if no [conservator] has been appointed, a [guardian] of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the [conservatorship] or [guardianship]." There is no comparable provision in the MUTC.

The rights of a settlor of a revocable covered trust who is of full age and legal capacity.

While the settlor of a revocable covered trust is of full age and legal capacity and holds a right of revocation, the settlor is deemed to have all the rights in the trust property that he would have if he owned the property outright and free of trust. The only limitation on his access to the property is the procedures he must follow, if any are specified in the terms of the trust, to gain access to the property, either by exercising his right of revocation or otherwise.

Rights of beneficiaries subject to control of settlor.

While the settlor of a revocable covered trust is of full age and legal capacity and holds a right of revocation, the contingent equitable property rights of all the beneficiaries of the trust are terminable at the will of the settlor.[61] It is as if those property rights were non-existent.

d. Duties and obligations of trustee of a revocable covered trust

The duties and obligations of a trustee under a revocable covered trust depend in large part on the settlor's capacity. Under the common law, a trustee is generally expected to take directions from a competent settlor who has retained a right to revoke, and in most cases, the trustee will be held harmless for doing so. However, the responsibility to ascertain the capacity of the settlor falls on the shoulder of the trustee. The trustee's duties will shift upon the incapacity of the settlor.

Duties when settlor of full age and legal capacity.

The MUTC generally tracks the common law duties of a trustee of a revocable trust to a settlor with full legal capacity. It is settled law in the United States that a trustee is the constructive agent of the holder of a power of revocation, and the trustee is therefore constructively subject to the laws of agency while the settlor is of the requisite mental capacity. While the settlor is of full age and capacity, the trustee will owe fiduciary duties exclusively to the settlor, and generally has no duty to communicate with other beneficiaries, and in fact, most likely owes a fiduciary duty to the settlor not to.[62] The trustee, without incurring liability, may follow the direction of the settlor, even if contrary to the terms of the trust.[63] The MUTC creates the technical requirement that the trustee may resign, as long as the trustee provides 30 days' notice to the settlor (and any co-trustees) before resigning.[64]

Duties when settlor not of legal capacity.

Upon the incapacity of a settlor of a revocable trust, the trustee's fiduciary duties intensify. He must now be mindful of the equitable rights of the other beneficiaries, not just the settlor's.[65] The MUTC requires that the trustee must provide notice to qualified beneficiaries within thirty days of the trust's becoming irrevocable.[66]

e. Liabilities of settlor of a revocable covered trust

Since the settlor is afforded particular rights and powers with his right of revocation, he is also exposed to additional liabilities due to his retention of control over the trust and trust property. Generally, the subject property of the trust will be reachable by the

53. *Id.*

54. For the effective date provisions and the exceptions to the effective date, see Report of the Ad Hoc Massachusetts Uniform Trust Code Committee, available at http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/upc/mutc-ad-hoc-report.pdf.

55. Official UTC §602(c); MUTC §602(c).

56. MUTC §603(a).

57. Official UTC §602(c).

58. MUTC §602(c).

59. *Id.*

60. *Id.* §602(e).

61. *Id.* §603(a).

62. *Id.*

63. *Id.* §808(a).

64. MUTC §705(a)(1).

65. *Id.* §603(b).

66. *Id.* §813(b).

settlor's creditors and later by the creditors of the settlor's estate, to the extent the property would be reachable were the settlor to own the property outright and free of trust.[67] This has been the state of the common law of trust for some time in Massachusetts.[68] The MUTC breaks no new ground here. The MUTC deviates from the common law, however, providing that a settlor will be liable for the obligations of a trustee if the trustee of the revocable covered trust holds an interest as a general partner.[69]

f. Limitation on action contesting validity of revocable covered trust

MUTC section 604 sets forth the limitations on an action contesting the validity of a revocable trust. A judicial proceeding may be commenced to contest the validity of a revocable trust within the earlier of: "(1) [one] year after the settlor's death; or (2) 60 days after the trustee sent the person a copy of the trust and a notice informing the person of the trust's existence, the trustee's name and address and the time allowed for commencing a proceeding."[70]

ii. Irrevocable noncharitable covered trusts

The trustee of a revocable noncharitable covered trust has a fairly easy job of it when it comes to balancing the equitable property interests of the various beneficiaries. At least when the settlor is of full age and legal capacity, all the trustee need worry about is the settlor, whom equity deems to possess a fully vested interest in the trust property.

The task of the trustee of the typical irrevocable noncharitable covered trust is more challenging. He or she must balance and accommodate the equitable property interests of the current beneficiaries and the remainder beneficiaries. Some equitable property interests are likely to be contingent. Some beneficiaries are likely to be unborn and unascertained. While much of the common law that regulates the rights, duties, and obligations of the parties to an irrevocable noncharitable covered trust has been left alone by the MUTC, it has made some effort to regulate how trustees and courts accommodate the due process rights and property rights of the beneficiaries, particularly the unborn and unascertained beneficiary. For example, it introduces the concept of the qualified beneficiary, which, as we shall see, is less than meets the eye.[71] Probably the MUTC's most radical feature—perhaps its only truly radical feature—is its five-year statute of ultimate repose.[72] On paper, at least, it can run against a beneficiary who has never been made aware of his beneficiary status. Later we consider whether there may be less than meets the eye here, as well. In this section on the irrevocable noncharitable covered trust, we address the general default rights of the trustee.

The trustee's external and internal liabilities.

The trustee of an irrevocable noncharitable covered trust risks two types of liability: external legal liability to third parties in contract and tort as holder of the legal title to the trust property and internal equitable liability to the beneficiaries for breaches of trust. As to the trustee's external liability in contract and tort, that is dealt with in MUTC section 1010. Its caption, "Limitation on Personal Liability of Trustee," is misleading. It has nothing to do, at least directly, with the trustee's personal liability *to the beneficiaries*.

First, the trustee's external contractual liability: the MUTC provides that "[e]xcept as otherwise provided in the contract, a trustee shall not be personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee, in the contract, disclosed the fiduciary capacity."[73] In other words, it is the trust estate that is on the hook, not the trustee personally. As to torts committed by the trustee against third parties, "[a] trustee shall be personally liable for torts committed in the course of administering a trust or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault."[74] If the trustee is not personally at fault, the tort victim's only recourse is against the trust estate. The trustee is personally off the hook.

Now that we have gotten the trustee's external liabilities out of the way, we turn our attention to the trustee's internal liabilities *to the beneficiaries*, which directly or indirectly take up the lion's share of the MUTC, and therefore this article.

a. Duties, powers and internal liabilities of the trustee of an irrevocable noncharitable covered trust

Under the Massachusetts common law of trusts, the trustee owes the beneficiary five fundamental duties: (1) the duty of prudence, (2) the duty to carry out the terms of the trust, (3) the duty of undivided loyalty (4) the duty to give personal attention to the affairs, a duty that is tempered by a right to prudently delegate ministerial functions and certain fiduciary discretions, and (5) the duty to account. Assorted specific duties are imposed on the trustee upon assuming office, during the trust's administration, and at the termination of the trusteeship or the trust. Even in the absence of an express grant of powers in a statute and/or in the terms of the trust, a trustee would have all the inherent power and authority he needs to properly carry out his lawful duties to the beneficiaries. A trustee may be held personally liable for a breach of a duty that the trustee owes to the beneficiary. The MUTC generally leaves much of this core doctrine undisturbed, although it does do some codifying at the margins. Here are the highlights.

i. Upon assuming office of trustee

Upon the acceptance of the office of trustee, the trustee will have a common law duty to the beneficiary to administer the trust. The designated trustee accepts the trusteeship by substantially complying with a method of acceptance provided in the terms of the trust, by words or conduct (*e.g.*, by accepting delivery of trust property, by exercising powers as trustee or by performing duties as trustee).[75] The MUTC breaks no new ground here. It does purport to impose an administrative duty on the trustee to inform the qualified beneficiaries of the acceptance.[76] The concept of the qualified beneficiary, one of the MUTC's innovations, we take up later. It is likely, however, that the trustee more or less had such a duty to inform under Massachusetts

67. *Id.* §505(1), (3).

68. *See, e.g.,* State St. Bank & Trust Co. v. Reiser, 7 Mass. App. Ct. 633 (1979) (setting forth the common law when it comes to the access of postmortem creditors of the deceased settlor of a revocable trust, *i.e.*, the creditors of the settlor's estate).

69. MUTC §1011(d).

70. *Id.* §604(a).

71. *Id.* §103.

72. *Id.* §1005(c).

73. *Id.* §1010(a).

74. *Id.* §1010(b).

75. MUTC § 701(a).

76. *Id.* §813(b).

common law even before the MUTC's enactment.

ii. During the administration of the trust

A trustee has common law duties and powers that come with the office. If the trustee breaches a duty that is owed to the beneficiary, he can be held personally liable for so doing. The MUTC acknowledges some of these duties and powers.

Duties of the trustee.

The MUTC acknowledges some of the common law duties that a trustee owes to the beneficiaries of the trust. The MUTC, for example, acknowledges the common law duty of a trustee to act in good faith and in accordance with trust terms and interests of beneficiaries, as well as the duty to administer the trust in good faith.[77] The MUTC in its silence leaves undisturbed the common law duty of the Massachusetts trustee to defend the terms of the trust. The MUTC imposes some additional duties on the trustee to keep the qualified beneficiaries informed of certain housekeeping matters, that is to say duties that are imposed over and above what are already imposed by the common law. In the words of the Official UTC, beneficiaries whose interests are remote and contingent "are not likely to have much interest in the day-to-day affairs the trust."[78] Here are some of those additional duties:

- the duty to inform qualified beneficiaries upon trust becoming irrevocable;[79]
- the duty to inform qualified beneficiaries of proposed transfer of principal place of administration;[80] and
- the duty of trustee relative to reduction of property or termination of a trust for care of animal.[81]

Powers of the trustee.

The MUTC catalogues some general inherent powers afforded a trustee under the common law, as well as some specific powers that are expressly granted in the typical trust instrument. At common law, a trustee is in any case vested with any power not specified in a statute and/or the terms of the trust if the trustee would need to possess that power in order to properly execute a lawful duty. This remains the case post-enactment of the MUTC.

The common law generally allows a trustee to exercise discretionary dispositive powers bestowed upon the trustee by the settlor. The MUTC breaks no new ground in this regard when it comes to trusts whose beneficiaries are designated and ascertainable with the period of the rule against perpetuities.[82] It does break new ground, however, in authorizing the enforcement of purpose trusts. A purpose trust is a non-charitable trust that lacks an ascertainable beneficiary.[83] The trustee is granted the specific dispositive power to select a beneficiary from an indefinite class.[84] Such arrangements were not appreciated by the common law, to say the least.

iii. Upon vacating office of trustee and upon termination

The trustee is saddled with residual common law duties upon vacating the office of trustee and upon the termination of the trust. The MUTC generally defers to common law in this regard, although there is some codification at the margins.

Upon vacating the office of trustee.

The trustee may resign with court permission, or in accordance with the terms of the trust.[85] The MUTC breaks no new ground in this regard. In addition, it authorizes a trustee to resign upon thirty days' notice to any co-trustees and the qualified beneficiaries.[86] There is less to this than meets the eye. Here is the catch: the trustee generally remains on the hook until a qualified successor trustee is in place to take the legal title. The MUTC endorses the common law principle that the trustee must "expeditiously" deliver the trust property to the person entitled to it.[87]

Distribution upon termination in ordinary course.

Under the common law, a trustee of a naturally terminated trust has continuing fiduciary responsibilities. The trustee's duty of confidentiality, for example, never goes away, absent special facts. Nor is the trustee relieved of his general fiduciary duties until the trustee is done "winding up" the trust's administration, including making distributions in a way that is consistent with the trust purposes and the interests of the beneficiaries. The MUTC does some supplemental codifying at the margins. The trustee, for example, must "proceed expeditiously to distribute the trust property to the persons entitled to it," subject to the trustee's right to set aside any trust property for payment of debts, expenses, and taxes.[88] The MUTC also provides that a trustee may send a proposal for distribution to the beneficiaries.[89]

Distribution upon termination because of unanticipated circumstances or inability to administer trust effectively.

The MUTC does not address how the trust property is to be distributed should there be a judicial determination that, due to unanticipated circumstances or inability to administer the trust effectively, the trust must be terminated. The Official UTC does, specifically in section 412(c). It provides that the trustee shall distribute the trust property "in a manner consistent with the purposes of the trust."[90] The MUTC's commentary explains why it lacks a section 412(c): "…presumably in connection with the decision, the court will determine how the property should be distributed if the Trust is unclear."

iv. Liabilities of the trustee arising out of breach of trust

A trustee may be held personally liable for a breach of trust that damages the equitable property rights of the beneficiary.[91] The MUTC in its Article 10 acknowledges some of the equitable remedies that may be available to the court to make the beneficiary whole, such as the injunction and the specific performance order.[92] The full panoply of breach-of-trust equitable remedies is covered

77. *Id.* §105.
78. Official UTC §105 cmt. at 16.
79. MUTC §813(b).
80. *Id.* §108(c).
81. *Id.* §408(d).
82. *Id.* §814(b).
83. *Id.* §409.
84. *Id.* §402(c).
85. MUTC §705.
86. *Id.*
87. *Id.* §707.
88. *Id.* §817(b).
89. *Id.* §817(a).
90. Official UTC §412(c).
91. MUTC §1001(a).
92. MUTC §1001(b).

exhaustively in *Loring and Rounds: A Trustee's Handbook* (2013).[93]

Defenses to breach of trust allegations.

