

PREPARING FOR 2012: UPDATING FORMS FOR THE MUPC

BBA Trusts & Estates Section Brown Bag Lunch Program

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I. WILLS¹

1) **SUMMARY: Changes to Vocabulary**

○ **Devise**

- Consider eliminating the word “bequeath.” Use “give” and/or “devise” in all circumstances.

○ **Descendants**

- Consider replacing the word “issue” with the word “descendants.”

○ **Personal Representative**

- Consider eliminating references to executor, temporary executor, administrator with the will annexed, etc. Use only “personal representative.” Consider defining the term ‘personal representative’ to include the decedent’s “executor, temporary executor, and administrator with the will annexed.”

○ **Special Personal Representative (“SPR”)**

- Consider whether or not to include “special personal representative” in the definition of “personal representative.” A testator may wish to treat SPRs differently from other personal representatives. A Special Personal Representative performs the functions formerly assigned to a special administrator or temporary executor. Accordingly, in some cases it may be appropriate to treat an SPR differently than a PR in the same instrument, for example, by limiting the powers given to the SPR.

2) **Definitions - § 1-201**

○ **Devise - § 1-201(10)**

- Current law: Personal property is “bequeathed” and real property is “devised”. M.G.L. c. 191, §§ 18, 23 & 24.

¹ MUPC provisions become effective on January 2, 2012 unless otherwise noted. Certain provisions of the MUPC, particularly those governing guardianship, conservatorship and durable powers of attorney, became effective July 1, 2009. All other provisions take effect 1/2/12.

- MUPC: The distinction between a bequest and a devise is eliminated. Both real and personal property are devised.
 - Drafting: “I give and devise all of my tangible personal property to my wife, Jane Doe.” “I give and devise the amount of Five Hundred Dollars (\$500.00) to my brother, Bob Smith.” “I give and devise any real property that I may own at my death to my wife, Jane Doe.”
- **“Descendants” - § 1-201**
- Current law: Whether a parent, sibling or some other next of kin takes under the laws of intestacy depend on whether the decedent left “issue”. M.G.L. c. 190, § 3.
 - MUPC: Defines “issue” to mean “descendants”. Replaces “issue” with “descendants” throughout Article II.
 - “Issue” is thought to have a biological connotation. Now that inheritance rights, in many cases, are extended to adopted children, “descendants” is more appropriate. Comment to § 2-103.
 - An individual is a child of his natural parents, regardless of their marital status. An adopted child is the child of his adopting parents and not his or her natural parents. Exception: A child adopted by the spouse of a natural parent has no effect on the child’s rights to inherit from either natural parent. § 2-114.
 - Adopted individuals and individuals born out of wedlock, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession. §2-705.
 - Drafting: Consider updating documents to reference “descendants” rather than issue. In any case, give special consideration to defining your chosen term in the governing instrument.
- **Personal Representative - §§ 1-201(37) & (46)**
- Current law: The person in charge of the estate administration process may have any of several possible titles. M.G.L. c. 192, §§ 13–16; c. 193, §§ 7, 7A, 9.
 - Executor: An executor administers the estate of an intestate decedent. A temporary executor may begin administration prior to the court’s issuance of a decree of appointment if the decedent’s will requested such temporary appointment.

- Administrator: An administrator administers the estate of an intestate decedent. A temporary administrator may begin administration prior to the court's issuance of a decree of appointment if all of the interested persons consent.
 - Administrator with the Will Annexed (or Administrator c.t.a.): Administers an estate where none of the person(s) named in the will as executor become such. A temporary administrator with the will annexed may begin administration prior the court's issuance of a decree of appointment if the decedent's will requested such temporary appointment.
 - Administrator de bonis non cum testament annexo: Administers an estate where all of the named executors cease to serve before the estate administration is complete.
 - Special Administrator: Collects and preserves estate property for the executor or administrator, when appointed.
- MUPC: Titles are simplified. The term "personal representative" replaces most of the above terms. The term "special personal representative" is used in two scenarios. First, it replaces "temporary executor" or "temporary administrator", but is relevant only in a formal probate proceeding if no personal representative was previously appointed informally, or if a personal representative was previously appointed informally but such person's appointment has been terminated. MUPC §§ 3-612 & 3-614. Second, any interested person may petition the court, in a formal proceeding, to appoint a special personal representative because doing so is necessary to preserve the estate or its proper administration. MUPC § 3-613.
 - Drafting: Consider updating wills to refer to "personal representatives" and "special personal representatives". As previously mentioned, consider defining the term "personal representative" to include the decedent's executor, temporary executor, administrator with the will annexed, and, if appropriate, special personal representative.

3) **NEW CONCEPT: Directions Regarding Bodily Remains - § 3-701**

- Current law: The executor has no authority over disposition of the decedent's body. If there is no spouse, next of kin control. *See* Massachusetts Comment to § 3-701, citing treatises.
- MUPC: The person named as personal representative has power to carry out the decedent's written instructions re: disposal of the body, funeral, and burial, even prior to appointment.

