AN ESTATE PLANNER'S GUIDE TO REAL PROPERTY TRANSFERS IN MASSACHUSETTS

by

Leo J. Cushing, Esquire, CPA, LLM
Cushing & Dolan, P.C.
Attorneys at Law
24 School Street, Suite 300
Boston, MA 02108
Telephone: (617) 523-1555
Fax: (617) 523-5653

Revised on 11/15/04
for the Real Estate Bar Association
Annual Meeting,

originally presented to
Massachusetts Bar Association
10/7/96

Many estate plans involve a transfer of real estate. The estate planner, therefore, must be aware of recent state and federal laws, regulations and court rulings which effect the real property transfers in Massachusetts. In each case, the estate planner should answer the following questions:

- Does the transfer violate a mortgage due-on-sale clause?
- Does the transfer trigger an inspection and up grade requirement in the case of property with a septic system subject to Title 5?
- Will the transfer result in the loss of homestead protection?

This article attempts to highlight the issues involved in these transfers although seemingly inconsistent statutes and underlying regulations and court decisions make a simple answer difficult.

1. Mortgage due-on-sale clauses.

Almost every residential and commercial mortgage contains a clause which provides that the lender may declare due and payable in full the outstanding mortgage balance in the event there is a transfer of the property

without its consent. The Massachusetts Fannie Mae/Freddie Mac uniform mortgage instrument contains the following specific clause:

> Transfer of property or a beneficial interest in the borrower. "If all or any part of the property or any interest in it is sold or transferred (or if a beneficial interest in borrower is sold or transferred and borrower is not a natural person) without lender's prior written consent, lender may, at its option, require immediate payment in full of all sums secured by this security instrument. However, this option shall not be exercised by lender if exercise is prohibited by federal laws as of the date of this security instrument.

The federal law to which the uniform mortgage instrument refers to is the Garn/St. German Act (known as the Garn St. German Depository Institutions Act of 1982, 12 U.S.C. §1701j-3). The Garn/St. German Act was enacted by Congress in an attempt to clarify the types of property and transfers to which due-on-sale clauses legally could be enforced. Prior to enactment, many states had legislation which prohibited a lender's right to exercise due-on-sale clauses. The Garn/St. German Act preempted all conflicting state limitations on due-on-sale clauses contained in mortgages involving all lenders, not merely federal savings and loan lenders. Western Life Insurance Company v. McPherson K.M.P., 702 F.Supp. 836 (D. Kansas, 1988).

In the Act, Congress fully supports the right of a lender to declare mortgages due and payable in full for violation of so-called due-on-sale clauses but Congress also created nine important exceptions where a lender's enforcement would violate federal law and therefore transfers would be permitted. These nine exceptions apply only to mortgages and liens secured by residential real property containing less than five dwelling units. The exceptions are as follows:

(1) the creation of a lien or other encumbrance subordinate to the lender's security interest does not relate to a transfer of rights or occupancy in the property;

(2) the creation of a purchase money security interest for household appliances;

(3) a transfer by devise, descent or operation of law on the death of a joint tenant or tenant by the entirety;

(4) the granting or leasehold interest of three years or less not containing an option to purchase;

(5) a transfer to a relative resulting from the death of a borrower;

(6) a transfer where the spouse or children of the borrower become an owner of the property;

(7) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse or the borrower becomes an owner of the property;

(8) a transfer into an intervivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights or occupancy in the property; or

(9) any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.

An estate planner should focus on exceptions (3), (5), (6) and (8).

It is clear that a lender may not declare a mortgage due and payable in full by virtue of the death of a joint tenant or a tenant by the entirety where the property passes to the survivor by operation of law. Additionally, it is equally clear that the death of a borrower will not trigger a due-on-sale clause provided the death of the borrower results in a transfer to a relative of the borrower.

Lifetime transfers of property from one spouse to the other or from a spouse to a child of the borrower are permissible under exception (6). Therefore, the Act seems to perming a parent to transfer mortgaged property

to children either outright or with a reserved life estate.