The MUTC also acknowledges some of the defenses that may be available to the trustee who has breached his trust. They include the following:

- the running of an applicable statute of limitations;[94]
- reliance on trust instrument;[95]
- exercise of reasonable care in ascertaining happening of event or change of status;[96]
- exculpation provisions;[97] and
- beneficiary consent, release, or ratification.[98]

Massachusetts has a general statute of limitations for breaches of fiduciary duty which pre-dates the MUTC's enactment and which has not been repealed. The MUTC introduces three- and five-year statutes of limitations for breaches of trust.[99]

Now, under certain circumstances, a trustee may be able to offload liability onto the shoulders of his agents. Assume the trustee prudently delegates a ministerial duty or a fiduciary discretion to an agent. The activities of the agent are prudently monitored by the trustee. The agent in the course of the agency commits what would be a breach of trust were he the trustee. The equitable property rights of the beneficiaries are damaged as a result. The MUTC joins the Massachusetts Prudent Investor Act in imposing primary and exclusive liability on the agent.[100] Prior to enactment of the Prudent Investor Act, under Massachusetts common law, the trustee would have been primarily liable. The agent would have been secondarily liable. One cannot say that this MUTC innovation is particularly beneficiary-friendly. More about this later.

b. General default rights of the trustee of an irrevocable noncharitable covered trust

Under the common law, the trustee has assorted general default rights. Some of them are law-based, while others are equity-based. They are:

- the right of possession (law);
- the right to convey title (law);
- the right to exoneration and reimbursement (equity);
- the right to reasonable compensation (equity); and
- the right to seek instructions from the court (equity).

The MUTC leaves all this fiduciary-rights doctrine largely untouched. MUTC section 708 provides that "if the terms of a trust do not specify the trustee's compensation, a trustee shall be entitled to compensation that is reasonable under the circumstances."[101] The Massachusetts common law of trusts continues to regulate what is "reasonable under the circumstances." MUTC section 709 provides that:

> A trustee shall be entitled to be reimbursed out of the trust property, with interest as appropriate, for:
>
> (1) expenses that were properly incurred in the administration of the trust; and
>
> (2) expenses that were not properly incurred in the administration of the trust, to the extent necessary to prevent unjust enrichment of the trust.[102]

No new ground is broken here either.

What may or may not be breaking new ground is MUTC section 1007, which provides that "a trustee who has exercised reasonable care to ascertain the happening of the event or change of status shall not be liable for a loss resulting from the trustee's lack of knowledge." The types of events and changes of status contemplated by this section are birth, adoption, marriage, divorce, performance of educational requirements, death, and the like. If nothing else, the harshness of the common law maxim that a trustee is absolutely liable for misdelivering the trust property is mitigated somewhat by MUTC section 1007.

MUTC section 1006 provides that "a trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument shall not be liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance." In and of itself, the provision probably breaks no new ground. That there has been a substantial expansion and liberalization of the doctrine of reformation at the hands of the MUTC, however, suggests that it was a good idea to memorialize the instrument-reliance exculpation in statute.

c. Rights of the beneficiary of an irrevocable noncharitable covered trust

A trust beneficiary has equitable property rights. As such, the beneficiary would generally have standing to bring an action against the trustee to enforce those rights in the event of a breach of trust. The trust being a creature of equity, the remedies that are available to the court to make the beneficiary whole are generally equitable. The beneficiary is entitled to all the information pertaining to the trust's creation, administration, and termination that the beneficiary needs in order to be able effectively to defend and protect his equitable property rights. In other words, the trustee is accountable to the beneficiary. Under the common law, the beneficiary must fully understand the applicable facts and law pertaining to a breach of trust before any applicable statute of limitations period can begin to run against the beneficiary, or in the absence of an applicable statute of limitations, the laches period. Any consent to a breach of trust must be a fully informed one. The nature and extent of the beneficiary's property rights are specified by the settlor via the terms of the trust. Thus, the economic rights of the beneficiary may be qualified by the trust's lawful purposes, which may not necessarily be solely in furtherance of the beneficiary's interests. With the exception of its statute of ultimate repose, the MUTC leaves much of this doctrine

93. *See* Charles E. Rounds, Jr. & Charles E. Rounds, III, Loring and Rounds: A Trustee's Handbook §7.2.3 (2013 ed.).
94. MUTC §1005.
95. *Id.* §1006.
96. *Id.* §1007.
97. *Id.* §1008.
98. *Id.* §1009.
99. *Id.* §1005.
100. MUTC §807(c); *see also* Mass. Gen. Laws ch. 203C, §10.
101. MUTC §708(a).
102. *Id.* §709(a).

undisturbed.

i. The beneficiary's substantive property rights

The equitable interest of the beneficiary may be a future interest, vested or contingent; it may rest solely in the discretion of the trustee; it may be limited to the occupation of the trust property. "[The equitable]…[i]nterests of beneficiaries of private express trusts run the gamut from valuable substantialities to evanescent hopes. Such a beneficiary may have any one of an almost infinite variety of the possible aggregates of rights, privileges, powers and immunities."[103] This is territory that the MUTC stays away from. Also, the "benefit of the beneficiary" principle—the policy centerpiece of the Official UTC—was kept out of the MUTC.[104] We explain *infra*, at VI(e). The consent of all beneficiaries may allow for termination of a trust, provided the trust lacks a material purpose.[105] No new ground is broken here.[106] The nature and extent of the beneficiary's property interest, if any, in the underlying property (the property to which the trustee has the legal title), is separate and distinct from the nature and extent of the beneficiary's equitable property interest. The continuing academic debate over whether it can be said that a beneficiary has a propriety interest in the trust property itself is covered in *Loring and Rounds: A Trustee's Handbook*.[107]

ii. The beneficiary's due process rights

A trustee has a duty to account to the beneficiary, which translates into a right in the beneficiary to all information needed to protect the beneficiary's equitable property rights. The non-qualified beneficiary as well as the qualified beneficiary is owed this duty. The MUTC introduces into Massachusetts trust law the concept of the "qualified beneficiary." The MUTC defines a qualified beneficiary as "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."[108] The purpose of carving out a special category of beneficiary is not to make the non-qualified beneficiary a second-class citizen when it comes to the trustee's duty to keep the beneficiaries fully in the know as to things that matter. Rather, it is to put in place a notice mechanism for actions that the trustee takes that do not materially affect one way or another equitable property rights. The MUTC, for example, requires that notice be given to the qualified beneficiaries before a trust may be combined or divided.[109] If the division is only to facilitate the investment of trust assets, then that may be all the notice that is required. If combining or dividing might compromise someone's equitable property rights, then due notice to the non-qualified beneficiaries as well may have to be given. We go into greater detail on the qualified beneficiary concept *infra*, at VIII(b)(ii).

Representation of interests of both qualified and non-qualified beneficiaries.

The MUTC breaks new ground by injecting virtual representation doctrine into Massachusetts trust law. Here is the doctrine in a nutshell:

> [A] minor, incapacitated or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable may be virtually 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*.[110]

Later on in this article, specifically in section VII(b)(iii), we consider whether the conflict-of-interest exception, as a practical matter, renders the doctrine far less than meets the eye.

When virtual representation is not an option, such as in a situation where equitable property rights are at stake and the parties' interests are all in conflict, then the services of a court appointed guardian ad litem may be required to represent the interests of the unrepresented.[111] Otherwise, the decrees that issue from the court may not be final and binding on all parties. This was the case before enactment of the MUTC and remains so post-enactment.

Rights of donee of a general testamentary power of appointment to represent and bind other beneficiaries.

MUTC section 302 provides that:

> 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.

The accompanying commentary sheds no light whatsoever on what would constitute a conflict of interest in this context. Had the power been general and inter vivos, there would be no conflict of interest exception. Moreover, the holder of a general inter vivos power of appointment could with impunity negate altogether the equitable property interests of the other beneficiaries.

There is a related issue, which the MUTC does not appear to tackle, namely whether the donee of a general testamentary power of appointment may ratify breaches of trust and in so doing exterminate the equitable property rights of the others beneficiaries. In 1948, Professor Scott had introduced into the Restatement of Trusts a provision endorsing his long-held view that a life beneficiary who was also the holder of a general testamentary power of appointment should be able to consent to a breach of trust and, in so doing, bind the appointees and takers in default. One cannot help but hear the echoes of Professor Scott's voice in the words of MUTC section 302.

iii. Limitation on the beneficiary's right to enforce the trust and to protect his/her equitable property interests

Laches doctrine governs actions of a beneficiary against a trustee. Laches will prevent a beneficiary from holding a trustee liable for a

103. Farkas v. Williams, 125 N.E.2d 600, 603 (Ill. 1955) (*quoting* 4 Richard R. Powell, The Law of Real Property 87 (1949)).

104. MUTC §404 cmt.

105. *Id.* §411(b).

106. *See generally* Claflin v. Claflin, 149 Mass. 19 (1889).

107. *See* Charles E. Rounds, Jr. & Charles E. Rounds, III, Loring and Rounds: A Trustee's Handbook § 5.3.1 (2013 ed.).

108. MUTC §103.

109. *Id.* §417.

110. *Id.* §304 (emphasis added).

111. *Id.* §305.

breach of trust if the beneficiary has so delayed in bringing an action against a trustee that it would be inequitable to permit the beneficiary to hold the trustee liable. The MUTC partially codifies the laches doctrine, creating two limitation periods for actions by beneficiaries against trustees: a six-month period and a three-year period.[112] For either period to run, however, the beneficiary, in the spirit of laches, has to have received actual notice of the breach. The MUTC's five-year statute of ultimate repose stands laches doctrine on its head. It purports to run even if no such notice has been given.[113] Whether the MUTC statute of ultimate repose can run against a beneficiary who is unaware of the trust's very existence without unacceptably violating fundamental principles of due process remains to be seen.

d. Rights of the settlor qua settlor of an irrevocable noncharitable covered trust expanded and limited

Mandatory rules.

The Official UTC, specifically section 105, has numerous "mandatory rules" that may not be drafted around.[114] Here is a list of the rules, found in MUTC section 105(b), that found their way into the MUTC:

- The requirements for creating a trust;[115]
- 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;
- the requirement that a trust have a purpose that is lawful and not contrary to public policy;
- the power of the court to modify or terminate a trust under sections 410 to 416, inclusive;
- the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust, as provided in article 5;
- the power of the court under section 702 to require, dispense with or modify or terminate a bond;
- the power of the court under section 708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- the effect of an exculpatory term under section 1008;
- the rights under sections 1010 to 1013, inclusive, of a person other than a trustee or beneficiary; and
- the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.

The benefit-of-the-beneficiary principle.

One important mandatory rule that ended up on the cutting room floor here in Massachusetts was section 105(b)(3) of the Official UTC, the rule that a trust and its terms "be for the benefit of its beneficiaries." The Massachusetts comment to MUTC section 105 offers no explanation. In the comment to MUTC section 404, which provides that "a Trust may be created only to the extent its purposes are lawful and not contrary to public policy," all is revealed, however. Official UTC section 404 has a second sentence that does not appear in its MUTC. Here it is: "A trust and its terms must be for the benefit of its beneficiaries." The comment to MUTC section 404 explains why that second sentence, the benefit-of-the-beneficiary sentence, was left out. According to the comment to MUTC section 404, the sentence was "eliminated" because "trusts are an interrelationship between the settlor, the beneficiaries and the trustee."

The good faith principle.

The facially-contractarian good faith principle is mentioned numerous times in the MUTC while equity's fiduciary principle is rarely alluded to, and only obliquely at that. The failure of the MUTC to lay down a working definition of good faith renders the principle an empty vessel in the trust context. Thus, we should not be surprised if courts pour into that vessel a contractarian brew that is not in the long-term interests of the Anglo-American institution of the trust, an institution which, at its core, is *sui generis*, not merely an aspect of the law of contracts.

The settlor's right to modify or terminate.

There is some common law to the effect that the settlor of an irrevocable inter vivos trust who reserves no rights and no powers is out of the picture once the ship is launched. He even lacks standing to seek the trust's enforcement in the courts. The MUTC, specifically section 411, provides that an irrevocable covered trust may be modified or terminated upon the consent of the settlor and all beneficiaries, "even if the modification is inconsistent with a material purpose of the trust." The MUTC and the Official UTC are silent as to whether this right dies with the settlor. The settlor may bring a proceeding to approve or disapprove of any proposed modification or termination.[116]

Termination by non-judicial agreement questionable.

MUTC section 111(b) provides that "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." MUTC section 111(c) provides that a "non-judicial settlement is 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." On the other hand, MUTC section 411(b) provides that a "noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the *court* (emphasis added) concludes that continuance of the trust is not necessary to achieve any material purpose of the trust."

Reformation and deviation actions before and after the settlor's death.

The MUTC, specifically section 415, provides that the "court may reform the terms of a trust, even if unambiguous, to conform

112. *Id.* §1005(a)-(b).

113. *See id.* § 1005(c).

114. Official UTC §105(b).

115. The requirements for creation of various covered trusts are set forth at MUTC §§402, 405, 408, and 409. In the case of the creation of an irrevocable non-charitable covered trust, for example, §402 requires that the settlor have the capacity to create a trust and the intention to create a trust for a definite beneficiary.

116. MUTC §410.

the terms to the settlor's intention if it is proved … that the settlor's intent or the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." Not only does the provision blow a hole in the plain meaning rule, but, to the extent it applies to testamentary trusts, it overturns the holding in *Flannery v. McNamara*.[117] That the MUPC authorizes the post-mortem *execution* of wills, even wills with testamentary trust provisions, is going to make things interesting going forward in this once quiet corner of Massachusetts law.

MUTC section 412(a), which partially codifies and radically expands equitable deviation doctrine, reads as follows:

> The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

The provision breaks new ground in Massachusetts in that it captures the dispositive as well as the administrative provisions of covered trusts.

How the two doctrines, the MUTC doctrine of substantive deviation and the MUTC doctrine of substantive reformation, differ from one another in their practical applications is not entirely clear. The Massachusetts commentary is devoid of any cross-referencing and textual coordination.

e. Rights of creditors of settlors and beneficiaries of irrevocable noncharitable covered trusts

The MUTC, specifically section 505, merely tweaks the common law when it comes to the rights of creditors of a settlor of a covered trust to access either the subject property or his equitable interests. The same goes for the rights of creditors of non-settlor beneficiaries. To the extent the MUTC gets into this area at all, it only clarifies the rights of the parties. It has nothing to say about the procedures a creditor must follow to realize whatever rights he might have under the common law and/or the MUTC.[118]

Settlor-beneficiary.

Since the Supreme Judicial Court ("SJC") of Massachusetts decided *Ware v. Gulda* in 1954, it has been settled law in Massachusetts that a creditor of the settlor of an irrevocable noncharitable covered trust may reach the maximum amount that could be distributed to or for the benefit of the settlor.[119] Since the court decided *State Street Bank and Trust Company v. Reiser* in 1979, the principle has been extended to the postmortem creditors of the settlors of revocable trusts.[120] MUTC section 505 does little more than codify all this pre-existing common law doctrine.