- Drafting: May draft written instructions directly in the will, but this may not be the preferred approach because if the testator changes his mind he will have to amend the will or execute a new will. Instead, the testator might consider leaving a written, signed memo in a place where the personal representative can easily find and access it. Reference to the memo could be made in the will. Sample provision:
 - “I may leave a written memorandum stating my wishes with respect to the disposition of my bodily remains. The person named herein to be my personal representative, and in the order in named, shall be the sole person who is authorized to dispose of my bodily remains in accordance with such wishes.”
- Possible considerations:
 - Organ donation
 - Disposition of the body, services, etc.
 - Prearrangement with funeral home
 - Burial, entombment, and embalming
 - Cemetery and burial lot
 - Casket
 - Cremation and disposition of ashes
 - Funeral and funeral home
 - Visitation
 - Memorial service
 - Memorial contributions
 - Notifications and obituary
 - Consider source of funds to carry out testator’s wishes

4) **Memorandum of Tangible Personal Property (TPP) - § 2-513**

- Current law: A TPP memo—a written statement or list to dispose of items of tangible personal property—is precatory (not binding), unless such memo is properly incorporated in a will by reference. *See* NEWHALL’S SETTLEMENT OF ESTATES & FIDUCIARY LAW IN MASSACHUSETTS, at §33:21 (5th ed.).
- MUPC: Unless the will states that a TPP memo is precatory, a TPP memo referenced in a will shall be binding on the disposition of personal property (other than money) not otherwise specifically disposed of by the will.
- Drafting:
 - Will must reference the TPP memo

- Memo may be created before or after the will is signed. Must be signed by the testator and must describe the items and devisees with reasonable certainty.
- Memo may be altered by the testator after its preparation.
- Sample provision for referencing a binding TPP memo in a will. Note the following features: (1) authentication by the personal representative; and (2) disposition of balance of TPP not disposed of by memo.
 - “A. I may leave a written memorandum or list disposing of items of tangible personal property. If I do and if my written memorandum or list is found and is identified as such by my Personal Representative no later than thirty (30) days after the probate of this will, then my written memorandum or list is to be given effect to the extent authorized by law and is to take precedence over any contrary devise or devisees of the same item or items of property in this will.

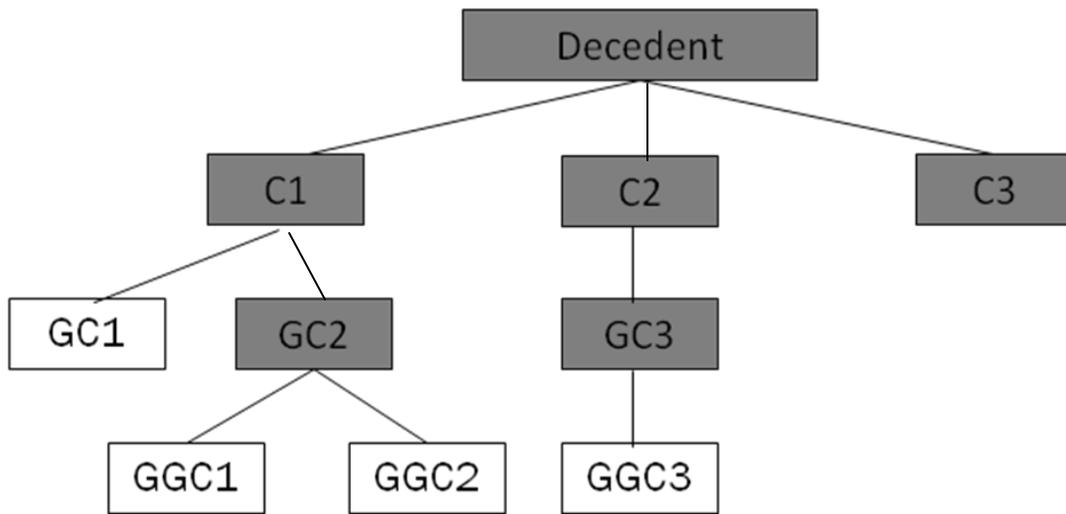
 - B. I give and devise all of my remaining tangible personal property, including any tangible personal property not effectively disposed of by any such written memorandum or list identified as such by my Personal Representative within the time provided for in Paragraph A of this Article __, in shares of approximately equal value to my children who survive me by at least thirty (30) days.”
- Sample TPP memo
 - “I leave this written memorandum of the disposition of items of my tangible personal property in accordance with Paragraph A of Article __ of my will and it is my intention that the disposition of such property as expressed in this written memorandum be given effect to the extent authorized by law and that the dispositions shall take precedence over any contrary devise or devisees of the same item or items of property in my will. In the event that any person who is named herein to receive an item of tangible personal property is not then living, such item shall be disposed of in accordance with Paragraph B of Article __ of my will.”
- Further drafting considerations:
 - What if testator leaves multiple memos and (a) the memos conflict, (b) the memos don’t conflict but it is unclear if a later memo nevertheless revokes an earlier memo, or (c) it is unclear which memo is the latest?
 - Practitioners concerned about these risks may prefer to retain the precatory nature of a TPP memo. Sample provision:

- “I give my tangible personal property in shares of approximately equal value to my children who survive me by at least thirty (30) days. I may leave a written memorandum or list stating my wishes regarding the distribution of my tangible personal property. The written memorandum or list will simply be an expression of my wishes and shall not create any trust or legal obligation, nor shall it be offered for probate as part of this will.”
- The MUPC does not require a TPP memo to be dated. Nevertheless, date TPP memos.
- Consider language in the memo indicating that the memo with the latest date controls.
- Consider language in the will giving the personal representative the authority to make the final decision as to which memo is binding.
- In situations where the testator has tangible personal property of significant value, some might be concerned about a testator disposing of that property by way of a TPP memo, rather than by will (where the dispositions will receive the protections afforded by executing with will formalities).
- Consideration should be given to whether certain classes of items (such as precious metals other than jewelry, artwork, etc.) should be specifically devised or excluded from the definition of tangible personal property.

5) Terms of Relationship

- “By representation”, “per capita at each generation” and “per stirpes” - §§ 2-103(1) & (3), 2-106, 2-709
 - Current law: Adopts the **modern per stirpes** (roots and stocks) system of representation with respect to intestate estates. This system is a hybrid of per stirpes and per capita at each generation.
 - If the surviving descendants are not all of the same generation, then property passes per stirpes/by representation. Property is divided into as many equal shares (per capita) as there are (a) then surviving descendants in the generation closest to the decedent which contains at least one survivor, and (b) then deceased descendants in the same generation who left surviving descendants. The surviving members of the nearest generation are each allocated one share. The descendants of the deceased member take the same share as their parent would have taken, if living. M.G.L. c. 190, §§ 3, 8.