Exception (8) permits transfers into intervivos trusts, (presumably revocable or irrevocable), provided the borrower remains at least one of the beneficiaries and the transfer does not result in a change in rights of occupancy in the property. Under this exemption, the borrower may establish either a revocable or irrevocable trust and transfer the mortgaged property to the trust provided the borrower is at least a beneficiary (not necessarily the only beneficiary) and the transfer does not result in a change in rights of occupancy. A change in rights of occupancy may result if the borrower does not reserve a life estate in the property by deed or by a reservation of such right in the trust itself. A transfer to a revocable trust in which the borrower remains a beneficiary would not appear to create any change in rights of occupancy in the property.

It should be noted that exemptions (6) and (8) are not entirely consistent. A lifetime transfer by gift without any reservation of rights of occupancy to a child of the borrower is permitted under exception (6) while a similar outright transfer by gift to an irrevocable trust for the benefit of the children would not fall within exception (8) since the latter would involve a transfer in which there was a change in rights of occupancy in the property.

Exception (9) should also be considered which provides that the Federal Home Loan Bank Board may exempt other transfers or dispositions as described in duly promulgated regulations. Presumably acting pursuant to this express statutory authority, the Board adopted 12 CFR, §591.5 entitled "Limitation on Exercise of Due on Sale Clauses". The regulation is somewhat troubling in that the regulations seem to limit the scope of the Act's exceptions, a position unsupported by the express language of the Act itself. For example, the regulations begin with the statement "With respect to any loan on the security of a home occupied or to be occupied by the borrower." The Act does not appear to be limited to one's home but rather applies to "any real property loan secured by a lien on residential real property containing less than five dwelling units".

Additionally, in the case of a lifetime transfer to a child, the Act contains no limitation or qualifications

on who occupies or will occupy the property but the regulations provide that exceptions (5) and (6) apply only if "the transferee is a person who occupies or will occupy the property which is (a) a transfer to a relative resulting from the death of the borrower, or (b) a transfer where the spouse (or children) become an owner of the property". The Act does not contain any qualification that the transferee (a relative, spouse or child(ren)), be a person who occupies or will occupy the property.

Finally, in the case of a transfer into an intervivos trust, the regulation provides that the borrower be and must remain the beneficiary and occupant of the property even though the Act provides that the borrower must be only one beneficiary. Also the lender may require the borrower to provide reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy. This notification requirement applies only to transfers into an intervivos trust.

2. **Title 5.**

On March 31, 1995, the Massachusetts Department of Environmental Protection (DEP) adopted Regulation 310 CMR 15.301 which provided:

> "A [septic] system shall be inspected at or within nine months prior to the time of transfer of title to the facility served by the system. If weather conditions preclude inspection at the time of transfer, the inspection may be completed as soon as weather permits, but in no event later than six months after the transfer, provided that the seller notifies the buyer in writing of the requirements of 310 CMR 15.300 through 15.305. THIS PROVISION SHALL NOT APPLY TO REFINANCING OR A CHANGE IN THE FORM OF OWNERSHIP AMONG THE SAME OWNERS, SUCH AS PLACING THE FACILITY WITHIN A FAMILY TRUST OF WHICH THE OWNERS ARE THE BENEFICIARIES."

If a system fails, it must be corrected. Subsequently, the Regulations were amended to change the nine month period to two years prior to the time of transfer of title and move the exceptions for refinancing

and placing the property within a family trust to a new section which created important exceptions to what constitutes a transfer of title. Section 15.301(2) provides:

> (2) The following transactions shall not be considered transfers of title for the purposes of section 15.301(1):
>
> > (a) taking a security interest in a property, including but not limited to issuance of a mortgage;
> > (b) refinancing a mortgage or similar instrument, whether or not the identity of the lender remains the same;
> > (c) a change in the form of ownership among the same owners, such as placing the facility within a family trust of which the owners are the beneficiaries, or changing the proportionate interests among a group of owners or beneficiaries;
> > (d) adding or deleting a spouse as an owner or beneficiary; or a transfer between spouses during life, out right or in trust; or the death of a spouse;
> > (e) the appointment of or a change in a guardian, conservator, or trustee.

