AMENDED REPORT OF THE

SUPREME JUDICIAL COURT'S AD HOC COMMITTEE

ON BOSCH LITIGATION

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AMENDED REPORT OF THE SUPREME JUDICIAL COURT'S AD HOC COMMITTEE ON BOSCH LITIGATION

Executive summary

The Supreme Judicial Court has had a longstanding practice of deciding the limited class of uncontested cases that are referred to in this report as Bosch cases. The resolution of the cases is not intended to, and does not in fact, settle any dispute between the parties per se, because all of the parties who are before the court agree as to the desired result. Rather, the resolution of these cases is meant to assist the parties in their dealings with the Internal Revenue Service by deciding a matter of State law that will be binding on Federal authorities. The court has held that it is appropriate to decide this category of cases even though they lack some of the usual characteristics of truly adversarial litigation.

Separate and apart from the question whether the Massachusetts courts should decide these one-sided cases is the question of which court should decide them. That question is at the heart of this report. To date, virtually all of the decisions in Bosch cases have come from the Supreme Judicial Court. The court recognizes that there is nothing in Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), that requires it to entertain these cases. Mindful that only a decision from this court, the highest court in Massachusetts, will be conclusive and binding on the Federal authorities as to points of State law, the court has routinely rendered decisions in these cases at the request of the parties, despite the fact that the cases are uncontested and the issues are sometimes straightforward.

In this report, the committee proposes a new approach to deciding Bosch cases in the Massachusetts courts. The committee proposes that the Massachusetts courts continue to hear and decide the cases, but that the Supreme Judicial Court no longer be solely responsible for deciding every one of them. Instead the cases would be allocated between the Supreme Judicial Court and the Probate and Family Court based on the nature of the issues involved. Under this proposed approach, explained at pp. 19-23 below, the Probate and Family Court would decide the bulk of the cases, and the Supreme Judicial Court would concentrate on those cases that raise novel or unsettled issues of Massachusetts law or that might otherwise be significant beyond the specific parties and the specific facts involved.

Membership

This committee was formed at the request of Justice Botsford, with the approval of Chief Justice Ireland and the Associate Justices. The outside attorney members of the committee were chosen based on their familiarity with the subject matter and experience in this field. Specifically, these members were selected from lists of attorneys of record in cases of this type before the Supreme Judicial Court, and from lists provided by the Massachusetts and Boston Bar Associations of attorneys with demonstrated expertise in this area. An attempt was made to bring together members representing a variety of perspectives: the court's perspective, the estate planning and tax perspectives, and the litigation perspective. The members of the committee were:

Marc J. Bloostein, Ropes & Gray
Honorable Margot Botsford, Chair, Supreme Judicial Court
Nancy E. Dempze, Hemenway & Barnes
John F. Hemenway, Esq.

William A. Lowell, Choate Hall & Stewart
Neal Quenzer, Supreme Judicial Court
John F. Shoro, Bowditch & Dewey
Mark E. Swirbalus, Goulston & Storrs
Raymond H. Young, Hemenway & Barnes [1]

Objectives

The committee met on four occasions. [2] The stated objectives of the committee were as follows:

- to examine the current state of Bosch litigation in the Supreme Judicial Court, including the number and various types of cases;

- to share, from a variety of perspectives – the court, litigants and their counsel, and the Internal Revenue Service – the experiences of those involved in this type of litigation;

- to gather information on how the court's decisions are used in Federal tax disputes in the real world – in other words, to examine whether the current approach actually serves the intended purpose of satisfying the Internal Revenue Service on matters of State law, what other approaches might suffice, etc.;

- to survey how cases like this are handled in the courts of other jurisdictions;

- to assess from different perspectives the need for and desirability of this court's continuing to hear and decide such cases;

- to arrive at a common understanding of the court's expectations with respect to the timing of such cases, the type of evidence that is required to support a request for reformation, and so forth; and

[1] This report represents the views of the individual committee members and does not necessarily reflect any views of their firms and organizations.

[2] At its second meeting, the committee heard from Richard H. Murray, Esq., a supervisory attorney in the Boston office of the Estate and Gift Tax Division of the Internal Revenue Service, who shared his views on Bosch litigation from the I.R.S.'s perspective.

In addition to the four regularly scheduled meetings, several committee members also attended a meeting of the Boston Probate and Estate Planning Forum, at which Justice Botsford gave a short presentation of the committee's work and the forum members discussed Bosch litigation generally and the work of the committee in particular.

- to make a report, with appropriate recommendations, to the court on the current state of affairs and on dealing with such cases in the future.

Brief historical background

In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the Supreme Court redefined the role that State court decisions on State law issues play in related Federal tax proceedings. It did this in an attempt to resolve the difficulties and differences that had arisen in the lower Federal courts concerning the application of the Supreme Court's earlier holdings in this area. Instead of focusing primarily on whether the State court proceedings were sufficiently adversarial and the State court decisions sufficiently free of fraud or collusion, as it had done in prior cases, the court in Bosch focused primarily on which court within the State had issued the decision. Applying an analysis similar to that in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), the court concluded that while Federal authorities should give "proper regard" to decisions of lower State courts on matters of State law, those decisions are not conclusive and binding on the Federal authorities. Commissioner v. Estate of Bosch, supra at 463-465. [3, 4, 5]

[3] In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the Supreme Court departed from its holdings in the earlier cases in which it had determined that decisions of State courts on matters of State law were conclusive – binding on the Federal authorities, if you will – in related Federal tax proceedings, at least where the State court decisions were not obtained by fraud or collusion. See Blair v. Commissioner, 300 U.S. 5 (1937); Freuler v. Helvering, 291 U.S. 35 (1934). In the earlier cases the court did not distinguish between decisions from a State's highest court and its lower courts. Indeed, the State court proceedings in both Blair and Freuler were lower court proceedings.