- But if all surviving descendants are of the same degree of kindred to the decedent, they all take equally. M.G.L. c. 190, § 3(1).
- MUPC: Adopts the **per capita at each generation** system of representation with respect to intestate estates (“equally near is equally dear”). Under this system, property is divided into as many equal shares as there are (a) then surviving descendants in the generation closest to the decedent which contains at least one survivor, and (b) then deceased descendants in the same generation who left surviving descendants. The surviving members of the nearest generation are each allocated one share. The remaining shares are combined and redivided in the manner just described.



	GC1	GGC1	GGC2	GGC3
Current law = modern per stirpes	1/3	1/6	1/6	1/3
MUPC = per capita at each generation	1/3	2/9	2/9	2/9

- Note that in the above example, if GC1 also predeceased the decedent, then the three great-grandchildren would take equally under either of these two rules of intestate succession.
- Drafting: The Comment to § 2-103 provides that the “equally near is equally dear” system of representation is preferred by most people. Consider whether this is true for your clients. In any event, define your system of representation in your forms.

6) **Nomination of Personal Representative - § 3-203**

- Current law: A testator may nominate an executor and successor executor in his or her will, and may name a person or entity to nominate a successor.
- MUPC:
 - A testator may nominate personal representatives and their successors in his or her will.
 - A testator may give one or all named personal representatives the power to nominate a successor personal representative. Note that this nomination power must be stated in the will.
 - For multi-state situations, a testator may nominate different persons as personal representatives in Massachusetts and in his state of domicile. This overrides the general rule that a personal representative appointed by the court in the state of domicile has priority over all other persons.
 - In any event, the court can override a testator's nomination in a formal proceeding if the court finds the appointment to be contrary to the best interest of the estate. § 3-203(f)(2).
- Drafting: Consider including the power to nominate as a standard option, as a fail-safe in the event that the person(s) named by the testator as personal representatives either fail or cease to serve. Sample provision:
 - "I nominate and appoint my wife, Jane Doe, as Personal Representative of my will. If my wife does not become or ceases to serve as Personal Representative, the person or persons who my wife nominates and appoints by written instrument shall become Personal Representative in her place."

7) **Bond and Sureties - §§ 3-603, 3-604**

- Current law: A testator may waive sureties on the personal representative's bond in a valid will. If the court requires sureties, the amount is in the court's discretion. M.G.L. c. 205, § 4.
- MUPC: The testator may still waive sureties in a valid will. § 3-603(a). Absent such provision, the default is that sureties are required. If the testator wishes to require sureties, or if the court ultimately requires sureties, the testator may request a specific amount of sureties. The court may increase or decrease this amount. § 3-604(a). Absent such provision, the default is that the amount of sureties must equal the estimated value of the personal estate (excluding real estate).

- Also, some jurisdictions outside Massachusetts permit a testator to waive a bond, but do not permit waiver of sureties on a bond.
- Drafting:
 - To provide for the chance that the will may be probated in another jurisdiction, consider requesting that the personal representative be “exempt from furnishing a bond or, in the event a bond is required by law, from furnishing surety or sureties upon any official bond.”
 - If a situation warrants sureties, consider what amount may be appropriate. For example, a child taking 50% of the estate may only need to post 50% sureties.

8) **NEW CONCEPT: Supervised vs. Unsupervised Administration - § 3-501 et seq**

- Current law: Probate administration is subject to one level of judicial supervision, unless it is a voluntary proceeding.
- MUPC: Probate administration will involve many options for judicial involvement in the probate process. Petitioners may file voluntary, formal or informal petitions to open an estate. Petitioners and beneficiaries may seek supervised or unsupervised administration, and personal representatives have multiple options related to the circulation and judicial approval of inventories and accounts. Supervised administration is the highest level of judicial oversight: under supervised administration a personal representative may not distribute estate assets without prior court approval. M.G.L. c. 190B, § 3-501.
- Drafting: Consider adding optional form language requesting either supervised or unsupervised administration. If the will *directs supervised administration*, the court must so order unless “circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration.” On the other hand, if the will *requests unsupervised administration*, the court may order supervised administration “only upon a finding that it is necessary for protection of persons interested in the estate.” If the will is silent on this issue, supervised administration may be ordered if it is “necessary under the circumstances.”
 - “I request that the administration of my estate be unsupervised.”
 - “I direct that the administration of my estate be supervised by the court as provided in G.L. c. 190B, § 3-501 et seq.”

9) **Appointing / Nominating Guardians and Conservators** (MUPC provisions became effective on July 1, 2009)

- Prior law: Prior law did not clearly delineate between custody of a person and custody of a person’s property.

- MUPC: Clearly makes this delineation. A guardian has custody of a person and a conservator has custody of a person's property. A parent, and in some circumstances, a guardian already serving, can nominate one or more persons to serve in either or both positions.

- **Minor child**

- Guardian of a minor: Parent (or guardian) *appoints* by will or by a writing signed by the parent (or guardian) and attended by two witnesses. The appointment becomes self-executing upon the death or incapacity of the parent (or guardian). The guardian must file an acceptance of appointment and a copy of the will or other nominating instrument with the court within 30 days after the appointment becomes effective. §§ 5-201; 5-202.
 - For purposes of the parent/guardian's incapacity, the will can speak at a time other than death.
 - If don't want to risk the parent/guardian's will becoming public prior to death, also execute an appointment by separate writing, to be filed with the court in the event that the parent/guardian becomes incapacitated.
- Conservator of a minor: Parent *nominates* by will or by a separate writing, as described above. Court appointment is required to become effective. The MUPC does not appear to give priority to nominations made by a guardian of a minor. § 5-409.