Non-settlor-beneficiary.

The creditor of a beneficiary may access a beneficiary's equitable interests under a trust to the extent that the beneficiary's interests are not subject to a spendthrift provision or the exercise of trustee discretion.[121] Since the SJC decided *Broadway National Bank v. Adams* in 1882, spendthrift trusts have generally been enforceable in Massachusetts.[122] For the most part, the MUTC has left Massachusetts spendthrift doctrine alone. It makes only a slight tweak, namely, section 502(a) provides that "[a] spendthrift provision shall be valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest." Before enactment of the MUTC, Massachusetts common law permitted a settlor to effectively restrain involuntary transfers of equitable interest while permitting voluntary transfers. The Massachusetts Appeals Court in *Pemberton v. Pemberton*, decided in 1980, confirmed that a beneficiary's contingent equitable interest in a discretionary trust that was not of his creation was virtually impervious to attack by the beneficiary's creditors.[123] This is territory that the MUTC stays out of, it containing no provision comparable to Official UTC section 504.

iii. Charitable trusts

The charitable trust is a creature of equity. It is a trust with a charitable purpose. The commonwealth's attorney general, first and foremost, has standing to seek the enforcement of charitable trusts in the courts. Courts in common law jurisdictions around the world have generally looked to the preamble to the Statute of Charitable Uses, enacted by Parliament in 1601, for guidance in determining whether the purposes of a trust are charitable or not. The preamble contains a non-exhaustive list of specific charitable purposes, such as "relief of aged, impotent and poor people," "repair of bridges," and "education and preferment of orphans." The main non-tax advantage of a court's finding the purposes of a trust to be charitable is that the trust is exempt from the durational requirements of the rule against perpetuities, provided that there must be a vesting in a charitable purpose in all events within the period of the rule against perpetuities.

As a general rule, a trust for the benefit of a designated individual is noncharitable, although there are exceptions. A charitable purpose has to in some way benefit the community as a whole. That being said, the charitable purpose is an unruly horse that has often been difficult to corral. This has not deterred the drafters of the MUTC from giving it a shot. The MUTC's plain-vanilla definition of a charitable purpose is found in section 405(a) and reads as follows: "A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes or other purposes which are beneficial to the community." No new ground is broken here.

Otherwise, the MUTC generally defers to the common law and other statutes when it comes to the regulation of covered charitable trusts and the application of the *cy pres* doctrine, with one very important exception. The settlor of a covered charitable trust may now "maintain a proceeding to enforce the trust."[124] In other words, no longer will the settlor of a charitable trust be thrown out of a Massachusetts court for lack of standing. From here on out, the trustee of a covered charitable trust must keep one eye on the attorney general and the other on the settlor, which is probably a good thing, in that there is no way that the Division of Public Charities can effectively oversee the administration of every single charitable trust in the commonwealth. Now it has some much-needed reinforcements, thanks to the MUTC. The MUTC has also given a shot in the arm to the

117. *See generally* Flannery v. McNamara, 432 Mass. 665 (2000).
118. See MUTC § 502.
119. *See* Ware v. Gulda, 331 Mass. 68 (1954).
120. *See* State St. Bank & Trust Co. v. Reiser, 7 Mass. App. Ct. 633 (1979).
121. MUTC §501.
122. *See* Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882).
123. *See* Pemberton v. Pemberton, 9 Mass. App. Ct. 9 (1980).
124. MUTC §405(c).

principle that donor intent is generally paramount.[125] Unaddressed in the MUTC commentary is whether the settlor's/donor's personal representative, heirs at law, descendants, or what have you also would have standing to seek enforcement of the trust's charitable terms.

iv. Non-common-law quasi-donative-type trust arrangements that are creatures of the MUTC

The MUTC introduces the purpose trust and the statutory trust for the care of an animal (hereinafter "pet trust") into the Massachusetts law of trusts. The purpose trust breaks new ground. The MUTC's statutory pet trust really doesn't. Under the common law one could always fund a trust with property, which could include one's pet. The trust would be for the benefit of human beings, whose enjoyment of the equitable interest would be contingent on their caring for the pet. The MUTC's statutory pet trust essentially deems the pet, though merely an item of tangible property, to be a quasi-beneficiary.[126] Here is how it dances around the enforcement conundrum inherent in such arrangements:

> The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument, by the person having custody of an animal for which care is provided by the trust instrument, by a remainder beneficiary or by an individual appointed by the court upon application of an individual or charitable organization.[127]

a. Purpose trusts

The MUTC, specifically section 409(1), provides that "a trust may be created for a non-charitable purpose without a definite or definitely ascertained beneficiary or for a non-charitable but otherwise valid purpose to be selected by the trustee." A purpose trust can be enforced by "a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court."[128]

b. Non-common-law trust for care of animal

Section 408 of the MUTC authorizes the creation of trusts for animals. The comment thereto explains: "To avoid the common law conclusion that such trusts were invalid because there was no person capable of enforcement, the settlor in the terms of the trust, otherwise the court, is authorized to appoint a person to enforce the trust. Because trusts for animals are sometimes overfunded, provision is made for distributing any excess."[129] The pet is deemed to be a life-in-being for purposes of applying the rule against perpetuities.[130]

VI. Deviations of the Massachusetts Uniform Trust Code from the Model Uniform Trust Code

Massachusetts has not enacted the Official UTC verbatim, far from it. Catalogued below are some of the more critical divergences.

a. Non-donative express trusts excluded from the MUTC's coverage

The Official UTC applies to "express trusts, charitable or non-charitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust."[131] The MUTC captures only "express trusts, charitable or non-charitable, *of a donative nature* and trusts created pursuant to a judgment or decree that requires the trust to be administered in the manner of an express trust."[132]

b. Model commentary not incorporated

Massachusetts declined to adopt the commentary to the UTC, instead replacing it with the Committee's commentary. The commentary to the Official UTC is more extensive and detailed, making it a useful resource for anyone researching the back-story of a particular MUTC partial codification.

c. Non-settlor holder of a general inter vivos power of appointment not treated under MUTC as settlor for creditor-access purposes

The Official UTC provides that if the settlor of a trust has reserved to himself a right of revocation, a form of general inter vivos power of appointment, then the trust property is subject to the claims of the settlor's inter vivos and postmortem creditors.[133] In other words, if the settlor of a trust has reserved a power of withdrawal, the trust property is fully vulnerable to attack by the settlor's creditors, whether or not the power is ever exercised and whether or not the settlor has engaged in any fraudulent conduct incident to the trust's establishment and administration.

For creditor access purposes, the Official UTC provides that any non-settlor who has been granted a nonfiduciary right of withdrawal over the trust property shall be deemed a settlor.[134] Thus, if granddaughter possesses a general inter vivos power of appointment under a testamentary trust established by grandfather, the property subject to the power is fully accessible to her creditors.

What about other types of powers? The Official UTC "does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment."[135] The Restatement (Third) of Property does, however. It would afford the postmortem creditors of the donee of an unexercised general testamentary power of appointment access to the property that is the subject of the power, even if the donee had not been the grantor of the power.[136] The only qualification is that the donee's estate has to have been insufficient to satisfy the claims of its creditors if the donee was not the settlor.

Now to Massachusetts: Prior to enactment of the MUTC, the common law rule had been that a settlor of a trust who reserves to himself a right of withdrawal fully exposes the trust property to attack by the settlor's intervivos and postmortem creditors. The MUTC has codified that rule in its section 505 for donative-type trusts. And that is all the MUTC has done. Unlike the Official UTC, it has not extended the rule to non-settlors.[137] And it certainly has not extended it to donees of general testamentary powers of appointment.

One had a sense that prior to enactment of the MUTC, it was

125. *See id.* §405(b).
126. *See id.* §408.
127. *Id.* §408(f).
128. *Id.* §409(2).
129. I*d.* §408 cmt.
130. MUTC §408(h).
131. Official §102.
132. MUTC §102 (emphasis added).
133. Official UTC §505(a)(1).
134. *Id.* §505(b)(1).
135. *Id.* §505, cmt at 98.
136. Restatement (Third) of Prop.: Wills and Other Donative Transfers §§22.2, 22.3(b) (2011).
137. The commentary to MUTC §505 explains: "The Committee deleted subsection (b), which would have changed current Massachusetts law relating to

only going to be a matter of time before the court in the exercise of its equitable powers would effectively deem any holder of a general inter vivos power of appointment (right of withdrawal) to be a settlor for creditor access purposes, either coincidentally or intentionally falling in line with the letter and spirit of the Official UTC. One should not be allowed to have it both ways, to have unrestricted access to one's property as if the property were not entrusted while having it off-limits to creditors. It is a fairness thing. That having been said, we must admit that the SJC has declined to venture down that road in the spousal-election context.[138]

In any case, the message that the court will take from the Massachusetts legislature's failure to fall in line with the Official UTC and deem all donees of general inter vivos powers of appointment to be settlors for creditor-access purposes remains to be seen. The court may take the failure to enact as an expression of the will of the legislature, in which case things are presumably frozen in place until the legislature speaks again. Or it might take the failure to enact as an act of legislative deference. Let equity work things out in the fullness of time.

If things are frozen in place then Massachusetts may well have become a stealth asset protection jurisdiction, and an interesting one at that. Grandfather impresses a fully discretionary trust on $10 million for the benefit of granddaughter. The terms of the trust grant her an untrammeled right to withdraw the property. Only to the extent she voluntarily exercises that right does the property become vulnerable to the reach of her creditors.[139]

d. "Benefit-of-the-beneficiary" principle not adopted

Buried in the Official UTC, specifically in section 404, is this sentence which is likely to pass for innocuous boilerplate outside the ivory tower: "A trust and its terms must be for the benefit of its beneficiaries." Within the walls of the ivory tower, however, a heated debate has ensued over the meaning, scope, and merits of the "benefit-of-the-beneficiary" rule.

Professor John Langbein of Yale Law School, the rule's godfather, believes and fervently hopes that in the future the rule "will interact with the growing understanding of sound fiduciary investing practices to restrain the settlor's power to direct a course of investment imparting risk and return objectives contrary to the interests of the beneficiaries."[140] There is no question that the rule is the philosophical centerpiece of the Official UTC. Why else would the trustee's traditional duty to defend his trust not be among the duties stated in Article 8 of the Official UTC? The rule is intent-defeating. The duty is intent-affirming. Professor Jeffrey Cooper of Quinnipiac University School of Law feels that the intent-defeating gloss that Professor Langbein would have the courts put on the rule would render the Official UTC "a fundamentally incomprehensible piece of trust legislation."[141] Each has directed at least two salvos of law review articles at the other over the issue.

In any case, the "benefit-of-the-beneficiary" rule never made it into the MUTC. The reason given in the comment to section 404 was that "trusts are an interrelationship between the settlor, the beneficiaries and the trustee." That being the case, the trustee's duty to defend the trust should have been included in the list of duties acknowledged in Article 8. It was not, and there is no explanation in the commentary as to why it was not. The trustee's general duty to defend the trust *and its terms* primarily against attack from within should not be confused with the trustee's duty to take reasonable steps to defend the trust property from external claims against the property; that duty is stated in section 811 of the MUTC. As an aside, the Massachusetts Prudent Investor Act, specifically section 6, has its own sole-benefit-of-the-beneficiary rule, which would appear to conflict with the spirit, if not the letter, of the MUTC.

e. The spendthrift trust qua spendthrift trust still presumed to have a material purpose

Modification or termination of a noncharitable irrevocable trust by consent is covered in section 411 of the Official UTC. In the official version, "a spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust."[142] This language is absent from the MUTC's version of section 411. Bottom line: *Claflin v. Claflin* survived the MUTC's enactment pretty much unscathed.[143]

f. Persons contemplating becoming trustee eliminated from list of exceptions to the no further inquiry rule in the MUTC

Section 802(b) of the Official UTC endorses the "no further inquiry" rule. The no further inquiry rule goes something like this: when a trustee without authority enters into a contract to acquire trust property, the beneficiaries may void the transaction even if the trustee had acted fairly with respect to the transaction. The MUTC adopted Official UTC section 802, which provides some specific exceptions to the no further inquiry rule in section 802(b), including persons contemplating becoming trustees. The Official UTC reference to a person contemplating becoming a trustee is not included in the MUTC. A literal textual reading of MUTC section 802(b)(5) would suggest that a person contemplating becoming a trustee would be subject to the no further inquiry rule.

g. Massachusetts Prudent Investor Act kept free-standing

The MUTC has not taken into its tent the Massachusetts Prudent Investor Act, which was enacted in 1996, instead leaving it free-standing outside and in full force and effect. Article 9 of the MUTC is where the provisions of the Act would have gone, had they been brought in. Instead, the entire article has been reserved.

h. *Cy pres* doctrine not codified

The Official UTC, specifically section 413, presumes to codify the *cy pres* doctrine. The MUTC has the good sense not to try. MUTC section 413 is reserved.

i. Damage computation methodologies for breaches of trust not codified

The Official UTC, specifically in sections 1002, 1003 and 1004, codifies damage computation methodologies for breaches of trust. All three sections are reserved in the MUTC.

creditor rights against property subject to powers of withdrawal…."

138. *See* Bongaards v. Millen, 440 Mass. 10 (2003).

139. *See* State Street Trust Co. v. Kissel, 302 Mass. 328 (1939).

140. John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105, 1111(2004).

141. Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. Rev. 1165, 1179 (2008).

142. MUTC §411(c).

143. *See generally* Claflin v. Claflin, 149 Mass. 19 (1889) (holding that beneficiaries are prohibited from terminating or modifying a trust if the modification or termination would defeat a material purpose of the trust).

j. Right of child, spouse, or former spouse of beneficiary of non-self-settled discretionary trust to access the trust property

The Official UTC, specifically section 504, affords the child, spouse, and former spouse of a beneficiary of a non-self-settled discretionary trust access to the trust property under certain limited circumstances. Section 504 of the MUTC has been reserved.

VII. Synchronization with and/or Absence of Synchronization with the Restatement (Third) of Trusts, the Restatement (Third) of Property, and the MUPC

The provisions of the MUTC have not been fully synchronized with those of the Restatement (Third) of Trusts, the Restatement (Third) of Property, and the MUPC. We explain.