Also, on August 16, 1995, the DEP issued written Questions & Answers relating to the regulations. The Regulation's Questions & Answers should resolve most of the estate planner's DEP questions. THESE NOW HAVE BEEN CODIFIED AS PART OF THE REGULATIONS.

With regard to an inheritance by will or intestacy, with the exception of inheritance by a spouse which does not require an inspection, an inspection of the system must occur within two years before or one year after the will being allowed by the probate court and the appointment of the executor or within two years before or one year after the appointment of an administrator if the deceased dies intestate regardless of whether the property passes specifically or as part of the residue of the estate. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.

Executors or administrators are only required only to notify, in writing, those who acquire title to real property from an estate of the inspection and upgrade requirements contained at 310 CMR 15.300 through 15.305.

With regard to a legal life estate or an interest for life in trust, an inspection of the system must occur within two years before or six months after the death of the life tenant. If a successive life interest passes to a spouse, the inspection must occur within two years of the death of the last surviving spouse. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.

All other inter-family transfers where new parties are involved require an inspection. For example, if parents deed property to children, the inspection must occur within two years prior to transfer or, if weather conditions prevent inspection at the time of transfer, the inspection must occur as soon as weather permits, but in no event later than six months after the transfer. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.

Changes in ownership or the form of ownership where new partners are introduced require an inspection. The Regulations provide the following specific examples of transfers where an inspection is required:

(1) introduction of new beneficiaries in a nominee trust;
(2) introduction of new joint tenant(s) or new tenant(s) in common;
(3) introduction of new parties where property is transferred from joint ownership to a nominee or business trust;
(4) when a new general partner is introduced; and
(5) creation of a legal life estate or an interest for life in trust for a party other than the creator or his or her spouse.

Inspection of the system must occur within two years prior to transfer or, if weather conditions prevent

inspection at the time of transfer, the inspection must occur as soon as weather permits, but, in no event, later than six months after the transfer. An inspection conducted up to three years before the time of transfer may be used if the inspection report is accompanied by system pumping records demonstrating that the system has been pumped at least once a year during that time.

3. **Homestead Exemptions.**

Massachusetts General Laws chapter 188, §1 provides for the declaration of a homestead:

> "An estate of homestead to the extent one hundred thousand dollars in the land and buildings may be acquired pursuant to this chapter by an owner or owners of a home or one or all who rightfully possess the premise by lease or otherwise and who occupy or intend to occupy said home as a principal residence."

By statute, an "owner" of a home includes a sole owner, joint tenant, tenant by the entirety or tenant in common. Additionally, only one owner may acquire an estate of homestead in any such home for the benefit of his family; and provided further, an estate of homestead may be acquired on only one (unless elderly or disabled) principal residence for the benefit of a family. The word "family" includes either a parent and child or children, a husband and wife and their children, if any, or a sole owner.

There is a special expanded homestead exemption for the elderly and disabled. By statute, real property of persons sixty-two years of age or older, regardless of marital status, or of a disabled person, shall be protected against attachment, seizure or execution of judgment to the extent of two hundred thousand dollars, provided that such person has filed an elderly or disabled person's declaration of homestead protection and such person occupies or intends to occupy such real property as his principal residence. Each owner fitting this category may delcare a homestead.

Each elderly or disabled individual having an ownership interest in the real property which serves as that individual's principal residence and who qualifies under the provisions of the homestead act shall, upon filing a declaration of homestead, be eligible for

protection up to a maximum amount of two hundred thousand dollars per individual, regardless of whether such declaration is filed individually or jointly with another.

The declarant's claim of homestead shall be terminated upon the sale or transfer of the real property during the declarant's lifetime or upon the sale or transfer of the declarant's interest in the real property during the declarant's lifetime or upon the death of the surviving declarant. An elderly or disabled person's estate of homestead is terminated during the lifetime of the declarant by deed conveying the property in which such an estate of homestead exists signed by the declarant; or by release of the elderly or disabled person's estate of homestead, duly signed, sealed and acknowledged by the declarant and recorded in the registry of deeds for the county or district in which such real estate is located; or by a release of the elderly or disabled person's claim of homestead, duly signed, sealed and acknowledged by the declarant and filed in the city or town clerk's office in the city or town in which the manufactured home is located.