- **Incapacitated spouse or unmarried adult child**

- Guardian of an incapacitated spouse or unmarried adult child: Spouse or parent *nominates* by will or by a separate writing, as described above. Court appointment is required to become effective. § 5-301 & Comment.
- Conservator of an incapacitated, unmarried adult child: Parent *nominates* by will or by a separate writing, as described above. § 5-409 & Comment.
- The MUPC does not prohibit a spouse from nominating a conservator of his or her incapacitated spouse, but it also does not give priority to that nomination. On the other hand, a parental nominee does receive priority. § 5-409.

- **Waiver of Surety on Bonds**

- Guardian: The MUPC requires surety on a guardian's bond unless sureties are waived by the court. Because a conservator will

generally be appointed to manage property, surety on a guardian's bond will usually not be required. However, the court may require surety if the guardian is receiving periodic income that might accumulate. The court may waive surety on the bond if it determines it to be in the best interest of the minor or incapacitated person to do so. §§ 5-208 & Comment; § 5-307 & Comment.

- Conservator: The court will not require sureties on a conservator's bond if the conservator has priority for appointment and the person nominating the conservator expressly waives sureties. § 5-410.
- Drafting:
 - Where a testator has minor children or an incapacitated adult child or spouse, draft a provision into the will whereby the testator appoints (for minor children) or nominates (for an adult) a guardian and nominates a conservator.
 - Consider preparing a separate document which duplicates the guardianship and conservatorship provisions from the will, in case the document becomes effective upon a parent's incapacity (and not death).
 - In each case, consider waiving any bond or, if a bond is required, waiving sureties on any bond.

10) **Guardian ad Litem**

- Current law: If the decedent requests in his will that the court dispense with the appointment of a guardian *ad litem* (GAL) to represent the interests of persons unborn or unascertained with respect to the allowance of accounts, absent good cause, the court shall comply. M.G.L. c. 206, § 24.
- MUPC: The MUPC revokes this section of current law and does not replace it. However, the MUPC's virtual representation provisions provide new opportunities to dispense with the appointment of a GAL in formal proceedings, including allowance of accounts.
- Drafting: Although GAL appointments are no longer required by statute for probate accounts, courts will continue to have authority to appoint a GAL. Therefore, it may be advisable for testators to waive GAL appointments in their wills.

11) **NEW CONCEPT: Negative Wills – General Comment to Article II; §§ 2-101; 2-302**

- Current law: Words of disinheritance can be drafted into a will, but if the will does not make a complete disposition of the estate (partial intestacy), the disinheritance is ineffective as to the property that passes by intestacy.

- MUPC: “Negative Will” provisions exclude or limit the right of an individual or class to succeed to all of a testator’s property, including any that might pass by intestate succession. If the will disinherits a person or class of people but does not make a complete disposition of the property, any disinherited person(s) who would normally take under intestate succession is treated as disclaiming.
- Drafting: Sample provisions:
 - Individual
 - “My brother Bob Smith is not to receive any of my property” or “My brother Bob Smith is disinherited”.
 - Class
 - “None of my brothers and sisters is to receive any of my property” or “All of my brothers and sisters are disinherited.”
 - “‘Cousins’ shall mean only A and B, and no other person claiming to be my cousin shall receive any of my property.”
 - Consider excluding the disinherited person’s descendants, if desired. Because the negative will treats the disinherited person as having disclaimed, property passes to the disinherited person’s heirs at law unless the will provides otherwise.
 - “None of my brother Bob Smith and any of his descendants is to receive any of my property.”
 - “None of my brothers and sisters and any of their respective descendants is to receive any of my property” or “My brothers and sisters and all of their respective descendants are disinherited.”

12) **Omitted Issue - § 2-302**

- Current law: If a testator fails to provide in his or her will for any children born or adopted before or after the will’s execution, or for the issue of a deceased child, the omitted child (or issue) take an intestate share unless provided for during the testator’s life or unless the omission was intentional. M.G.L. c. 191, § 20.
- MUPC: An after-born or after-adopted child unprovided for in the testator’s will is entitled to an intestate share of the estate, or if there are children who are provided for, a pro rata share of the devise to such children. The MUPC no longer provides for omitted descendants of a predeceased child. §2-302.
- If a child is omitted solely because the parent believes that child to be deceased, and the child is still living, the child will be entitled to a share of the probate estate. M.G.L. c. 190B, § 2-302(c).

- Drafting:
 - In light of the fact that Massachusetts statute no longer provides for unintentionally omitted descendants of a predeceased child, give careful consideration to drafting in a manner that accounts for each child and his or her descendants.
 - When intentionally disinheriting a child, consider affirmatively stating that the omission is intentional and that the parent believes the child is living at the time of the will's execution.

13) No Contest Clauses - § 2-517

- Current law: A no contest clause in a will is enforceable.
- MUPC: A no contest clause in a will remains enforceable.
- Drafting: Sample provision:
 - “If my son Hector Smith (“Hector”) or any of his descendants shall oppose the probate of this will or shall appeal from any decree or court order for the probate hereof, or shall institute or participate in, directly or indirectly, any legal proceedings in any court to set aside this will or any part hereof or the probate hereof, or shall assert any claims or rights against this will or my estate (whether as creditor or otherwise), I direct that the provisions of this will shall be construed, applied and administered as though Hector predeceased me without leaving any descendants surviving me.”