A. Attempted synchronization of the MUPC/MUTC with the newly-minted Restatement (Third) of Property

i. Reformation of testamentary trusts: Flannery v. McNamara overturned

The SJC, in *Flannery v. McNamara*, emphatically articulated the public policy/practical reasons why courts should not be in the business of reforming the provisions of testamentary trusts whose terms are unambiguous:

> To allow for reformation in this case would open the floodgates of litigation and lead to untold confusion in the probate of wills. It would essentially invite disgruntled individuals excluded from a will to demonstrate extrinsic evidence of the decedent's "intent" to include them. The number of groundless will contests could soar. We disagree that employing "full, clear and decisive proof" as the standard for reformation of wills would suffice to remedy such problems. Judicial resources are simply too scarce to squander on such consequences.[144]

MUTC section 415 overturns *Flannery v. McNamara*. It provides that the court may reform the terms of a testamentary trust, even if unambiguous, to conform to the testator's/settlor's intention, provided it is proved by clear and convincing evidence what the testator's/settlor's intention was, and that the terms of the trust were created by mistake of fact or law, whether in expression or inducement. As authority for upending the long-standing proscription against the mistake-based reformation of unambiguous wills, the commentary to the Official UTC section 415 cites as authority the Restatement (Third) of Property (Wills and Other Donative Transfers), specifically section 12.1. A perusal of section 12.1 and its commentary reveals that the Code and the Restatement are cross-tracking, and cross-citing to, one another. The policy that implicitly underpins the discarding of the ancient reformation proscription is this: Preventing unintended devisees, including beneficiaries of testamentary trusts, from being "unjustly" enriched is more important than controlling the litigation floodgates. As to distributions already made, there is always the procedural equitable remedy of the constructive trust.[145]

ii. MUPC's application of antilapse principles to equitable interests under trusts is a partial synchronization with the Restatement (Third) of Property

The Restatement (Third) of Property (Wills and Other Donative Transfers) would apply antilapse principles by analogy to revocable inter vivos trusts.[146] MUPC section 2-707 is in accord, and then some. It applies antilapse principles to failed equitable future interests under irrevocable, as well as revocable, trusts.[147]

B. Absence of synchronization of MUTC with Restatement (Third) of Trusts, the MUPC, and the Restatement (Third) of Property

i. Divergences from Restatement (Third) of Trusts

a. Critical nomenclature

The most dramatic divergence in nomenclature is the designation of the class of trust beneficiaries who are entitled on an ongoing basis to be kept informed of important matters pertaining to the trust. The MUTC refers to them as "qualified beneficiaries,"[148] and the Restatement (Third) of Trusts refers to them as "fairly representative beneficiaries."[149] It is unclear what, if anything, is connoted by this divergence in nomenclature, which further creates confusion and lack of uniformity across codification efforts.

The Restatement (Third) of Trusts, for example, catalogs the "initial information" that the trustee should furnish the "fairly representative" beneficiaries of a trust that is irrevocable or has just become so:

> The existence, source, and name (or descriptive reference) of the trust; the extent and nature (present or future, discretionary or conditional, etc.) of their interests; the name(s) of the trustee(s), contact and compensation information, and perhaps the roles of co-trustees; and the beneficiaries' right to further information, ordinarily including the usual right to request information concerning the terms of the trust or a copy of the trust instrument.[150]

A beneficiary may not qualify as "fairly representative" at the time when an irrevocable trust is funded, or when a revocable trust becomes irrevocable. Should the beneficiary, however, later achieve "fairly representative" status, perhaps because of the death of a "higher" remainder beneficiary, the trustee would have a duty to furnish the beneficiary with the initial information described immediately above.[151] If a beneficiary is currently entitled to distributions (such as by obtaining a specified age or because of another's death), or becomes eligible to receive or request discretionary distributions, or if a beneficiary ceases to be entitled or eligible to receive distributions, the trustee should appropriately inform the beneficiary.[152]

144. Flannery v. McNamara, 432 Mass. 665, 674 (2000) (internal citations omitted).

145. For a critique of the general quality of the newly-minted Restatement (Third) of Property, *see generally* Charles E. Rounds, Jr., *Old Doctrine Misunderstood, New Doctrine Misconceived: Deconstructing the Newly-Minted Restatement (Third) of Property's Power of Appointment Sections*, 26 Quinnipiac Prob. L.J. 240 (2013).

146. Restatement (Third) of Property, Don. Trans. §5.5 cmt. p. (*citing to* Restatement (Second) of Property, Don. Trans. §27.1).

147. MUPC §2-707.

148. MUTC §103.

149. Restatement (Third) of Trusts §82 cmt. a(1).

150. *Id.* at cmt. b.

151. *Id*. at cmt. c.

152. *Id*.

b. Spendthrift doctrine

The Restatement (Third) of Trusts creates an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to a beneficiary, and possibly also for tort claimants.[153] The MUTC does not in either case.[154]

c. Access creditors of beneficiary of a non-self-settled discretionary trust to the trust property

Section 60 of the Restatement (Third) of Trusts provides as follows:

> [I]f the terms of a trust provide for a [non-settlor] beneficiary to receive distributions in the trustee's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion after the trustee has knowledge of the transfer or attachment. The amounts a creditor can reach may be limited to provide for the beneficiary's needs … .

None of this doctrine is captured in the MUTC.

ii. Divergence from Massachusetts Uniform Probate Code: Reformation of testamentary trust will provisions

The MUPC is clear: The judicial reformation of wills whose terms are unambiguous is not authorized.[155] The MUTC is also clear: the judicial reformation of the unambiguous provisions of a trust created under the terms of a will is authorized.[156] The two statutes are in conflict and need to be reconciled.

iii. Divergence from the Restatement (Third) of Property (Wills and Other Donative Transfers): Creditors of donees of general powers of appointment

The MUTC, specifically section 505(a)(1), provides that "[d]uring the lifetime of the settlor, the property of a revocable trust shall be subject to claims of the settlor's creditors." The Restatement (Third) of Property (Wills and Other Donative Transfers) is far more creditor-friendly. Under the Restatement, the donee need not also be the settlor, nor the general power inter vivos, for there to be vulnerability to creditor attack; had the general power been testamentary and the donee someone other than the settlor, then upon the death of the donee, property subject to the power would be subject to creditors' claims to the extent that the donee's estate ends up being insufficient to satisfy those claims.[157] Had the donee of the general testamentary power also been the grantor of the power, then there would be no requirement that estate assets be depleted first.[158] None of this doctrine is captured in the MUTC.

VIII. The MUTC's Traps for the Unwary Fiduciary

Because the MUTC is not a freestanding all-inclusive codification of the law of trusts, there is much Massachusetts common law and statutory law applicable to covered trusts that remains outside the MUTC tent. The partial codifications that make up the Official UTC are supported by extensive commentary. That commentary, however, has intentionally not been incorporated into the MUTC. The homegrown commentary that does support it is sparse, fragmentary, and incomplete. That there is so much law outside the MUTC tent, coupled with the fact that there is a dearth of official commentary supporting what is inside, means that the legal landscape in Massachusetts is now strewn with myriad traps for the unwary trust scrivener and unwary trustee. We catalogue some of the more lethal traps.

A. Scrivener traps

i. Express trusts of a non-donative nature not covered

The MUTC regulates only express trusts "of a donative nature."[159] The qualification "of a donative nature" is explained neither in the statute itself nor the accompanying commentary, although there is a suggestion in the commentary that a "business trust" for purposes of the MUTC shall be deemed "non-donative" per se.[160] Presumably, an express revocable inter vivos trust whose sole purpose is property management would not be regulated by the MUTC, such as an express inter vivos trust that terminates upon the settlor's death in favor of the settlor's probate estate. A nominee trust may or may not be covered, depending upon whether the shares of beneficial interests are created incident to a donative transfer.

ii. Presumption of revocability unless expressly stated otherwise in the trust instrument

The MUTC has replaced the traditional presumption of irrevocability with a presumption of revocability when it comes to the creation of an express donative-type Massachusetts trust.[161] Either presumption is a trap for the unwary scrivener, but it is probably easier to escape from the irrevocability trap. Here is why. If a settlor mistakenly impresses an irrevocable trust upon his property, the tried and true equitable remedy of restitution for the unjust enrichment of the person who benefited from the mistake is tailor-made to effect an unwinding of the arrangement. There was simply no donative intent. Equity, however, is somewhat less solicitous when it comes to the mistaken creation of a revocable trust. The intended equitable donee, the one who would have benefited had the trust been irrevocable *ab initio*, will have to work around the maxim that equity generally is loath to assist a volunteer.[162] Moreover, a claim for restitution brought against one who benefited from the trust's mistaken revocability is likely to be more circuitous than a claim for restitution that is based on the mistaken creation of an irrevocable trust.

iii. Limitation on the settlor's authority to determine which state law governs the requirements for creating a trust

In Massachusetts, prior to enactment of the MUTC, the settlor of a donative-type inter vivos trust could, within reason, effectively designate the law to be applied in determining whether the trust had been validly created. This is no longer possible under the MUTC.

153. *Id*. §59 cmt.

154. MUTC §503 cmt.

155. The MUPC did not adopt the Uniform Probate Code ("Official UPC") §2-805, which provides for reformation of wills, even in the event the terms are unambiguous. The Official UPC is available at http://www.uniformlaws.org/shared/docs/probate%20code/2014_UPC_Final_apr23.pdf.

156. MUTC §415.

157. Restatement (Third) of Property (Wills and Other Donative Transfers) §22.3(b).

158. *Id*. §22.2.

159. MUTC §102.

160. *See id.* §102 cmt.

161. *Id.* §602.

162. *See generally* John McGhee, Snell's Equity 495 (31st ed. 2005).

Section 403 of the MUTC provides as follows:

> A trust not created by will shall be validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which, at the time of creation:
>
> (1) the settlor was domiciled, had a place of abode or was a national;
>
> (2) a trustee was domiciled or had a place of business; or
>
> (3) any trust property was located.

The problem is that MUTC section 105 makes the rule mandatory. One learned commentator has a theory as to what might be going on here: "…[I]t may be that the unwillingness of section 403 to allow the settlor, by the terms of the trust, to designate the law that is to apply in determining whether the trust has been 'validly created' is simply a consequence of an almost entirely cosmetic effort at buttressing section 105…"[163] He then goes on to suggest that the "primary impact" of excluding a jurisdiction designated by the settlor in the terms of the trust from its list of validating jurisdictions may well be to "require certain settlors to execute their trust instruments in places they would not otherwise have chosen to execute them."[164]

iv. Guardian ad litem may now consider the interests of the family of the beneficiary

MUTC section 305(c) allows a court-appointed guardian ad litem "in making decisions" to "consider general benefit accruing to the living members of the …[beneficiary's]…family." *See infra* at VIII(d)(vii). The term family is defined neither in section 305 nor in section 103, the general definition section. Assume the prospective settlor wants no part of this. The term family is too open-ended. He hates the beneficiary's family. Or he would just prefer that the loyalties of the guardian ad litem not be divided. At minimum the scrivener might want to insert into the terms of the trust a strong expression of the settlor's intent, namely that the trust be for the exclusive benefit of the beneficiary. The interests of his family are not to be "considered." Time will tell whether the court in the exercise of its general equitable powers can effectively order guardians ad litem to ignore section 305(c). There is nothing the scrivener can do about that.

v. Antilapse principles extended to failed equitable interests under trusts as per the MUPC

The MUPC, in section 2-707, applies antilapse principles to failed equitable interests under trusts. *See infra* at VII(a)(ii). Certain equitable remainders that were traditionally considered vested may no longer be. Say goodbye to the resulting trust in all its simplicity. The trust instrument scrivener should move heaven and earth to draft around this complex and convoluted default law, particularly if its application would thwart the intentions of the settlor. As antilapse is a particularly lethal trap for the unwary trustee, the scrivener in the process will be doing the trustee a favor. Though the application of antilapse is a radical and controversial "reform" of the Massachusetts law of trusts, there is no mention, whatsoever, of antilapse in the MUTC. At the very least, its existence and location should have been flagged, and provisions cross-coordinated. As section 2-707 belongs somewhere within the four corners of the MUTC, we feel justified in covering the topic in an article on the MUTC, a benevolent bending of the rules as it were.

vi. An MUTC statutory pet trust may not be the best way to skin the cat

In the MUTC's grab-bag of codifications is the section 408 "trust for care of an animal," which we discuss elsewhere at section V(b)(iv). Now, the pet-lover has two options for providing for the care of his lifetime pets after he has died. He can set up an MUTC statutory pet trust or he can create a garden-variety express trust for the benefit of human beings, making sure, of course, that the rule against perpetuities is not violated. The traditional common law trust would in part be funded with the subject pet, the pet being property and a trust being a fiduciary relationship with respect thereto. The governing instrument would have appropriately strong pet retention language. The trustee also might be relieved of the duty to make the pet productive. The equitable interests of the human beneficiaries might be subject to the condition precedent that at least one of them assumes custody of the pet and cares for it. Title to the pet, however, would remain in the trustee.

In other words, the much-publicized MUTC statutory pet trust may not be the only way to skin the pet-care cat. It also may not necessarily be the best way, in that it fails to fully and specifically address the inconvenient care-monitoring and terms-enforcement problems that are inherent in a trust for the benefit of a helpless and non-verbal item of property, which, sentimentality aside, is still what a pet legally is. An MUTC section 408 pet trust looks comforting on paper, but going with the tried and true pet-funded common law express trust for the benefit of humans may well make more practical sense.

B. Trustee liability traps

i. Trustee is accountable to the qualified and the non-qualified beneficiary even when trustee is authorized by the terms of the trust to withhold information from either or both

The Official UTC contains two mandatory rules that have not been incorporated into the MUTC. The first is that the trustee must "notify qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports."[165] The second is that the trustee must "respond to the request of a [qualified] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust."[166] Let us assume that the terms of an irrevocable donative-type Massachusetts trust purport to relieve the trustee of the duty to keep the beneficiaries informed of critical matters pertaining to the administration of their equitable property rights. Taken together, the omission of the two rules and the express negation of the duty to inform might suggest that the trustee may with impunity keep the qualified and non-qualified beneficiaries in the dark as to the affairs of the trust. The trustee would do well not to do so, for his own sake. The commentary to the Official UTC is clear on this: "Waiver by a

163. 7 Scott & Ascher § 45.4.2.1.