These benefits can be substantial. A bankruptcy court has ruled that the homestead exemption protects the equity in the property and not only value. Unfortunately, homestead benefits will be lost if the property is transferred to a revocable trust, at least according to the Massachusetts Appeals Court.

In Assistant Recorder v. Spinelli, 338 Mass. App. Ct. 655 (1995), the Massachusetts Appeals Court ruled that a homeowner, having elected to place property in trust, is not entitled to the protection afforded by declaration of homestead either as trustee of the trust or as occupant of the property. The decision to separate legal and equitable ownership of the property affords her only the protection provided in the instrument of trust, but it renders the property owner ineligible for the protection afforded by the declaration of homestead.

The case of Spinelli is rather unsettling since it involves a technique commonly employed by estate planners. The property owner transferred title to the real estate to a Massachusetts nominee trust. The sole beneficiary of the nominee trust was the property owner's living revocable trust. The property owner was the sole trustee and principal beneficiary of the living trust

during her lifetime. Under the principal's enunciated in the Spinelli case, it may be better to leave property in the name of one spouse or the other and have the property pass to the decedent's revocable trust by virtue of a pourover provision contained in the property owner's will even though this would involve probate which so often is sought to be avoided.

Supplemental Material

1. **Homestead Exemptions.**

G.L. c.188, Sec. 1 was amended to increase the Homestead amount to $500,000 from $300,000 for nondisabled and nonelderly home owners effective October 26, 2004. It applies to Declarations previously filed but does not have priority over prior recorded interests. Paragraph 24 entitled "Waivers," provides as follows:

> "Borrower waives all rights of homestead exemption in the property and relinquishes all rights of curpesy and dower in the property." Does a homestead exemption survive a refinancing?

2. **Title Insurance issues.**

An often overlooked issue is what happens when title is transferred to a child, a nominee trust, or another type of trust, for estate planning purposes. Most owner's title insurance policies are not assignable so it is necessary to obtain an "additional insured endorsement." Some owner's title insurance policies permit transfers for estate planning purposes without obtaining an additional insured endorsement.

3. **Federal & State Estate Tax Liens.**

For federal estate tax purposes, a general lien arises when the federal estate tax is assessed and continues until the tax is paid or becomes unenforceable by the statute of limitations (ten years). However, the lien shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof has been filed by the secretary. IRC Section 6321 - 6323. If a Release of Lien becomes necessary, a lien can be released by requesting a Form 792 when the estate tax return is filed. If a release is needed before the estate tax

return is filed, Form 4422 can be filed. A copy of the purchase and sale agreement or mortgage commitment should be included. Unlike the Massachusetts lien, which arises upon death and encumbers the property immediately and follows the property upon sale, the federal lien attaches to the sale proceeds so a federal estate tax lien release should not be required.

For Massachusetts estate tax purposes, for dates of death on or after January 1, 2003, an if no estate tax return is required to be filed, an affidavit stating that the decedent's estate does not necessitate a Massachusetts estate tax filing will release the gross estate of the lien imposed by G.L. c.65C, Section 14. See also, D.O.R. Dir. 03-2 (Feb. 19, 2003). See also, M.C.A. Title Standard No. 24, Massachusetts Estate Tax Liens.

Note that lifetime gifts in excess of annual exclusion gifts reduce the filing thresholds which are as follows:

Year of Death	**Filing Threshold**
2003	$700,000
2004	$850,000
2005	$950,000
2006 & after	$1,000,000

4. **The Uniform Testamentary Additions to Trust Act (UTATA)**

The UTATA provides as follows:

A devise or bequest, the validity of which is determinable by the laws of the commonwealth, may be made to the trustee or trustees of a trust established by the testator or by the testator and some other person or persons or by some other person or persons, including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts, if the trust is identified in the Will and the terms of the trust are set forth in a written instrument executed before or concurrently with the execution of the testator's Will and set forth in the valid Will of a person who has predeceased the testator, regardless of the existence, size or character of the corpus of the trust. The devise or bequest shall not be invalid because the trust is amendable or revocable, or

both, or because the trust was amended after the execution of the Will or after the death of the testator. Unless the Will provides otherwise, the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator, but shall become a part of the trust to which it is given, and (b) shall be administered and disposed of in accordance with the provisions of the instrument or Will setting forth the terms of the trust, including any amendments thereto made before or after the death of the testator. A revocation or termination of the trust before the testator shall cause the devise or bequest to lapse. M.G.L. c.203 § 3B.

Two major benefits to establishing and funding a revocable trust before death are privacy and an expeditious administration of the estate. If trust provisions are included in the Will, the estate must remain open until the trust is established and funded with court approval and thereafter remains subject to court jurisdiction and approval.

5. **New Chapter 184, § 35 "Trustees Certificate"**

Under M.G.L. c.184, § 25, either the actual trust document (or a nominee trust) needed to be recorded to avoid an "indefinite reference." M.G.L. c.184, § 35, now allows for the use of a "trustees certificate" instead of recording the actual trust itself. The Massachusetts Conveyancers Form is as follows:

Trustee's Certificate Under G.L. c. 184 § 35

I, ________________________________ of ____________________________
____

in my capacity as Trustee of a certain trust entitled:
____

which trust was executed on, and dated as of:
____

do hereby, pursuant to the pains of perjury, certify as to the following facts:

1. The present trustees, pursuant to the provisions of said trust, are;

____

2. The successor trustees, pursuant to the provisions of said trust, (to take office in the event of death, resignation, removal or incompetence of the present trustees, are, in order of their succession;

3. The beneficiaries of said trust (if same are intended to be disclosed by the terms of the trust) are;

4. The trustee(s), pursuant to the provisions of said trust, have authority to act with respect to the real estate owned by such trust; (Strike through that option which is not permitted)

a. By unanimous consent and execution of documents by all;
b. By majority consent and execution of documents;
c. By the execution of any one trustee acting alone.

5. The trustee(s), pursuant to the provisions of said trust, have authority to act with respect to the trust; (Strike through that option which is not permitted)

a. to amend the trust;
b. to revoke the trust
c. to sell the real estate of the trust
d. to mortgage the real estate of the trust
e. to lease the real estate of the trust
f. other:

6. The trustee(s), pursuant to the provisions of said trust, have authority to execute documents setting forth the existence or non-existence of any fact which is a condition precedent to the actions of the trustee(s) or which is, in any manner, germane to the affairs of the trust;

Then personally appeared ____________________________________, Trustee, as aforesaid, and made oath that the foregoing statements are true, and acknowledged the foregoing to be his/her free act and deed, before me.

_____________________ ______________________________
Notary Public
My commission expires: . . . .

The federal & state gift tax exemptions.

The following table shows the rate reductions and the exemption increases for the estate and gift taxes that will occur between 2002 and 2010:

Year	Estate Transfer Exempt Amount (Applicable Exclusion Amount) and GST Exemption	Lifetime Gift Exempt Amount	Highest and Gift Tax Rates
2002	$1 million	$1 million	50%*
2003	$1 million	$1 million	49%
2004	$1.5 million	$1 million	48%
2005	$1.5 million	$1 million	47%
2006	$2 million	$1 million	46%
2007	$2 million	$1 million	45%
2008	$2 million	$1 million	45%
2009	$3.5 million	$1 million	45%
2010	Tax repealed	$1 million	35% (gift tax)
2011	$1 million	$1 million	55%

*Reflecting repeal of the 5% surtax.

This is effective for estates of decedents dying and lifetime gifts made after 2001.

Planning Note:
The lifetime gift tax exemption will stay at $1,000,000. The reason for this was concern over the likely significant income tax loss by virtue of the shifting of assets to lower income tax-bracket taxpayers. As a result, current gift giving techniques, particularly those which incorporate discounts and leverage (such as family limited partnerships, limited liability companies, grantor retained annuity trust, qualified personal residence trusts, and the like) will remain important techniques. Also, note that even after the estate tax is repealed in 2010, the gift tax will remain with a maximum gift tax rate of 35%, which is related to the maximum income tax rate in effect for the year 2010.