14) Testamentary Additions to Trusts - §2-511

- Current law: Massachusetts common law recognizes the Doctrine of Incorporation by Reference. Thus, a receptacle trust must be executed before the will instructing the pour-over.
- MUPC: A will may devise property to a trust not in existence when the will is signed. (If the trust is not in existence *at the testator's death*, the devise lapses.)
 - Not necessary to have the testator sign his receptacle trust prior to (or concurrently with) the signing of the will that devises property to such trust.
- Drafting: Under the MUPC, it will no longer be necessary to recite in the will that the trust was previously created. However, this may still be a best practice because the will may be submitted for probate in a jurisdiction which requires trusts to be executed before wills.

15) Estate Tax Apportionment - § 3-916

- Under current law and the MUPC, the testator may direct how federal and Massachusetts estate tax shall be apportioned among all persons interested in the estate. There are statutory defaults which apply if the will is silent regarding tax apportionment. Current law: M.G.L. c. 65A, §5. MUPC provision: M.G.L. c. 190B, § 3-916.
- To grossly simplify the changes, current law generally provides that tax on property passing under the will is apportioned to the residue of the estate, and the MUPC generally provides that taxes will be apportioned among all persons interested in the estate in proportion to value of the property received. QTIP property and taxes on GST transfers receive special allocations, so those taxes are allocated to the property which generates the tax.
 - A simple example of the MUPC's impact is where the will is silent as to tax apportionment and a specific devise is made:
 - "I devise my real estate located in Barnstable to my friend Jack"
 - The specific bequest will bear its share of the tax.
 - Jack will be responsible for the estate tax on the Barnstable property. Can Jack afford to pay the tax? Will the real estate need to be mortgaged or sold? These problems follow from the absence of an appropriate tax apportionment clause drafted into the will.
 - When taxes are apportioned to the residue...
 - Jack will take the Barnstable real estate and will not bear the burden of estate tax. The tax will be paid from the residue.
- Drafting: in all cases, a tax apportionment clause in the will applies in lieu of the statutory law. Therefore, continue to include tax apportionment clauses in wills.
- When drafting, note that taxes on GST Transfers & QTIP Property may be addressed specifically in the will. If the testator does not specifically direct the allocation of tax on GST transfers or QTIP property, the statutory default allocation applies. A general direction in a will to pay federal and Massachusetts estate taxes out of the residuary estate does NOT cause taxes arising from GST transfers or QTIP property to be paid out of the residuary estate; instead these taxes are allocated to the property which generates the tax. § 3-916(k).

16) Marriage - §§ 2-102, 2-301, 2-403, 2-405, Comment to § 2-508

- Current law: Marriage revokes a will unless it is clear from the will that it was executed in contemplation of the marriage. M.G.L. c. 191, § 9.
- MUPC: Marriage does not revoke a will. However, if the will does not clearly reflect the testator's intention to execute the will in contemplation of the marriage or that it be effective notwithstanding a subsequent marriage, the surviving spouse is entitled to property equal to the value of her intestate share of any portion of the testator's estate that passes to someone other than the testator's children (or their descendants) from a prior relationship. This means that devises to charity and other non-descendants are at risk.
 - Amount of intestate share:
 - **If (i) no surviving descendants or parent OR (ii) the surviving descendants are the only descendants of the decedent and the surviving spouse** = Surviving spouse takes entire intestate estate
 - **If no surviving descendants, but a surviving parent** = Surviving spouse takes 1st \$200k + $\frac{3}{4}$ of the balance of the intestate estate
 - **If (i) all surviving descendants are also descendants of the surviving spouse AND (ii) surviving spouse has other descendants** = Surviving spouse takes 1st \$100k + $\frac{1}{2}$ of the balance of the intestate estate
 - **At least one surviving descendant is not the descendant of the surviving spouse** = Surviving spouse takes 1st \$100k + $\frac{1}{2}$ of the balance of the intestate estate
 - Implications:
 - Devises to charity and other non-descendants are substantially reduced or revoked.
 - Depending on the amount of property subject to the surviving spouse's intestate share, the MUPC could increase the likelihood that a surviving spouse will claim the elective share.
 - Amount of the elective share, for purposes of comparison, is as follows. In each case, the decedent's property subject to the elective share is limited to probate property and property transferred by the decedent to a revocable trust during life.
 - **Decedent is survived by descendants:** Elective share is $\frac{1}{3}$ of the decedent's personal and real

property. Gets first \$25k outright and has a life estate (LE) in the balance.

- If LE involves personal property, that portion is held in trust
- If LE involves real property, that portion is vested in the surviving spouse for life
- **Decedent is survived by kindred but not descendants:** Elective share is first \$25k of personal property outright + LE in ½ of the balance of the decedent's property.
 - If LE involves personal property, that portion is held in trust
 - If LE involves real property, that portion is vested in the surviving spouse for life
- **Decedent is not survived by any living relation:** Elective share is first \$25k + ½ of the balance outright.
- Other available spousal claims to a decedent's estate:
 - The surviving spouse receives an exemption amount of the first \$10,000 of tangible personal property and automobiles, other than specifically devised property. § 2-403.
 - In addition to the exempt property, the personal representative has discretion to pay a surviving spouse and minor children up to \$18,000 per year (or up to 1 year if the estate is insolvent) while the estate is open. § 2-405.
- Drafting:
 - If testator wants the will to survive the marriage, continue to draft a clear intent that it do so into the will. "I, Sam, make this will in contemplation of my marriage to Jane." Note that the surviving spouse can still claim the elective share.
 - If testator is later married and wants to provide for the spouse, redo the will. Otherwise, the spouse is limited to the larger of the intestate share of the non-descendants' devise and the elective share.