164. *Id.*

165. Official UTC §105(b)(8).

166. *Id.* §105(b)(9).

settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions."[167] Not only is the trustee accountable to all the beneficiaries, whether their interests are vested or contingent, and whether they are born or unborn, but, aside perhaps from the MUTC's five-year ultimate repose provision, no statutes of limitation applicable to breach of trust actions will commence to run against the beneficiary who is being kept in the dark as to the status of his or her equitable property rights.

ii. Non-qualified beneficiaries, as well as qualified beneficiaries, are entitled to due process when equitable property rights are at stake

If the trustee is accountable to all the beneficiaries of an irrevocable covered trust, including the contingent equitable remaindermen, whether born or unborn, then where does the "qualified beneficiary" fit into the scheme of things? Recall that MUTC section 103 defines a qualified beneficiary as "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."[168] One thing is for sure: The qualified beneficiary status *per se* has nothing do with virtual representation, at least in the context of defending or sorting out of equitable property rights. If one consults the commentary to the Official UTC, all is revealed:

> Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust Code uses the concept of "qualified beneficiary" … to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in Section 705 to define the class to whom notice must be given of a trustee resignation. The term is used in Section 813 to define the class to be kept informed of the trust's administration. Section 417 requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in Section 704. Prior to transferring a trust's principal place of administration, Section 108(d) requires that the trustee give at least 60 days notice to the qualified beneficiaries.[169]

In other words, the MUTC's qualified beneficiary concept imposes *additional duties* on trustees of irrevocable covered trusts. It is just about administrative "notices" and "consents." It in no way tampers with the trustee's overarching general common law duty to furnish all beneficiaries, qualified and non-qualified alike, with all the information they must have if they are to effectively defend and protect their equitable property rights. The trustee remains at least as accountable before enactment of the MUTC as after its enactment.

Now the fact that the qualified beneficiary concept has nothing to do *per se* with the virtual representation concept, at least in the context of the defense and/or sorting out of equitable property rights, does not mean that in a given situation the two concepts cannot coincidentally intersect. Under the MUTC, specifically section 304, a qualified beneficiary could conceivably be authorized by the court to represent a non-qualified beneficiary in a matter involving the defense and/or sorting out of equitable property rights, provided their equitable interests are "substantially identical," and provided the interests of the qualified beneficiary are not in conflict with those of the non-qualified beneficiary.

iii. The MUTC's substantially-identical-interest and no-conflict-of-interest prerequisites for virtual representation

There is less to the MUTC's virtual representation provisions than meets the eye. Guardians *ad litem* need not fear for their jobs anytime soon. The provisions are housed in MUTC section 304, which reads as follows:

> 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.

The substantially-identical-interest prerequisite and the no-conflict-of-interest prerequisite will rule out virtual representation in most cases, particularly in discretionary trust cases. The equitable property interests of permissible beneficiaries of a discretionary trust are generally *per s*e in mutual conflict, while the equitable property interests of the class of permissible beneficiaries are generally *per se* in conflict with those of the contingent equitable remaindermen. Bottom line: any authority in the trustee to invade principal is likely to rule out virtual representation, which is a very common provision nowadays, particularly if the particular dispute involves the judicial sorting out of equitable property rights. That having been said, some of the parties in the 2013 SJC case of *Morse v. Kraft*, a discretionary trust decanting-authority case, were virtually represented with the court's blessing.[170] The facts were unique, however, in that the dispositive provisions of the trust to be decanted were substantially identical to those of the prospective receptacle trust.

The concept of virtual representation also has a due process conundrum baked into it, which can only serve to further limit its practical utility. In an adjudication of the threshold issue of whether the interests of the parties are substantially identical and whether there are any conflicts of interests *in light of the particular facts and circumstances*, who is to stand in the shoes of and speak for, say, the unborn or unascertained? At stake is the finality of the court's decrees.

iv. Listed trustee duties not exhaustive, and were implied pre-enactment

The list of duties imposed on the trustee of a donative-type in Article 8 of the MUTC is a partial one only. A glaring omission

167. *Id.* §105 cmt. at 24.

168. Official UTC §103(13) provides as follows: "'Qualified beneficiary' means a beneficiary who, on the date the beneficiary's qualification is determined: (A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributee described in subparagraph (A) terminated on that date *without causing the trust to terminate*"(emphasis added).

169. Official UTC §103 cmt. at 16.

170. *See* Morse v. Kraft, 466 Mass. 92 (2013).

is the trustee's critical duty to defend the trust. It essentially is the duty that makes a trust a trust. The duty is not expressly negated in the MUTC, either, so it is very much out there waiting to trap the unwary trustee. It is that duty that might require a trustee to file an appearance in opposition to a trust reformation action, or lawfully oppose the issuance of a charging order against the equitable interests of a party to a divorce action. One may speculate on whether the omission in the MUTC was intentional. Its omission from the Official UTC most certainly was, as the trustee's duty to defend the trust and its terms is somewhat incompatible with Professor Langbein's benefit-of-the-beneficiary rule [*see infra* at VI(e)], which is in the Official UTC but not in the MUTC. Again, the trustee's overarching duty to defend the trust and its terms against internal attack should not be confused with the trustee's duty to defend the *trust property* against external attack by third parties. That duty is stated/restated in section 811 of the MUTC.[171]

v. The list of powers expressly granted/enumerated in the MUTC is a partial list of powers that were, in any case, implied pre-enactment

A trustee by implication is vested under the common law with all the powers that he requires to properly carry out his lawful responsibilities. Warning: statutory codifications of common law powers, such as sections 815 and 816 of the MUTC, are only the tip of the iceberg. The common law power in a trustee to decant trust assets is a good example of what we mean. Nowhere in the MUTC is such a power mentioned. Still, in *Morse v. Kraft*, the court found that the trustee of a certain trust had inherent common law authority to decant, though the terms of the trust also made no mention of decanting.[172]

On the other hand, a statutory fiduciary power to do something is generally less than meets the eye. Take section 815(2)(i) of the MUTC, which provides that a trustee without authorization of the court may exercise "all powers over the trust property which an unmarried competent owner has over individually owned property." Yes, but while the trustee may have the power to throw the trust property in the river, he most likely lacks the fiduciary authority to do so. Moreover, the more expansive and general an express power grant, the more likely it is that equity will dismiss it as boilerplate. Express powers are not all that they are cracked up to be. They are nice to have, however, if only because bankers and brokers, perhaps misguidedly, take comfort in their existence.

vi. Expansion of the doctrine of reformation to include unambiguous testamentary trust provisions

The reformation of an unambiguous dispositive term of a testamentary trust upon clear and convincing evidence that the term was the product of a mistake of fact or law, whether in expression or inducement, is authorized by the MUTC. Additionally, MUTC section 1006 may well protect a trustee who misdelivers trust property in "reasonable reliance" on the terms of the trust as expressed in the trust instrument, with no comment as to a definition or clarification as to what "reasonable reliance" means. Would the trustee then have a fiduciary duty post-reformation to the post-reformation beneficiaries to at least make a reasonable effort to claw back the misdelivered property by bringing, if necessary, a judicial recoupment action against the pre-reformation beneficiaries? Presumably the trustee would seek to have the pre-reformation beneficiaries declared constructive trustees of the innocently misdelivered property. On the other hand, during the reformation proceedings themselves, would the trustee not have had a fiduciary duty to the pre-reformation beneficiaries to file an appearance in opposition to the complaint for reformation? The terms of a testamentary trust are generally found within the four corners of the will. It is traditional wills doctrine that a provision in a will that is neither patently nor latently ambiguous may not be reformed to remedy a mistake of fact or law. It does not matter whether the mistake was in the expression or the inducement.

vii. MUTC statute of ultimate repose governing actions against a trustee not necessarily the last word

The MUTC has an ultimate repose provision, specifically section 1005(c), which turns laches doctrine on its head when it comes to breach-of-trust actions against trustees of covered trusts. It provides that "a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of: (1) the removal, resignation, or death of the trustee; (2) the termination of the beneficiary's interest in the trust; or (3) the termination of the trust." It turns traditional laches doctrine on its head because the statute will begin to run against the beneficiary and in favor of the trustee whether or not the beneficiary has been made aware of the facts and law that pertain to the breach. The beneficiary's quiver may not be devoid of arrows, however.

First, there may be a fraud exception to section 1005(c). If the trustee knew or should have known of the breach but fraudulently kept the beneficiary in the dark about it, then the trustee may well have forfeited the protections of section 1005(c). The commentary in the Official UTC leaves the door open. The commentary in the MUTC is silent on the issue.

Second, the MUTC's trust reformation provisions are so open-ended that an aggrieved beneficiary might well be able to achieve a measure of relief, such as trustee removal, via a well-crafted trust-reformation complaint. MUTC section 1005 regulates breach of trust actions, not trust reformation actions.

Third, to the extent the trustee's breaches of trust have caused the trustee, co-beneficiaries, and/or third parties to be unjustly enriched at the expense of the aggrieved beneficiary, the aggrieved beneficiary ought not to be foreclosed by section 1005(c) from bringing an equitable restitution action. The aggrieved beneficiary might even be able to bring such an action against the trustee for the fees he took while he was in breach of trust. MUTC section 1005 regulates breach of trust actions, not equitable restitution actions for unjust enrichment. Recall that one can be found "liable in restitution" even in the absence of fault.[173]

viii. Beneficiary consent to breaches of trust still must be informed

A trustee may enter into a self-dealing transaction, or any other breach of trust, if the beneficiary has given informed consent to the breach of trust.[174] In order for the beneficiary to give informed

171. MUTC §811, which states that a trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust, deals with the trustee's duty to defend the trust against third-party claims in contract and tort, distinguished from the separate common law duty of the trustee to defend the very integrity and provisions of the trust against attack.

172. *Morse*, 466 Mass. at 92.

173. *See* Restatement (Third) of Restitution and Unjust Enrichment §1, cmt. f.

174. Restatement of Restitution §191.

consent, she must be of full age and legal capacity, and under no undue influence (or even "over-persuasion") by the trustee.[175] The beneficiary must "know" or have "complete awareness" of the material facts and critical law, including the "possible consequences" of the breach.[176] Equitable, rather than contractual principles will govern, and the test is a subjective one. It is not enough that the trustee furnished the beneficiary with the required information, but that the beneficiary understood the implication of the trustee's actions as well. The burden is on the trustee to demonstrate that the beneficiary had actual and full knowledge of her legal rights. The mere signing of a form will not be enough, and a trustee must be aware that he or she is still required to meet the informed consent requirements to prevent any liability.

ix. Proprietary-mutual-fund investment authority an exception to the no further inquiry rule, not to the duty of loyalty

MUTC section 802(e) in part provides as follows:

> An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee shall not be presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of chapter 203C.

The Massachusetts comment to section 802 characterizes the provision as "an exception to the duty of loyalty." That it is not. It is instead a statutory exception to the no-further-inquiry rule. Now the beneficiary has the burden of proving that the trustee, in investing the assets of a trust in one of its proprietary mutual funds, has breached its duty of loyalty. Under the no-further-inquiry rule, such an act of self-dealing might have been a *per se* breach of trust. The Federal Reserve in the past has raised concerns that banks that invest their fiduciary funds in their proprietary mutual funds may be subject to suit for breach of the common law duty of undivided loyalty, notwithstanding general statutory authority to do so.[177] Nothing has changed in this regard. MUTC section 802(e) is much less than meets the eye. Any trustee who is lulled into behaving otherwise does so at its peril.

x. Limitations on trustee resignation

a. Implied limitation on the right to resign remains in force

MUTC section 705 provides that a trustee may resign upon 30 days' notice, in the case of a revocable trust, to the settlor and all co-trustees, and in the case of any other trust, to the qualified beneficiaries and co-trustees of the trust; or with court approval. The section could misleadingly lead one to believe that a trustee may now resign without a qualified successor trustee in place. Wrong.

b. Resigning trustee still saddled with affirmative fiduciary duties until legal title and possession transfer

The comment to MUTC section 707 misleadingly states that it has not created an "affirmative duty" while handing off the trusteeship. When it comes to the administration of a trust, there cannot be a break in the chain of responsible fiduciaries. If the resigning trustee has no express duties, then he would perforce morph into a constructive trustee of the property so long as he retains the legal title, which would be a strange innovation. A trustee with express or statutory resignation authority may not resign until there is someone ready, willing and able to immediately take his place and receive the title to the trust property. In other words, the trustee cannot just walk away from the trust, even if there is express or statutory authority to do so. To the extent the trustee has a role to play in the selection of who is to succeed him, then the outgoing trustee must exercise due diligence in the selection of his successor. In other words, he must see to it that the successor is "qualified." He has a residual fiduciary obligation to do so. Otherwise, if he is on actual notice that his designated successor is unqualified then he has a residual fiduciary duty to do something about it, such as bring the matter to the attention of the court.

A trustee will not be relieved of obligations as trustee by mere transfer and abandonment. Essentially the trustee will be held to have improperly delegated to the transferee—or the world at large in case of abandonment—responsibility for administering the trust. The mere resignation and acceptance thereof may not, in the absence of statute or appropriate language in the governing instrument, operate to transfer title to a successor trustee. Thus, the resigning sole trustee may need to execute suitable conveyances of the trust property to the successor in office. The outgoing trustee will want to do so in any case to put others on notice of the succession. A trustee who has resigned should proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee, or any other person entitled to it. The trustee retains residual affirmative duties to protect the trust property until such time as the legal title thereto duly transfers to the successor trustee.

xi. Antilapse applies to equitable interests under trusts under the MUPC, while the MUTC allows a trustee to rely on the terms of the trust instrument

Camouflaged in the bowels of the Massachusetts Uniform Probate Code, specifically section 2-707, is a provision that extends antilapse principles to equitable interests under trusts. This is one of the more lethal traps for the unwary trustee, in that a trustee who misdelivers the trust property has traditionally done so at his peril.[178] While the MUTC was not the vehicle for "projecting the antilapse idea into the area of future interests,"[179] it is complicit in keeping the trap camouflaged. There is not a word in the MUTC about antilapse, which one commentator has referred to as a "sea change in the law of remainders."[180] The inheritability of vested remainders had been recognized in the time of Edward I, their divisibility since enactment of the Statute of Wills in 1540. This all changed in Massachusetts with the stroke of the Governor's pen. Professor Jesse Dukeminier (the late Maxwell Professor of Law at the University of California, Los Angeles) and Professor Mark L. Ascher (the Sylvan

175. Restatement of Restitution § 191, cmt. d

176. MUTC §1009 (2); Cohen v. First Camden Nat'l Bank and Trust Co., 237 A.2d 257, 261 (N.J. 1967).

177. *See* Conversion of Common Trust Funds to Mutual Funds, SR-97-3 (SPE), Fed. Banking L. Rep. (CCH) ¶ 37-052 (Feb. 26, 1997). *See also* Supervisory Guidance Regarding the Investment of Fiduciary Assets in Mutual Funds and Potential Conflicts of Interest, SR 99-7 (SPE), Fed. Banking L. Rep. (CCH) (Mar. 26, 1999).