Planning Note:
Byrd Amendment -- Sunset Provisions
Unless Congress votes to extend the estate tax repeal and/or any portion of its relief, the entire legislation will sunset on January 1, 2011. This means that the entire 2001 Act will be automatically repealed and the estate tax system will revert to current law, which provides that in the year 2006, the maximum exemption equivalent amount will be $1,000,000 with the return of the 55% maximum estate and gift tax rate.

Implied retained life estates without written agreements.

A unique planning opportunity exists in the case residential real estate. With growing concern over the continued attack on such Medicaid planning, planners may wish to utilize the principles in the *Estate of Guynn,* 437 F.2d 1148 (4th Cir. 1971). See also Rev. Rul. 70-155, 1979-1 C.B. 189. Generally, where the donor/decedent and the donee are husband and wife, the continued occupancy by the donor does not imply an agreement as to retain an interest in the property. However, when the donor and the donee are other than a husband and wife, such as a transfer of a home from a single parent to a child, then the IRS has asserted that there is an implied agreement as to retained enjoyment by the transferors. This rule would apply even though there was no legal life estate or written

documents concerning the arrangement. The benefit here is that for estate tax purposes, the transferee may obtain a stepped up basis while at the same time the asset clearly is placed beyond the reach of Medicaid creditors under existing law.

In *Estate of Maxwell*, 98 T.C. 39 (1992); aff'd 3 F.3d 591 (2nd Cir. 1993), the Tax Court ruled that the value of the decedent's former home had to be included in the decedent's estate even though the decedent "sold" the property to a child for $270,000; required payments of interest only at 9% per year (no principal was required); the decedent's will forgave the rule at death and the decedent cancelled $20,000 of the note each year. The problem was that the decedent did not move out of the house and the Court found an implied agreement to use and occupy the home under IRC § 2036(a).

In *Estate of Powell v. Commissioner*, 63 T.C.M. 3192 (1992), the decedent transferred approximately 60% of his ownership interest in his principal residence to his children and their relatives. At the time of his death, the decedent owned approximately 40%. The decedent continued to live in the home until he was forced to move because of his physical condition. The decedent paid all expenses including real estate taxes, maintenance and upkeep. The Service argued that the decedent retained a life estate under IRC § 2036. The tax court disagreed finding that his continued occupation of the residence was consistent with his ownership as a tenant in common with his children. (*See* also PLR 9128005 holding that a tenancy in common does not result in inclusion under IRC § 2036 or IRC § 2038.)

In considering this planning alternative, one must consider Rev. Rul. 70-155 which provided that where the donor and donee are other than a husband and wife, such as a case involving a transfer of a home from a single parent to a child for Medicaid planning purposes, the IRS will assert that there is an implied life estate as to retained enjoyment by the transferor if the transferor continues to live in the property. A similar result was reached in the *Estate of Guynn*, 437 F.2d 1148 (4th Cir. 1971).

In *Estate of Rebecca A. Wineman*, 79 TCM 2189 (2000), twenty years before death, the decedent had gifted a 24% interest in her homestead property to her three children (8% to each child). The IRS argued the entire value of the property would be includible under

IRC § 2036. The Court found that the homestead was the site of two residences, a larger home with three bedrooms in which the decedent occupied one bedroom at the time of her death and had the use of the living room, kitchen and dining area. One son used a second bedroom as an office where he kept his business records. The other bedroom was used primarily for a daughter when she visited. A son lived in a second house on the homestead but he never paid rent. The Court found that the decedent's continued use and possession of the real property following transfer of a minority interest was not unusual and not inconsistent. "All facts and circumstances for any transfer and subsequent use of the property must be considered."