17) **Divorce - §§ 2-508; 2,802; 2-804**

- Current law: Under current Massachusetts case law, divorce severs testamentary devises to the ex-spouse, powers of appointment given to the ex, and nomination of the ex as a fiduciary. The ex, however, is treated as predeceasing the testator. Accordingly, ex's heirs-at-law will inherit property in his/her stead. Moreover, divorce does not impact a stepchild's direct inheritance under a will.
- MUPC: Divorce revokes all of the above with respect to the ex-spouse *and* his/her relatives (where such relative is not related to the testator by blood, adoption or affinity after the divorce). (Also may revoke all of the above with respect to nonprobate transfers such as inter vivos revocable trusts and beneficiary designations, subject to superseding Federal laws such as ERISA.) The ex and his/her relatives are all treated as having disclaimed. Note that the MUPC does not revoke dispositions made in irrevocable trusts prior to the divorce; these must be addressed specifically in the divorce decree.
- Drafting: If the testator *wants* a relative of an ex-spouse to inherit despite a divorce, the testator must state that the will is drafted in contemplation of divorce, or state a clear intent with respect to a certain devise. Sample provision:
 - “Notwithstanding my divorce from Jane Smith, I give the sum of Ten Thousand Dollars (\$10,000) to Jane Smith’s daughter, Susan Smith.”

18) **Powers of Personal Representative - various, including §§ 3-715; 3-813; 3-906; 3-707**

- Current law: Massachusetts statute gives executors and administrators a short list of powers, which may be expanded or restricted by the testator in a will:
 - Power to sell any personal property of the estate, or any interest therein, for cash, credit or for part cash and part credit, and with or without security for unpaid balances.
 - Power to invest in prudent investments.
 - Power to distribute assets of the estate in kind or partly in cash and partly in kind and pro rata or not pro rata at then current values as between beneficiaries.
 - Power to effect a fair and reasonable compromise with any debtor, creditor, obligor or obligee.
 - “Others powers conferred by law”. M.G.L. c. 195, § 5A.
- MUPC: The MUPC gives personal representatives a much expanded list of powers. These powers are effective except as restricted, expanded or otherwise provided by will, or as restricted by the court following a formal proceeding.

Most of the powers are listed in § 3-715(a), but provisions affecting personal representatives' powers may be found in many other MUPC sections as well.

- MUPC § 3-715(b) provides that special personal representatives have only some of the powers granted to a personal representative. A special personal representative's powers can be expanded or further restricted in the will, or restricted by formal proceeding.
 - The MUPC continues to require a personal representative to obtain a license from the court to sell or mortgage real estate, absent a power granted in a will. Accordingly, a license is still required absent specific authority in the will to proceed without one.
- Drafting:
- Consider giving the personal representative the power to sell or mortgage real estate without any approval or license from the court. Note that this power must be included in the will; it is not granted by statute.
 - Consider giving the personal representative the power to operate a business without court authorization. The MUPC permits a personal representative to operate a testator's business up to four months without court authorization, but only "if continuation is a reasonable means of preserving the value." § 3-715(a)(24).
 - Consider authorizing the personal representative to file a joint income tax return with a surviving spouse, and to make tax elections.
 - Review any current list of powers in your will form, as compared to those granted under the MUPC, particularly to identify any powers enumerated in your will form which are narrower or more restrictive than the powers granted under the MUPC. Consider the below sample provision so as not to unintentionally restrict powers through the inadvertent use of narrower terms.
 - "In addition to and not in limitation of common law and statutory powers, my personal representative shall have and may exercise the following powers without the necessity of court license or approval:"
 - Consider eliminating or finessing any incorporation by reference of statutory powers, because some powers granted to personal representatives by the MUPC are found outside § 3-715(a). (e.g. "In addition to and not in limitation of common law and statutory powers, including but not limited to M.G.L. c. 190B, § 3-715(a), the provisions of which are hereby incorporated by reference,")

- Note that the statutory short form provisions of M.G.L. c. 184B remain effective. Review any prior document which incorporates 184B by reference, to determine the effect of the MUPC's enactment for that document.
- Expand a special personal representative's powers to equal those of a personal representative, if desirable.
 - In the above clause, add the bold language: "In addition to and not in limitation of common law and statutory powers, my personal representative, **including any special personal representative**, shall have and may exercise the following powers without the necessity of court license or approval:"
 - Note that if the term "personal representative" (PR) is defined in the will to include the term "special personal representative," (SPR) then all powers granted to a PR should apply to an SPR. If this is the desired result, consider reiterating the testator's wishes in the powers clause using the above language.
- Consider expanding the personal representative's power to distribute assets for the benefit of a minor or incapacitated person. Absent express direction, the MUPC requires distributions to minors to be made only to an UTMA account. Similarly, the MUPC requires distributions to an incapacitated person to be made to the person's agent under a power of attorney, or for distributions of \$10,000 or less, or with court approval, a distribution may be paid to the spouse, parent, or other close relative with whom the incapacitated person resides. § 3-915.
 - For distributions to a minor, include the power "to make any distribution to which a minor is entitled hereunder to such minor, to his or her parent or guardian, or to a custodian for the minor under the Uniform Transfers to Minors Act of any jurisdiction"

19) Revising Default Provisions to Address Specific Circumstances

- MUPC: In many places, the MUPC explicitly permits a testator to override many statutory provisions governing the administration of a probate estate. Below is a list of such alternatives. Note that no provision in any will purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. § 3-714. During administration, any notable limitations on a personal representative's authority should be clearly listed on the decree of appointment.
 - Powers of Surviving Co-Personal Representatives. A surviving co-personal representative may exercise all powers incident to the office unless the will provides otherwise. Comment to § 3-609.