178. The trustee has traditionally been absolutely liable for injury to the beneficiary's equitable interest occasioned by misdelivery.

179. MUPC §2-707, cmt.

180. Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*,

Lang Professor in Law of Trusts at the University of Texas and author of the Fifth Edition of *Scott on Trusts*) had expressed profound reservations about this expansion of the antilapse concept back in the 1990s, which they laid out with some vehemence and in considerable detail in law review articles. The National Conference of Commissioners on Uniform State Laws had adopted section 2-707 in 1990. Their questions and concerns have largely gone ignored and unaddressed to this day.

A simple example will illustrate what the fuss was all about. Take the classic trust formula: A (settlor) to B (trustee), for C (income beneficiary) for life, and then to D (equitable remainderman). Assume D is John Jones. His equitable property interest in our fact pattern being subject to no condition precedent, such as that he must survive C to take, his interest vested in him at the trust's inception. Should John Jones predecease C, legal title to the trust property passes to John Jones's executor when C eventually does die. At least that was the way the law worked in Massachusetts before enactment of its version of the Uniform Probate Code. It was said that John Jones took *ab initio* a vested non-possessory equitable remainder.

Now there is section 2-707(a) of the MUPC, which reads as follows: "If an instrument is silent on the requirement of survivorship [which is the case in our fact pattern], a future interest under the terms of a trust shall be contingent on the beneficiary surviving the distribution date." In other words, the trust property in our fact pattern would not pass to Mr. Jones's executor should Mr. Jones predecease C. Where then would it go? Under prior law it would have passed upon a resulting trust back to A or into A's probate estate at the death of C. The MUPC, instead, supplies alternate remaindermen, which are likely to be determined with reference to laws of intestacy. The complexity and convolution of the commentary to section 2-707 reminds one of the Internal Revenue Code.[181]

The prospective Massachusetts trustee would be well-advised to condition acceptance on a negation in the terms of the trust of the application of the MUPC's antilapse provisions. The fewer moving parts the better when it comes to a matter as serious as relinquishing title to trust property. Time will tell whether the trustee of a Massachusetts irrevocable covered trust can take comfort in the provisions of MUTC's section 1006, which read as follows: "A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument shall not be liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance." The trust said John Jones. It said nothing about John Jones's descendants, whom John Jones also made no mention of in his will.

C. A primary-liability trap for the unwary agent of the trustee

i. Agent of the trustee of a covered trust may be held primarily liable for injuring the trust economically

MUTC section 807(c) provides that an agent of the trustee of a covered trust will be held primarily liable for any breaches of trust, or for injuring the trust economically. The trustee is taken off the hook as long as he/she exercises reasonable skill and caution in selecting an agent, establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust, and periodically reviewing the agent's actions to monitor the agent's performance and compliance with the terms of the delegation. As long as the trustee complies with these conditions, the agent will be held fully liable.

ii. MUTC and MUPIA coordination lacking when it comes to the primary liability of a trustee's agents

The MUTC's trustee exoneration provision appears to be all encompassing, that is, it appears to capture all types of delegations, whereas the MUPIA appears to capture "investment and management" functions only. Why wasn't the MUPIA exoneration section repealed as being subsumed into the MUTC? Does the MUTC delegation section not cover "investment and management" functions? What does "management" mean in this MUPIA context? The answers to these questions are not contained in the text or the commentary to the MUTC.

IX. MUTC Features That Could Be Adverse to Interests Of Beneficiary

A. The MUTC's ultimate repose statute may run against a designated beneficiary who has never even been apprised of the existence of the trust

It cannot be said that the MUTC's ultimate repose statute, specifically section 1005(c), is beneficiary-friendly. It provides that even if the trustee is never apprised of the existence of the trust, "a judicial proceeding against a trustee for breach of trust must be commenced within five years after the first to occur of: (1) the removal, resignation or death of the trustee; (2) the termination of the beneficiary's interest in the trust; or (3) the termination of the trust." If there is a fraud exception, the MUTC makes no mention of it. And even if there is one, trust counsel's allegiance to the trustee could mute its effectiveness in practice. If counsel, for example, becomes aware towards the end of the five-year period that X rather than Y should have received a terminating distribution, should he so advise his client, the trustee? If he doesn't, presumably the ultimate repose statute will continue to run against the beneficiary, unless trust counsel's knowledge can somehow under agency principles be imputed to the trustee. Assume counsel does inform the trustee of the mis-delivery. If the trustee keeps quiet about it, then the actual or constructive fiduciary fraud would likely toll the running of the statute.

B. Reformation of testamentary trust provisions

Under the Official UPC,

> The court may reform the terms of a [will], even if unambiguous, to conform the terms to the testator's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the [will] were affected by a mistake of fact or law, whether in expression or inducement.[182]

There is no such provision in the MUPC. Assume that a will is allowed in Massachusetts. It contains an *in terrorem* clause and a testamentary trust provision. The trust is now funded. The trust beneficiaries could be forgiven for assuming that their equitable interests are now more or less etched in stone. But then there is the MUTC, specifically section 415, which provides that:

> The court may reform the terms of a [testamentary] trust, even if unambiguous, to conform the terms to

94 Mich. L. Rev. 148 (1995).

181. *See generally* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, Or More Like the Internal Revenue Code?*, 77 Minn. L. Rev. 639 (1993).

182. Official UPC §2-805.

> 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 expression or inducement.

It is lucky for the trust beneficiaries that there is an *in terrorem* clause in the will…maybe, maybe not. While the clause might pose a deterrent to a designated trust beneficiary, it would not for the third party who seeks trust-beneficiary status via a mistake-based testamentary trust reformation action. Nor in the real world is the "heightened" clear and convincing evidence standard likely to be much of a deterrent.

C. Postmortem execution of wills with testamentary trust provisions

In Massachusetts, prior to the enactment of the MUPC, a critical will-execution formality was subscription by two witnesses in the conscious presence of the testator. Under the MUPC, specifically section 2-502, the witnesses may sign after the testator's death. No time limit is specified. Under the Official UPC there is a reasonable time requirement.[183] Assume that X is the devisee of Blackacre pursuant to the terms of a duly executed will. It is the last will that the testator executed before his death. In the scrivener's files is a later document designating Y as the beneficiary of a testamentary trust of Blackacre. It was signed by the decedent with testamentary intent. There are two individuals who witnessed the signing. They have yet to sign, but eventually will. X's interest in Blackacre is not as clear as it would have been prior to enactment of the MUPC, nor is presumably the state of the title to Blackacre in the period between the death of the testator and the consummation of the post-mortem execution of the later will.

D. A trustee may no longer be held liable for injury caused the trust by a prudently-selected and prudently-monitored agent of the trustee

Assume the trustee prudently delegates fiduciary discretions to an agent and then prudently monitors the agent's activities. Under the MUTC, specifically section 807(c), the trustee is off the hook if, in the course of the agency, the agent damages the trust property. If the agent is judgment-proof, then the beneficiary could well be out of luck, no matter how deep the pockets of the trustee. Under the common law, the trustee would have been primarily liable. The lesson is that the beneficiary needs to pay attention to the creditworthiness of the trustee's agents, including trust counsel.

E. Guardian ad litem may consider interests of the beneficiary's family

Section 305(c) of the MUTC provides that "in making decisions," a guardian *ad litem* representing the interests of a beneficiary "may consider general benefit accruing to the living members of the [beneficiary's] family." This is yet another provision of the MUTC that cannot be said to be beneficiary-friendly, absent special facts.

X. The Policy Case for the Enactment of the Uniform Trust Code

Much ink has been spilled in making the policy case for enactment of the Uniform Trust Code. We offer a representative sampling.

A. National case for codification

In an article entitled *Why Did Trust Law Become Statute Law in the United States?,* Professor John H. Langbein, a professor at Yale Law School and a member of the drafting committee of the Official UTC back in 2000, makes the general policy case for codifying trust law across the jurisdictions. Here is an excerpt from his article:

> What explains the trend across the twentieth century to recast the law of trusts from a field of case law into one of statute law? We are not surprised that relatively new fields such as pension law or condominium law should have a largely statutory basis. These fields developed too recently and too rapidly for the accretive processes of the common law to have been able to supply timely and adequate guidance. But trust law is an ancient field. The enforcement of trusts in the English court of Chancery can be traced back to the late fourteenth century, and there is some indication that the courts of the English church may have been enforcing trusts even earlier. Why, then, the movement to turn trust law into statute law in the twentieth century?
>
> My answer is that the trust of today bears only a distant relationship to the trust of former centuries. The trust that we know is mainly a creature of the twentieth century; accordingly, common law processes of incrementalism were no more suitable for today's trust law than for the regulation of nuclear power plants.[184]

Professor David M. English, University of Missouri School of Law, explains the general policy rationale of the Official UTC and makes the case for its enactment in the various states in *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*. Professor English was a reporter for the Official UTC, and serves as a Uniform Law Commissioner. Here is an excerpt from his article:

> The drafting of the UTC was prompted by the much greater use of trusts in recent years. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, led to a recognition by the Commissioners that the trust law in most states is thin, with many gaps between the often few statutes and reported cases. It also led to a recognition that previous uniform acts relating to trusts, while numerous, are fragmentary. The primary source of trust law in most other states is the Restatement of Trusts and the multivolume treatises by Scott and Bogert, sources that fail to address numerous practical issues and that on others sometimes provide insufficient guidance. The purpose of the UTC is to update, fill out, and systematize the American law of trusts. The UTC will enable states that enact it to specify their rules on trust law with precision and in a readily-available source. Finally, while much of the UTC codifies the common law, the UTC makes some significant changes.
>
> … The drafters desire and hope that the Code will be enacted in all fifty states. The result would be one uniform approach to trust law in the United States. But there are limits to what legislation can accomplish. Over time, legislation tends to become obsolete. Updating obsolete legislation is often far more difficult than securing an original enactment. Minor amendments do not

183. *Id.* §2-502.

184. John H. Langbein, *Why Did Trust Law Become Statute Law in the United*

excite interest, and other issues will enjoy higher legislative priority. Any attempt to codify the law of trusts comprehensively, therefore, must stand the test of time and not require constant amendment. The statute must be sufficiently specific to add content to the rules developed by the courts but yet not so detailed as quickly to become obsolete as conditions change.

It is hoped that the UTC has met the challenges for a utilitarian, comprehensive code of law. The drafters have not tried to codify all conceivable trust law topics. Not all topics are amenable to legislation. Problems are sometimes too new for workable solutions to have suggested themselves, or efforts to reduce rules to writing will result in excess rigidity and insufficient discretion vested in the courts to adapt to changing conditions. Even on issues the drafters have elected to codify, the UTC, in many cases, does not specify every possible detail, the drafters preferring flexibility and brevity to greater precision but probable quick obsolescence. Hopefully, the final result is a Code that will serve as the model for trust statutes for decades to come.[185]

B. Massachusetts case for codification

Why should a seasoned trust jurisdiction like Massachusetts have something like the MUTC on its books? We defer to the Committee, whose members unanimously recommended its enactment. Here is an excerpt from its Report:

> The Committee felt that having all trust law in one place would be valuable. Since current law is scattered and subject to varying interpretation, a codification of law was favored. In addition, where there is some uncertainty as to the law or there has not been a case on point, trustees and beneficiaries will not have to wait for the legal process to finalize the law if a comprehensive code is enacted. Having a code also means that an encyclopedic knowledge of case law is less necessary to "know the law."[186]

In *Highlights of the Uniform Trust Code*, Attorney Timothy D. Sullivan, a Massachusetts practitioner and a member of the Committee, explains why, in his opinion, Massachusetts was well-advised to adopt the UTC:

> As much of trust law in this country developed in Massachusetts courts, the UTC is not a radical departure from our current jurisprudence. Instead, it comes as an evolutionary progression of the law.
>
> The UTC simplifies trust administration and makes financial institutions more competitive. This fact has not escaped states that have adopted the UTC. In New Hampshire, early adoption of the act is part of a deliberate attempt to pry financial services jobs away from Massachusetts. The UTC was drafted to fit neatly into a fabric that includes other uniform laws. Thus, the concepts and definitions from the Massachusetts Prudent Investor Act and the Massachusetts Principal and Income Act work in concert with the UTC.
>
> … [T]he UTC generally tracks current Massachusetts law. Where there are differences, most of the differences simplify the administration of trusts and reduce the amount of expensive routine judicial supervision and intervention.
>
> When all states have adopted the UTC, institutions will enjoy a consistent set of laws and regulations, with less risk and expense. Trust beneficiaries will enjoy lower costs, and as a result of clearer notification and reporting requirements, more assurance that the information they need to protect their interests is complete and accurate.[187]

XI. The Policy Case against the Codification of Trust Law

The Anglo-American trust remains a principles-based creature of equity. Even the hubristic drafters of the Uniform Trust Code declined to define the trust, leaving that task to equity. On this side of the Atlantic, each American state cultivates its own equity jurisprudence. Yet this federal constellation of equity regimes is bound together by a common set of principles (such as the fiduciary principle), maxims (such as "Equity looks to intent (substance) rather than to the form"), and remedies (such as the specific performance order). Thus the Uniform Trust Code can be nothing more than a collage of partial codifications. These legislative tweaks do more harm than good in that they barnicalize the trust relationship and in so doing, to put it bluntly, muddle it. They muddle it by distracting the bench and the bar from the foundational principles extrinsic to the Code that are supporting the collage. A nuclear power plant is cumbersome, complicated, static, physically dangerous, and endowed with a shelf life of only a few decades. A trust is not a nuclear power plant and should not be regulated like one. The Uniform Trust Code and other such partial codifications of the trust relationship have perverse and unintended immediate practical consequences, as well. There is now less pan-jurisdictional uniformity and more technical complexity. When it comes to facilitating commercial and noncommercial solutions to society's problems, the trust is now less protean and less nimble. It is said that "[t]he silent waters of equity run deep—often too deep for legislation to obstruct."[188] We shall see.