In Re: Estate of Grace Fracasso, an Ohio Court of Appeals ruled that decedent's transfer of a residence to her three children as tenants in common more than ten years before her death would not be includible under Ohio estate tax law even though the decedent continued to live in the property until she died. The Court noted that the children exercised actual control over the real estate assuming responsibility for the financial burdens which accompanied ownership of the real estate. The children leased a portion of the real estate to a third party and paid taxes, insurance, maintenance and plumbing costs, as well as lawn care, cleaning and other repairs.

Nominee Trust.

A. Introduction

Many titles are held by so-called nominee or realty trusts. Recently there has been a flurry of litigation involving nominee trusts and certain rules have become reasonably well established.

A nominee trust, sometimes referred to as a "realty trust", may not really be a trust at all. The trustee simply declares that it will hold whatever property is conveyed to the trust for the benefit of the beneficiaries. It is a declaration of an agency relationship. The relationship between the trustee and the beneficiaries is that of an agent to his principal.

The beneficiaries of the nominee trust may be individuals, a general partnership, a limited partnership, a corporation, or even a revocable trust. The benefit of a nominee trust is two-fold. First, the nominee trust conceals the identity of the true owner of the property from public scrutiny since the schedule

of beneficiaries is not filed at the Registry of Deeds. (This only would be true if the true owners took title in the name of the nominee trust from the date of acquisition. If the owners transfer property to a nominee trust, their prior ownership interest always will be on record at the applicable Registry of Deeds.) Second, a nominee trust permits off record property transfers. An ownership change within the framework of a nominee trust is evidenced by an assignment of the beneficial interest. Like the original schedule of beneficiaries, the assignment is not recorded in any public place, but rather is recorded in a file with the schedule of beneficiaries.

Recently, the Supreme Judicial Court had occasion to address a nominee trust in the context of a gift over to a beneficiary in a nominee trust. The question presented in *Roberts v. Roberts*, 419 Mass. 685 (1995), was whether the gift over in the nominee trust violated the Statute of Wills and therefore was invalid. The case arose when one brother claimed that his parents gift over to his other brother to his exclusion in a nominee trust was void for violating the Massachusetts Statute of Wills requiring two witnesses and a notary public.

The Court rejected the brother's claim and, in the process, discussed at length the nature of the nominee trusts. The Court Stated that a nominee trust has characteristics of both agency and trust. The trustee is an agent/trustee who holds title to property for the benefit of and subject to the control of another." Nominee trusts are subject to the Rules of Agency for certain purposes citing *Apahouser Lock & Security v. Carvelli*, 26 Mass. App. Ct. 385 (1988).

The Court, however, stated that "The fact that a nominee trust is held to be an agency in some context, however, does not mean that it should be treated as an agency in every instance." Further, while gifts over "are not typical of nominee trusts, gifts over are not related to the purpose for which nominee trusts are used" (maintaining anonymity of ownership, easing title transferability and avoiding title transfers). The Court ruled that because the gift over is unrelated to a typical nominee trust, agency principals were not applicable to this. In this case, the gift over was provided for in the nominee trust itself which had been recorded at the Registry.

It seems that, by including a gift over provision in the nominee trust, the nominee trust/agency

relationship was converted to a trust relationship rather than an agency relationship. Note that upon termination of a nominee trust the beneficiaries receive title as tenants in common. *In Re: Grand Jury Subpoena, Johnston v. Holiday Inns, Inc.*, 595 F.2d 890, 893.

A significant misconception about the nominee trust is the avoidance of liability. Since the trustee is merely an agent of the beneficiary, ultimate responsibility for debts and expenses of the trust should fall directly on the beneficiaries who are the true owners of the property.

The typical features of a nominee trust are: (1) the names of the beneficiaries are filed with the trustee rather than being publicly disclosed; (2) a trustee may serve simultaneously as a beneficiary; (3) the trustee's lack power to deal with the trust property except as directed by the beneficiaries; (4) a third party must rely on the disposition of the trust property pursuant to any instrument signed by the trustees, without having to inquire as to whether the terms of the trust have been complied with; and (5) the beneficiaries may terminate the trust at any time, thereby receiving legal title to the trust property as tenants in common in proportion to their beneficial interest. The third feature is the key to the nominee nature of the trust. See *In Re: Grand Jury Subpoena*, 973 F.2d 45, 48 (1st Cir. 1992), *Roberts v. Roberts*, 419 Mass. 685 (1995).