- Removal. Unless the testator's will directs otherwise, a personal representative appointed in the decedent's domicile, incident to securing his or her appointment or his or her nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this commonwealth to administer local assets. § 3-611. In other words, testator's will can direct that a non-Massachusetts personal representative can NOT remove a Massachusetts personal representative.
- Conflict of Interest Transactions. A testator's will may expressly authorize a sale, encumbrance, or transaction involving a conflict of interest on behalf of the personal representative. § 3-713.
- Expressly make a power personal to a particular representative named in the will. If this occurs, such power is not available to a successor representative. § 3-716
- Authorize co-representatives to act alone or by majority decision. Absent such authorization, the default is that concurrence of all co-representatives is required. § 3-717.
- Limit the powers of remaining co-representatives, when one dies. Absent such limitation, the default is that those remaining can exercise all the same powers as the original group of co-representatives. § 3-718.
- Provide for compensation of a personal representative. The default is that a personal representative is entitled to reasonable compensation. Note that if testator's will expressly provides for little compensation and there is no contract, the personal representative can renounce the provision and be entitled to reasonable compensation. § 3-719.
- Encumbered assets. Testator's will can direct that a devisee of assets encumbered by a mortgage, pledge, lien, or other security interest, take free of the encumbrance. Absent such provision, the default rule is that the devisee takes subject to the lien without the right to have other assets applied to discharge the obligation. Comment to § 3-814.
- Applicable law. Direct that the law of a particular jurisdiction be used to identify the testator's successors. § 3-816.
- Establish the order of abatement. Testator may direct the order in which the assets of his estate are applied to the payment of his debts. 3-902(b); Comment to 3-902. Absent such a provision, property abates without preference to real or personal, in the following order: (1) property passing by intestacy, (2) residuary devises, (3) general devises, and (4) specific devises.

- Establish an interest rate and period on a general pecuniary devise or distribution. Absent such a provision, the default is that the SJC rules establish this rate (absent an SJC rule, the rate is 4% per year) and interest is payable from the date of the expiration of the period within which creditors may bring actions against a personal representative. § 3-904.
- Distribution in kind. Testator's will can direct the form in which the personal representative distributes assets. Absent such a provision, the default is that a personal representative may distribute estate assets in kind, partly in cash and partly in kind, pro rata or not pro rata. § 3-906.
- Surcharge and remedies. Testator's will may subject the personal representative to surcharge or other remedies of interested persons if the personal representative disregards his duties. Comment to § 3-714.

20) Self Proved Wills - § 2-504

- Current law: A will is self-proved if it is simultaneously executed, attested and made self-proved by acknowledgement of the testator and affidavits of witnesses before a notary public. M.G.L. c. 192, § 2 provides sample language.
- MUPC: A will is self-proved by the same procedures. The MUPC provides new sample language. Language "substantially similar" to the sample language is also effective.
- Drafting: Use the MUPC sample language, or revisit your own self-proving language to confirm that it is substantially similar to the MUPC provision.

21) DRAFTING FAILURES: Lapse and Antilapse - §§ 2-603; 2-707 & Comment

- Antilapse rule provides that, absent a contrary intent in a governing instrument, in some situations, a bequest to a person who predeceased the testator will pass to the deceased person's descendants.
- Current law: If the decedent made a bequest to any blood relative and the relative predeceased, the relative's descendants take, unless the will expressed a contrary intent. M.G.L. c. 191, § 22.
 - "To my Second Cousin". If predeceased, Second Cousin's descendants take.
- MUPC: The antilapse rule applies more narrowly. It no longer applies to all relatives, just to the decedent's grandparents and the grandparents' lineal descendants. Devises to other deceased persons pass to the residue. §2-604.
 - "To my Second Cousin." If predeceased, Second Cousin's descendants don't take.

- “To my Sister.” If predeceased, Sister’s descendants take.
 - Language of survivorship is sufficient to show a “contrary intent”. Thus, a devise that says “to my Sister, if she survives me” will override the antilapse statute and if Sister does not survive, the bequest will lapse and fall to the residue.
- Drafting: For each devise in the will, consider an alternate devise.
 - If application of the antilapse rule *is not desired*, consider specifying what happens to the devise if the devisee does not survive.
 - “I give the sum of Ten Thousand Dollars to my sister Jane.” Jane’s descendants will take the devise if Jane is not living at the testator’s death.
 - “I give the sum of Ten Thousand Dollars to my sister Jane, if she survives me, and if she does not survive me, such amount shall pass as part of the residue of my estate.” Jane’s descendants will not take the devise if Jane is not living at the testator’s death.
 - “I give the sum of Ten Thousand Dollars to my sister Jane, if she survives me.” Jane’s descendants should not take the devise if Jane is not living at the testator’s death, and instead it should pass to the residue. The Massachusetts version of the §2-603 did not adopt the current UPC version of §2-603 which would apply the antilapse provisions notwithstanding words of survivorship contained in the bequest. Since the Massachusetts version of §2-603 did not adopt this UPC approach, it stands to reason that the words “if she survives me” should be considered a “contrary intention shown by the terms of the will” under §2-601, thus negating the application of §2-603.
- If application of the antilapse concept *is desired* for gifts to individuals other than the testator’s grandparents and their lineal descendants, the testator must specify what happens to the devise if the devisee does not survive.
 - “I give the sum of Ten Thousand Dollars to my friend Judy.” Judy’s descendants will not take the devise if Judy is not living at the testator’s death.
 - “I give the sum of Ten Thousand Dollars to my friend Judy, if she survives me, and if she does not survive me, I give such amount to Judy’s descendants, by right of representation.” Judy’s descendants will take the devise if Judy is not living at the testator’s death.