Sir Francis Bacon (1561-1626) observed that codifying in a common law context can do more harm than good. "Sure I am there are more doubts that rise upon our statutes, which are a text law, than upon the common law, which is no text law."[189] The debate over the merits of codification in the common law context has been ongoing for well over a hundred years. Chief Justice Lemuel Shaw, a former chief justice of the Massachusetts SJC, explained generally why there is merit to letting the law as enhanced by equity evolve organically:

> It is one of the great merits and advantages of the common

States?, 58 Ala. L. Rev. 1069, 1071 (2007).

185. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143, 144, 211-12 (2002).

186. Report of the Ad Hoc Massachusetts Uniform Trust Code Committee 2 (available at http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/upc/mutc-ad-hoc-report.pdf).

187. Timothy D. Sullivan, *Highlights of the Uniform Trust Code*, Massachusetts Bar Association *Section Review*, Vol. 9. No. 2 (2007).

188. The Hon. Justice J.D. Heydon, A.C., *Does statutory reform stultify trusts law analysis?*, 6 Tr. Q. Rev., Issue 3, at 28 (2008) [a STEP publication].

189. Catherine Drinker Bowen, Francis Bacon: The Temper of a Man 144 (1st ed.1963).

> law, that, instead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it.[190]

Professor John Chipman Gray saw codification in a common law environment as fostering more complexity and ambiguity in the law, and thus more litigation, not less.[191] So did Professor Austin Wakeman Scott. A good example of how codification can fuel litigation is the New York legislature's well-intentioned but misguided meddling back in 1828 with the rule against perpetuities. Professor Gray explained:

> Before the year 1828, the forty or fifty volumes of the New York Reports disclose but one case involving a question of remoteness. In that year the reviewers (clever men they were, too) undertook to remodel the Rule against Perpetuities, and what a mess they made of it! Between four and five hundred cases [as of 1886] have come before the New York Courts under the statute as to remoteness, an impressive warning on the danger of meddling with the subject.[192]

Reading between the lines, one of Professor Gray's messages is that such legislative interventions are fiendishly difficult to conduct effectively and elegantly. The original statute of wills (1545) enacted by Parliament was only several sentences, yet it has spawned perhaps millions of interpretive decisions over the centuries. The Uniform Trust Code has many more pages of legislation than the Statute of Wills has words. The hubris of thinking that one can partially codify large swaths of the law of trusts without setting in motion a tsunami of unintended consequences.

In any case, Chief Justice Shaw seems to have had it right in at least one respect: codifications do tend to have a limited shelf life. After only 35 years, for example, the Uniform Management of Institutional Funds Act ("UMIFA"), which has been enacted in 47 jurisdictions, has now been superseded by the Uniform Prudent Management of Institutional Funds Act ("UPMIFA").[193] This is because UMIFA is now apparently already "out of date."[194] While the prudence standards in UMIFA may have provided some "useful guidance," still "prudence norms evolve over time."[195] These are the words of the National Conference of Commissioners on Uniform State Laws.

We allow Justice J.D. Heydon, of the High Court of Australia, to make the closing argument in this public policy debate over the merits of enacting partial codifications of the law of trusts, such as the Uniform Trust Code. In a paper delivered to the Sydney Branch of the Society of Trust and Estate Practitioners, he expressed his reservations: "A system of judge-made law resting on principles of stare decisis has a degree of stability; but it teems with life, and is inherently capable of change in the light of experience."[196] In other words, the law of trusts is best fine-tuned judicially though the application of general principles to doubtful problems. "The process revivifies the general principles: it enables them to be explored, understood afresh when looked at from the new angle, modified in the light of the new problem so that the general principles in turn can have slightly different applications in future."[197] Codification tends to "deaden and stultify that process … ."[198]

XII. Conclusion

Whether or not the recent enactment of the MUTC was good public policy is necessarily a subjective question; reasonable minds will take different views on the point. However, one thing is certain: the Massachusetts law of trusts has gotten a whole lot more complicated with its enactment. The Massachusetts common law of trusts has not gone away. Myriad free-standing trust-related statutes remain very much on the books and in force. And now there are pages and pages of partial codifications of selected aspects of Massachusetts trust law. The official title of this collection of partial codifications is the Massachusetts Uniform Trust Code, the subject of this article. The words of Justice Heydon of the High Court of Australia, ever the optimist, seem apropos: "…the silent waters of equity run deep—often too deep for legislation to obstruct."[199] Time will tell.

190. Nor. Plains Co. v. Boston & Me. R.R., 67 Mass. 263, 267 (1854).

191. *See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 Ariz. St. L.J. 713 (2006).

192. John Chipman Gray, The Rule Against Perpetuities app. G §871 (4th ed. 1942).

193. Uniform Prudent Management of Inst. Funds Act Prefatory Note (available at www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf).

194. *Id*.

195. *Id*.

196. The Hon. Justice J.D. Heydon, A.C., *Does statutory reform stultify trusts law analysis?*, 6 Tr. Q. Rev., Issue 3, at 28 (2008) [a STEP publication].

197. *Id*.

198. *Id*.

199. *Id*.

Case Comment

Florida v. Jardines, 569 U.S. ____, 133 S. Ct. 1409 (2013)

Criminal Law: Police dog sniffing outside private home is a search within Fourth Amendment requiring probable cause

Drug and bomb detection canines sniffing luggage at airports, lockers in schools and people at border crossings have become, for better or worse, an accepted part of the American legal and cultural landscape. What has been unsettled until now is the constitutionality of such olfactory searches outside such public areas in what is considered the last bastion of privacy—behind the threshold of one's own home.

In March, 2013, the United States Supreme Court ruled that the use of a trained narcotics dog to sniff for drugs outside the front door of a suspect's house constitutes a search under the Fourth Amendment, and therefore probable cause is required. Without consent, a warrant for the use of the canine is requisite. In a five to four decision authored by Justice Antonin Scalia, the court in *Florida v. Jardines*[1] affirmed an earlier decision of the Florida Supreme Court,[2] in the first case where the court determined the legality of a law enforcement dog sniff outside the context of a public area such as an automobile, an airport, a post office or package delivery service.[3]

It is noteworthy that, in *Jardines*, the majority decision was based not on privacy rights, but rather on freedom from "physical intrusion" upon property rights.[4] In that way, the opinion aligned with the court's reasoning the previous year in *United States v. Jones*.[5] In the *Jones* decision, the court had ruled that placing a Global Positioning System ("GPS") on a car was an unreasonable search per se, as such an act was a trespass on private property rather than an invasion of privacy.[6]

In *Jardines*, a detective working for the Miami-Dade Police Department received an unverified tip from an informant that Joelis Jardines was growing marijuana inside his home.[7] A surveillance team observed the house for 15 minutes, saw no vehicles in its driveway, no activity around the house, and could not see inside the structure.[8] It was then that Franky, a trained drug-sniffing police dog, was brought to the scene and taken onto the porch, where the dog gave a positive alert for drugs and indicated that the strongest odor of a controlled substance was at the front door.[9] Based upon the canine's actions, a search warrant was obtained and executed on that day.[10] As a result of that search, marijuana was found in the home and the defendant was arrested.[11] An order suppressing the evidence was granted by the trial court, reversed by a state appellate court,[12] and then affirmed by the Florida Supreme Court, which upheld the order granting the motion to suppress.[13] The United States Supreme Court granted certiorari on the sole question of whether the conduct of the police in bringing the trained dog within the curtilage of the home was a search within the meaning of the Fourth Amendment.[14]

Justice Scalia, writing for the majority, wrote that the Fourth Amendment, which ensures that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,"[15] establishes "a simple baseline."[16] He cited the recent *Jones* case, which endorsed the concept that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"[17]

Justice Scalia further wrote:

> [W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." … This right would be of little practical value

1. Florida v. Jardines, 133 S. Ct. 1409 (2013).
2. Jardines v. State, 73 So. 3d 34 (Fla. 2011).
3. The United States Supreme Court had previously considered three dog-sniffing cases and, each time, ruled that a search as protected by the Fourth Amendment had not taken place. In United States v. Place, 462 U.S. 696 (1983), the court ruled that the act of a police dog sniffing a commercial airplane passenger's luggage was not a search, since the luggage was not actually opened and its contents were not exposed to public view. The sniff was just to determine whether contraband in the form of narcotics was present. Therefore, the court ruled that the sniff was minimally invasive and compromised no privacy interest. In City of Indianapolis v. Edmond, 531 U.S. 32 (2000), where a roadblock was set up for the sole purpose of having a trained canine sniff random motor vehicles for the presence of narcotics, the court used reasoning similar to that used in *Place*. The court noted that there was no entry into the car and the contents of the vehicles were not viewed by anyone; the mere objective of the sniff was to determine the presence or absence of narcotics. In Illinois v. Caballes, 543 U.S. 405 (2005), where a car was stopped for a routine traffic stop, a search by a police canine was not deemed a protected search because the motor vehicle was not entered, the sniff happened on public property where there would be no reasonable expectation of privacy, the sniff would only be used to reveal the presence of narcotics which no one has a legal right to possess, and the vehicle had already been seized for the traffic citation, however briefly.
4. *Jardines*, 133 S. Ct. at 1414.
5. United States v. Jones, 132 S. Ct. 945 (2012).
6. *Id.* at 949-54.
7. Florida v. Jardines, 133 S. Ct. 1409, 1413 (2013).
8. *Id.*
9. *Id.* at 1413, 1420 (Alito, S., dissenting).
10. *Id.* at 1413.
11. *Id.*
12. State v. Jardines, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 2008).
13. Jardines v. State, 73 So. 3d 34 (Fla. 2011).
14. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).
15. U.S. Const. amend. IV.
16. *Jardines*, 133 S. Ct. at 1414.
17. *Id.* (*quoting* United States v. Jones, 132 S. Ct. 945, 950-51 n.3 (2012)).

> if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.[18]

The court acknowledged that certainly, precedent dictated that police officers need not "shield their eyes" when passing by a home while "on public thoroughfares."[19] Additionally, the court noted that, if there was no intent to search, then there is no bar to approaching the door of the home of another. Justice Scalia stated:

> We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v. Alexandria*, 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.[20]

In this very readable decision, Justice Scalia continued repeatedly to use the subject of dogs as an entree for wit, as when he further stated that "it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home."[21]

However, the accepted right of private citizens to stroll up to the front door of a stranger's house for routine business or social reasoned does not extend itself to permitting that stranger to enter that property in order to begin surveillance.[22] Here Justice Scalia reasoned that, "To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to — well, call the police."[23]

There is no customary invitation to bring a dog to search for evidence and this "behavior" of bringing a dog with the specific objective of a search cannot be viewed as routine.[24] Therefore, there would be no implied license because "the background social norms that invite a visitor to the front door do not invite him there to conduct a search."[25]

Justice Scalia asserted that the property-rights baseline of the Fourth Amendment is so clear that there is no need to deliberate on whether the act of bringing a trained police drug-sniffing dog onto private property to further an investigation is also a violation of one's expectation of privacy.[26] In the court's view, this line of analysis permits the court to forgo consideration of privacy rights, and "keeps easy cases easy."[27]

It is here that the justices supporting the majority opinion are themselves divided. Justice Elena Kagan, in a concurring opinion joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, wrote that, although she agrees with Justice Scalia that the police action in this case was an encroachment on property rights, it was, additionally, a violation of the defendant's reasonable expectation of privacy.[28] In her view, it should be expected that property rights and privacy rights, naturally and inevitably, converge.[29] The law of property would naturally influence "shared social expectations"[30] of what areas should be free from government intrusion, and those "privacy expectations are most heightened"[31] in the home and surrounding areas.