When addressing the nominee trust, the Supreme Judicial Court has noted that a nominee trust is "An entity created for the purpose of holding legal title to property with the trustees having only perfunctory duties... unlike... a traditional trust, the trustees of a nominee trust have no power, as such, to act in respect of the trust property but may only act at the direction of the beneficiaries. *Morrison v. Lennett*, 415 Mass. 857 (1993); *Roberts v. Roberts, id.*

B. Personal liability of trustee

The personal liability of a trustee if a nominee trust was recently addressed by the Supreme Judicial Court in *Apahouser Lock & Security v. Carvelli*, 26 Mass. App. Ct. 385 (1988). In *Apahouser*, the trustee of a nominee trust had signed a contract with Carvelli to install a fire alarm system. Carvelli signed the contract as trustee and identified his representative capacity. After materials were delivered and some work

performed, the premises were destroyed by fire and Apahouser sued Carvelli to recover for services rendered. The trustee relied on M.G.L. c.203 § 14A which provides:

> "Unless otherwise provided in the contract, a trustee shall not be personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he failed to reveal his representative capacity and identify the trust estate in the contract. A trustee shall be personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the estate only if he was personally at fault. M.G.L. c.203 § 14(A).

In discussing this section which limited personal liability, the Court wrote that in a nominee trust the trustee served as agent for the principal's convenience rather than as a trustee in the more typical probate situation. The Court found that section 14(A) and its legislative history suggested that its protection should apply only to a trustee acting under a trust of the donative type typically associated with probate practice rather than a trustee of an organization conducting business which a trustee, as an individual, controls. The Court, however, could not render a definitive decision on this issue since the litigating parties failed to produce the very instrument upon which the entire case was decided.

In *First Eastern Bank, N.A. v. Jones*, 413 Mass. 654 (1992), the Supreme Judicial Court ruled that a co-trustee of a Massachusetts business trust was not entitled to limitation of trustee liability as set forth in M.G.L. c. 203, § 14(A). That section applies only to trust of the "donative" type associated with probate practice and not the trustees of Massachusetts business trusts. In this case, the non-active trustee of a Massachusetts business trust was deemed to be jointly and severally liable for obligations of the trust.

This holding is now questioned following the case of *Sylvia v. Johnson*, M.L.W. No. 11-060-98. In *Sylvia*, the Massachusetts Appeals Court ruled that trustees of a nominee trust were not liable by ruling of the express terms of the "trust" which expressly limited liability. This trust provided:

> "Paragraph VIII of the declaration of trust, captioned 'NO PERSONAL LIABILITY,' provides as follows: 'No trustee or beneficiary of this Trust shall be held personally or individually liable for any of the obligations incurred or entered into on behalf of the Trust and *each person who deals with the Trustee[s] shall look solely to the Trust Estate for satisfaction of any claims which such persons may have against the Trust' (emphasis added)."*

When dealing with a nominee trust, it is essential that all beneficiaries consent to a proposed transaction and that evidence of direction be obtained. Failure to do so may provide a basis for a beneficiary to avoid the transaction. *Penta v. Concord Auto Action*, 24 Mass. App. 635 (1987).

A nominee trust might be considered when a change of domicile is contemplated. While there is no Massachusetts tax decision on point, an Illinois court held that a Florida resident's beneficial interest in a land trust which owned real estate located in Illinois and was very similar to those of the Massachusetts nominee trust was in the nature of personal property and therefore not taxable by the State of Illinois. *Matter of the Estate of Swanson*, 463 NE2d, 1379 (Ill. App. 3. Dist. 1984). No doubt the Commonwealth of Massachusetts would fight this issue.

C. Remainderman

A remainderman owes no duty of care to the life tenant or life tenant's tenants absent a duty voluntarily assumed by the remainderman. *Delprete Adm. v. Ferrante, et al*, LW No. 16-106-91, King, J-Suffolk CA 90-2152B.