22) DRAFTING FAILURES: Nonademption of Specific Devises - § 2-606

- Ademption rules apply when something specified to be given to a recipient is not owned by the decedent at death. Example:
 - Sam drafts a will leaving his “house in Maine” to Jane. Sam sells his house before death and buys a new house in Vermont.
 - Sam does not change his will, then dies. The devise is adeemed. Jane takes nothing.
- Current law: Subscribes to the so-called “identity” theory. Presumption that the testator wanted to give *the thing itself* to the recipient. If the testator does not have the thing, the recipient gets nothing.
- MUPC: Subscribes to the “intent” theory. Presumption that the testator intended to give *something* to the recipient. If the testator does not have the specific thing, then in *some* situations the recipient will get something else.
 - When will the recipient get something else under the MUPC?
 - Sale: Recipient will take the *unpaid* purchase price.
 - Example: Specifically devised property sold by the testator in exchange for a note. *Outstanding amount of note* will pass to the devisee.
 - Example: Specifically devised property sold by the testator. Entire purchase price paid to testator before death. *Devisee takes nothing.*
 - Casualty: Recipient will take *unpaid* insurance proceeds.
 - Example: Specifically devised property burns to the ground, killing the testator. Insurance proceeds will pass to the devisee.
 - Sale, mortgage or collection of insurance proceeds by attorney-in-fact under DPoA, or conservator acting on behalf of an incapacitated person: Recipient will take *entire* sale proceeds (whether or not unpaid at testator’s death).
- Drafting: Consider what should happen in the event that a specific bequest is adeemed. Sample provisions:
 - “I give my vacation home located on Ocean Drive in Ogunquit, Maine, to my friend Jane, or if I do not own such home at my death, I give to Jane such replacement vacation home that I may own, if any, at my death”.

- “I give my real property located at 123 Main Street, Boston, Massachusetts, to my friend Jane, if she survives me and I own such property at the time of my death. If such real property is not part of my estate at the time of my death, the devise to Jane shall lapse and she shall take nothing, notwithstanding any rule of nonademption.”

II. DURABLE POWER OF ATTORNEY (MUPC provisions took effect on July 1, 2009)

23) MUPC: **Durability**

- A power of attorney is a writing by which a principal designates another to be his attorney-in-fact. A *durable* power of attorney remains effective after the principal’s incapacity and until the principal’s death. To be durable, a power of attorney must contain provisions speaking to durability. § 5-501. The statute provides the following specific provisions, although “similar words” may also be effective:
 - “This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time.” *or*
 - “This power of attorney shall become effective upon the disability or incapacity of the principal.”
- Drafting: Update Durable Power of Attorney forms to include the lapse of time language, which is new under the MUPC.

24) MUPC: **Nominating a Guardian / Conservator for Oneself**

- A person may nominate a guardian and conservator of oneself, to serve in the event of one’s own incapacity, in a durable power of attorney form. §§ 5-305; 5-409.
- Surety on a bond may be waived. §§ 5-208; 5-410
- Drafting: Sample provision: “I do hereby nominate Jane Doe as my guardian and/or conservator if protective proceedings for my person or property are hereafter commenced and direct that she should be exempt from giving any bond or, if required to give bond, shall be exempt from furnishing any surety thereon.”

25) MUPC: **Revocation**

- A power of attorney is not revoked until the attorney-in-fact has actual notice of its revocation. §5-505
- Consider whether it is appropriate to revoke prior durable powers of attorney. Have the prior attorney-in-fact acknowledge receipt of the revocation. Sample revocation form:

REVOCATION OF
DURABLE POWER OF ATTORNEY

I, Sam Smith of Boston, Massachusetts, hereby revoke that certain Durable Power of Attorney dated June 1, 2011 by which I constitute and appoint Jane Doe of Salem, Massachusetts as my attorney-in-fact.

Date: _____
_____ Sam Smith

COMMONWEALTH OF MASSACHUSETTS

County of _____, ss.

On this 20th day of October, 2011, before me, the undersigned notary public, personally appeared Sam Smith, who is personally known to me or who has produced _____ as satisfactory identification that he is the person whose name is signed on the preceding document, and acknowledged that he signed such document voluntarily for its stated purpose.

Notary Public
My Commission Expires:

RECEIPT ACKNOWLEDGED

_____ Date: _____
Jane Doe

III. OTHER FORMS

- 26) Minor's Nomination of Guardian or Conservator: A minor who is at least 14 years old may nominate his own guardian or conservator. MUPC §§ 5-207; 5-409. A minor nominates a guardian using form MPC 441, which requires notarization of the minor's signature. There does not yet appear to be a court form for a minor to nominate a conservator, but practitioners have modified MPC 441 to nominate a conservator instead of a guardian, and used the modified form with success.
- 27) Parental/Guardian 60 Day Delegation of Powers: A parent (or parents) of a minor, or a guardian (or guardians) of a minor or an incapacitated person, may delegate any power that he or she has with respect to the care, custody or property of the minor or incapacitated person, such delegation to be effective for no more than 60 days. The delegation must be in writing and signed by the parent(s)/guardian(s) in front of two witnesses. The agent must accept the delegation in writing. MUPC § 5-103. There is no court involvement (though the court retains the authority to limit or alter the agent's authority).

28) Caregiver Authorization Affidavit: Compare the above delegation to the caregiver authorization affidavit under M.G.L. c. 201F (not part of the MUPC). In executing a caregiver authorization affidavit, a parent, legal guardian or legal custodian of a minor can delegate certain *concurrent* rights to a *caretaker with whom the minor resides*. Only certain rights may be delegated: making health care decisions, accessing health care information, making education decisions and accessing education records. Note that the principal is not giving up his or her own rights—the principal and the agent have concurrent rights. In a disagreement between the principal and the agent, the principal’s decision takes priority. The affidavit must be signed by the principal in front of two witnesses and a notary, and also signed by the agent. The affidavit is effective for up to two years.