In fact, Justice Kagan stated that the applicability of privacy rights to this kind of case was already resolved more than a decade earlier. In *Kyllo v. United States*, police used a thermal-imaging device outside a suspect's home to detect heat emanating from the inside of the house.[32] The court ruled that because no observer outside the house could have naturally learned whether excessive heat spots existed in the house and, if so, where, the use of the device constituted a "search."[33]

Justice Kagan asserted that *Jardines* is no different than *Kyllo*, in that law enforcement officials were outside the house, yet searching inside with a super-sensitive instrument.[34] The fact that one instrument was a machine and another a living creature made no difference to Justice Kagan, who found it irrelevant that the "equipment they used was animal, not mineral."[35] Here, the canine used was no friendly pet wandering around a neighbor's porch. As Justice Kagan wrote, trained drug-sniffing dogs "… are to the poodle down the street as high-powered binoculars are to a piece of plain glass. Like the binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell)."[36]

She further elaborated:

> For me, a simple analogy clinches this case — and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high-powered binoculars. See *ante,* at 1416, n. 3. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him

18. *Jardines*, 133 S. Ct. at 1414 (*quoting* Silverman v. United States, 365 U.S. 505, 511 (1961)).
19. Florida v. Jardines, 133 S. Ct. 1409, 1415 (2013) (*quoting* California v. Ciraolo, 476 U.S. 207, 213 (1986)).
20. *Jardines*, 133 S. Ct. at 1415.
21. *Id.*
22. *Id.* at 1416.
23. *Id.*
24. Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013).
25. *Id.*
26. *Id.* at 1417.
27. *Id.*
28. *Id.* at 1418 (Kagan, E., concurring).
29. Florida v. Jardines, 133 S. Ct. 1409, 1419 (2013) (Kagan, E., concurring).
30. *Id.* at 1419 (Kagan, E., concurring) (*quoting* Georgia v. Randolph, 547 U.S. 103, 111 (2006)).
31. *Id.* at 1418 (Kagan, E., concurring).
32. Kyllo v. United States, 533 U.S. 27, 29 (2001).
33. *Id.* at 34-35.
34. Florida v. Jardines, 133 S. Ct. 1409, 1419 (2013) (Kagan, E., concurring).
35. *Id.* at 1418 (Kagan, E., concurring).
36. *Id.*

> to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? Yes, of course, he has done that too.[37]

Justice Kagan found support for this analogy in the 1967 landmark case of *Katz v. United States*,[38] which extended the Fourth Amendment to prevent warrantless intrusions in any place where a person might have a "reasonable expectation of privacy," including intrusions that are not actually physical, but rather are committed through the use of technology.[39] In essence, she viewed a canine snout as a highly sophisticated technological device.[40]

Justice Samuel Alito, writing the dissent in which Chief Justice John Roberts, Justice Anthony Kennedy and Justice Stephen Breyer joined, argued that the majority wrongly based its decision on a "putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence."[41] He declared, in essence, that members of the public have a right to use a walkway to someone's house, whether they are mail carriers, door-to-door salespeople, or dropping off flyers.[42]

Justice Alito conceded that such a visit must be reasonable and not prolonged. He notes:

> "[T]here is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows." … The license is limited to the amount of time it would customarily take to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer), leave.[43]

Dogs are included here, too, according to Alito, who suggested that, during the course of one's life, it is not unexpected that a strange dog could walk onto one's property.[44] He wrote, "Dogs have been domesticated for about 12,000 years; they were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment."[45]

Justice Alito went beyond the premise that there is no reasonable expectation of privacy on the front porch of one's home and wrote that, under the test adopted in *Katz v. United* States[46]—discussed by Justice Kagan with a contrary conclusion—neither is there any such expectation held in the odors coming from one's home.[47] He argues, "A reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectible by a dog, cannot be smelled by a human."[48] He rejected the majority view equating a dog's sniffing ability to a heat-detecting instrument;[49] in the majority's view, both are devices, though one is animate and the other inanimate.[50]

The significance of the *Jardines* opinion extends to its placing import on the traditional property-based perception of the Fourth Amendment, rather than on privacy rights. Here, the majority implements the hoary legal canon of the 1765 English case of *Entick v. Carrington*, which "holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave."[51]

On another level, *Jardines* also follows the recent trend of opinions of the United States Supreme Court suggesting that the distinction between liberal versus conservative justices is less significant than previously assumed. Instead, an improbable alliance of liberal and conservative justices seems bent on determining whether the manner in which police conduct searches is constitutional, regardless of whether it is an effective law enforcement tactic.[52]

—Peter Elikann

37. *Id.* (citation omitted).

38. Katz v. United States, 389 U.S. 347 (1967). In *Katz*, an individual calling in illegal sports wagers was convicted after his conversations were recorded by a warrantless wiretap attached to the outside of the phone booth he regularly used. The court ruled that, since members of the public would have had a reasonable expectation of privacy in their conversations inside the booth, particularly once the door was closed, even though its use was offered to the public in a public place, the recording was subject to the Fourth Amendment's requirements. *Id*. at 351-53.

39. Florida v. Jardines, 133 S. Ct. 1409, 1418 (2013) (Kagan, E., concurring).

40. *Id.*

41. *Id.* at 1420 (Alito, S., dissenting).

42. *Id*.

43. *Id.* at 1423 (Alito, S., dissenting) (*quoting* State v. Jardines, 9 So. 3d 1, 11 (Fla. App. 2008) (rev'd, 73 So. 3d 34 (2011)).

44. *See* Florida v. Jardines, 133 S. Ct. 1409, 1420, 1424 (2013) (Alito, S., dissenting).

45. *Id*. at 1420 (Alito, S., dissenting).

46. Katz v. United States, 389 U.S. 347 (1967).

47. *Jardines*, 133 S. Ct. at 1421 (Alito, S., dissenting).

48. *Id.*

49. Florida v. Jardines, 133 S. Ct. 1409, 1425 (2013) (Alito, S., dissenting).

50. *Id*. at 1417.

51. *Id*. at 1415 (*citing* Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.) 817).

52. In Arizona v. Gant, 556 U.S. 332 (2009), the court, in the majority opinion of Justices Stevens, Scalia, Souter, Thomas and Ginsberg, ruled that, to justify a warrantless search of a motor vehicle incident to an arrest, police must demonstrate an actual and continuing threat to their safety, or a need to preserve evidence of the crime of arrest. In Missouri v. McNeely, 133 S. Ct. 1552, 1568 (2013), the court held that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." In Bailey v. United States, 133 S. Ct. 1031 (2013), the divided court ruled that the Fourth Amendment does not recognize the right to detain a person if he is not in the vicinity of the object of a search, whether it is a motor vehicle or a home. Justice Scalia sided with Justices Ginsberg, Sotomayor and Kagan in their dissent in Maryland v. King, 133 S. Ct. 1958 (2013), which held that, when police officers have probable cause to make an arrest, it is reasonable under the Fourth Amendment to take a DNA sample during the booking procedure.

Book Review

Small Town Lawyer, by Burton Chandler (TT Publishing Company, May 2013), 199 pages.

In the New England legal market, the dominant players are law firms of over 40 attorneys, especially those in Boston. Yet the majority of attorneys are not in large firms. In 2013, there were 67,803 attorneys admitted to practice in Massachusetts; of this total, 47,106 (69 percent) were based in the commonwealth. Over 80 percent of these attorneys were in firms of fewer than 40 attorneys.[1]

Burt Chandler is one of these attorneys. In a dozen vignettes, he draws on his career of over 50 years as a litigator in a mid-sized firm in Worcester, Mass., the second largest city in New England. With a degree of modesty in his successes, Chandler tells his war stories with a pragmatic acceptance of the reversals and injustices that attorneys face no matter the size of their firms, the affability of their clients, or the strength of their legal arguments.

In this self-published memoir, Chandler demonstrates the benefits and risks of limited editorial input. His writing has a charming freshness about it, and a clean conversational tone that puts the reader at ease including, for example, one of the best, most succinct definitions of declaratory judgment and summary judgment ever published.[2] Yet a judicious editorial hand might have smoothed some of the transitions and limited the instances of repetition.

Over the course of his career, Chandler handled cases involving police brutality, municipal corruption, and employment discrimination. For spicier tastes, there is the account of his representation of a pornographic movie theater. For those who fancy politics, especially on a local level, there are turf battles of municipal administrative law (petty only to those without a dog in the fight), local zoning involving liquor licensing for a bookstore café, tax exemptions for a house of worship that may have been more house than worship, and regulation of retail establishments in a vacation community.

Chandler often refers to the mounds of information he had to absorb in order to begin to represent his client well, which warmed this reviewer's heart—television and movies too often present attorneys working hard as something that happens for a nanosecond before a commercial, in an office dark except for a banker's light on the desk covered with too many books open to too many cases; the drudgery and tedium of the practice of law slides by unmentioned under the piles of papers and the flow of revenue. In Chandler's world, research is a necessary part of an attorney's work and an especially rewarding part when it provides the basis for a novel and winning argument or theory.

Chandler's firm has enjoyed more than moderate success and has endured over the years (contrast some large firms, which swell, merge, and sometimes implode with alarming frequency). His war stories demonstrate the two-edged sword of a smaller firm in a smaller community: he had the luxury to consider longer-term benefits flowing from a client relationship (and thus agreed to accept pro bono clients because it was not only the right thing to do in the moment, but also because a resounding victory could open the door to much more lucrative business for his firm), but sometimes had to forego or reduce a fee, or mute his creative strategies as they bumped up against established, unbending local custom and practices.

In each chapter, Chandler summarizes the dispute and its underlying facts while deftly avoiding a dry recitation by including descriptions of the personalities and other externalities that not only make for a good war story, but also show his sympathetic understanding of the context in which the challenges that came across his desk arose. The author paints a vivid picture of the nuances of depositions, discovery, subpoenas and trial tactics of his litigation practice. Unwilling to rely on his personal memories of cases, Chandler thoughtfully includes excerpts from the public records, including a 1972 memorandum of decision in a police brutality case and the Supreme Judicial Court's decision in the pornographic theater case.

Three of his vignettes—a police brutality lawsuit, an employment dispute, and an urban redevelopment matter—illustrate his approach to the law and the variety of his cases.

Police brutality

Chandler represented the plaintiffs in Worcester's first police brutality case. His clients, two brothers and their brother-in-law (their sister's husband), brought a civil rights action against seven police officers after criminal charges were brought against the three family members. In less than two dozen pages, Chandler recounts the case from its early beginnings when his wife met one of the plaintiffs at a meeting ("the place and purpose for which has been lost in the dustbin of history")[3] through his research (both to educate himself about criminal trials and to develop a strategy for what proved to be a ground-breaking case), to the criminal trial replete with motions for judicial recusal, *voir dire*, and exclusion of evidence, meetings with city officials, and filing a complaint with the United States Attorney's Office (stymied when the Worcester city solicitor advised the police chief to forbid any policeman from giving statements to the FBI).

When the brothers and the brother-in-law declined the judge's suggestion that they release their claims against the police officers in return for the government dropping the criminal action, the criminal case went to trial before a jury on the charges of drunkenness and disturbing the peace. Chandler elicited testimony from the officers that they had told his clients to get in their car and drive home, which sufficiently undermined the drunkenness charge so that the jury returned a not guilty verdict. The jury only found Chandler's clients guilty of disturbing the peace, and the judge fined them $10 each.

The conclusion of the criminal matter opened the door for the civil action that Chandler brought in federal court against the police officers for use of undue force in violation of his clients' civil rights. Almost two years after the conclusion of the trial, the court issued a decision in favor of Chandler's clients, with a sizeable award of monetary damages against four of the seven police officers.

1. Electronic mail correspondence with Ed Denne, COO and Publisher, Lawyers Diary and Manual, LLC, October and November 2013.

2. *Small Town Lawyer* at 48-9.

3. *Small Town Lawyer* at 13.

Employment – When Tenure is No Guarantee

When a local Catholic college with an excellent basketball team terminated the employment of several tenured professors, the author delved into the labyrinth of tenure, religious institutions, and local politics. To address his admitted ignorance of Massachusetts law on tenure, Chandler did significant research and consulted his colleagues and knowledgeable acquaintances in academic circles to educate himself. A little bluster came in handy: the complaint alleged that his client had tenure, although the author acknowledges that this point was not so clear.

An agreement with the American Association of University Professors provided that the college could terminate the employment of tenured professors in instances of financial exigency. Leveraging his knowledge of the city, Chandler questioned whether the college's construction of a state of the art gymnasium was consistent with the requisites of financial exigency to justify his client's dismissal. He moved for an injunction ordering the college to close its basketball program and gymnasium. The next day, before the court had considered the motion, Chandler's client informed him that the college had reinstated him. Well satisfied with the result, the client directed him to dismiss the suit.

Urban Redevelopment Gone Awry

Although it contains several war stories of triumph, S*mall Town Lawyer* is not a smug memoir of an inevitably successful attorney. Chapter 9 recounts a sad instance involving redevelopment in the face of urban blight in Worcester which Chandler candidly admits was a difficult and ultimately disillusioning experience. His client was a financially sophisticated banker whose wife had purchased a parcel of land in a rundown part of Worcester. Pursuant to a statute that permitted municipalities to take blighted land by eminent domain and sell the parcels to private parties for redevelopment, the City had taken a large portion of land, and the client's wife had purchased a small parcel and redeveloped it into a thriving, well-run (if small) strip mall.

A large developer sought the land for a huge project involving a local hospital and related medical facilities. In order for the project to proceed, the developer asked the city to determine that the strip mall was in a blighted area, and through the Worcester Redevelopment Authority, take it back by eminent domain. Chandler ran into conflicts with opposing counsel, who did not conduct themselves with the decorum that he expected from colleagues. Things went downhill from there, and Chandler was bitterly frustrated when his solid preparation, excellent facts, and the clarity of applicable law did not lead to the right outcome.

The common threads of these three vignettes are that a small town attorney, like the fictional Atticus Finch, can have a diverse and interesting practice. Chandler obviously enjoyed most of his cases enormously, and took delight in the challenges and uncertainties of new matters, new clients, new legal issues and the opportunity to do good and lasting work. The hero of *To Kill a Mockingbird* exemplified the honor and joys of small-town practice, and the author of *Small Town Lawyer* is a living example of that ideal. Sadly, the days of Atticus Finch are gone, and the likelihood of successful, satisfying general practice diminishes with each passing tax season.

—Nancy Weissman

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			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*				
b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	9,933	10,657
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	0	0
	(3)	Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	0	0
	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	0	0
c. Total Paid Distribution *[Sum of 15b (1), (2), (3), and (4)]* ▶			9,933	10,657
d. Free or Nominal Rate Distribution *(By Mail and Outside the Mail)*	(1)	Free or Nominal Rate Outside-County Copies included on PS Form 3541	0	0
	(2)	Free or Nominal Rate In-County Copies Included on PS Form 3541	0	0
	(3)	Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	0	0
	(4)	Free or Nominal Rate Distribution Outside the Mail *(Carriers or other means)*	0	0
e. Total Free or Nominal Rate Distribution *(Sum of 15d (1), (2), (3) and (4))*			0	0
f. Total Distribution *(Sum of 15c and 15e)* ▶			9,933	10,657
g. Copies not Distributed *(See Instructions to Publishers #4 (page #3))* ▶			100	100
h. Total *(Sum of 15f and g)*			10,033	10,757
i. Percent Paid *(15c divided by 15f times 100)* ▶			100	100 %

* If you are claiming electronic copies, go to line 16 on page 3. If you are not claiming electronic copies, skip to line 17 on page 3.

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a. Paid Electronic Copies ▶		
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a) ▶		
c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a) ▶		
d. Percent Paid (Both Print & Electronic Copies) (16b divided by 16c í 100) ▶		

☐ **I certify that 50% of all my distributed copies (electronic and print) are paid above a nominal price.**

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☒ If the publication is a general publication, publication of this statement is required. Will be printed in the Feb. 2015 issue of this publication. ☐ Publication not required.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner	Date
	11/7/14

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