[4] The Bosch decision has been criticized by some courts and commentators on the ground that its reasoning is flawed and that the standard it has created – the "proper regard" standard – is unworkable. It was not this committee's purpose to reevaluate the merits of the Supreme Court's decision. Correct or incorrect, weak or strong, Bosch is a decision of the Supreme Court on a point of Federal law, and as such it sets the framework within which attorneys, litigants, the Internal Revenue Service, Federal courts, and this court must operate.

In two cases decided by the Supreme Judicial Court in 1978, the court paused, before addressing the substantive merits of the cases, to examine in considerable detail whether a determination on the merits was warranted despite the fact that some of the traditional indicia of adversarial litigation were absent. In opinions authored by Chief Justice Hennessey, the court concluded that the cases were sufficiently adversarial, and that there was also other adequate justification for reaching and deciding the merits, including the fact that this court's decisions would be binding on the Internal Revenue Service on the State law issues. Dana v. Gring, 374 Mass. 109, 113-115 (1978). Babson v. Babson, 374 Mass. 96, 101-103, 103 n.5 (1978). [6] The court thus made a considered, precedential decision to resolve the cases "notwithstanding the fact that no adversaries appeared before this court," id. at 98, a fact that has been the hallmark of virtually all Bosch litigation in this court in the decades that have followed. [7] In many other cases of this type, both before and after Dana v. Gring and Babson v. Babson, the court, without

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[5] The Bosch decision has been widely accepted for the proposition that, on matters of State law, only decisions of a State's highest court are binding on the Federal authorities. There is also some research demonstrating that the Internal Revenue Service and the Federal courts, notwithstanding the "proper regard" mandate of Bosch, in practice often give little regard or no regard at all to the decisions of the lower State courts in this context. Paul L. Caron, The Role of State Court Decisions in Federal Tax Litigation: Bosch, Erie and Beyond, 71 Or. L. Rev. 781 (1992) (surveying more than 900 cases and administrative rulings). See Gilbert P. Verbit, State Court Decisions in Federal Transfer Tax Litigation: Bosch Revisited, 23 Real Prop., Prob. and Trust J. 407 (Fall, 1988). The committee is aware of this, but, for reasons explained below, is nevertheless of the view that a decision from the Probate and Family Court will be sufficient in most of the cases.

[6] The relevant passages from these two decisions are attached to this report as appendices "A" and "B" respectively.

[7] But see Justice Quirico's dissenting opinions in First Nat'l Bank of Boston v. First Nat'l Bank of Boston, 375 Mass. 121, 125-126 (1978), and Babson v. Babson, 374 Mass. 96, 106-108 (1977). Justice Quirico took the position that cases such as this should not be decided by this court, or presumably by any Massachusetts court, because they lack a true adversarial character.

discussing the point at any great length, simply noted in passing that it was deciding the cases in order to provide a determination of the State law issues that would be binding on the Internal Revenue Service. See, e.g., Berman v. Sandler, 379 Mass. 506, 508-509 (1980); Pastan v. Pastan, 378 Mass. 148, 149 (1979); Putnam v. Putnam, 366 Mass. 261, 262 n.2 (1974); Mazzola v. Myers, 363 Mass. 625, 633-634 (1973); Woodberry v. Bunker, 359 Mass. 239, 240 (1971); Worcester County Nat'l Bank v. King, 359 Mass. 231, 233 (1971). See also Pond v. Pond, 424 Mass. 894, 894-895 (1997); Simches v. Simches, 423 Mass. 683, 686 n.8 (1996); Shawmut Bank v. Buckley, 422 Mass. 706, 709-710 (1996); Loeser v. Talbot, 412 Mass. 361, 362 (1992); First Agricultural Bank v. Coxe, 406 Mass. 879, 882 (1990); McClintock v. Scahill, 403 Mass. 397, 398 n.4 (1988); Persky v. Hutner, 369 Mass. 7, 8 (1975). [8]

In 2001, faced with three such cases at a single sitting, the court again paused to consider its practice of entertaining Bosch cases. Again the court made a considered decision to continue deciding these uncontested cases. In an opinion authored by Chief Justice Marshall, the court concluded:

> "[I]t is not only permissible, but also in keeping with this court's long-standing practice, for us to decide cases such as this despite the fact that they lack some of the usual adversary characteristics. This court has decided many of these 'uncontested' cases, which call for interpretation or reformation of trust instruments under Massachusetts law, because the parties have represented that a decision from this court will facilitate their dealings with the Internal Revenue Service. We do so because we are mindful of the fact that the Internal Revenue Service and the Federal courts are not bound by decisions of lower State courts. See Simches v. Simches, 423 Mass. 683, 686 n.8 (1996); Berman v. Sandler, [379 Mass. 506, 509 (1980)]; Persky v. Hutner, 369 Mass. 7, 8 (1975). [Footnote omitted]

[8] Even before the Supreme Court's decision in the Bosch case, this court had decided at least one uncontested case involving a question of State law (interpretation of language in a will) where the resolution of the matter was designed to assist the parties in dealing with the Internal Revenue Service. See Old Colony Trust Co. v. Silliman, 352 Mass. 6 (1967).

> "We have decided cases like this not only when parties have been actively engaged in disputes with the Internal Revenue Service, but also, on occasion, when parties have sought decisions that would enable them to plan their estates correctly and to prepare effectively for future tax consequences. See Putnam v. Putnam, 425 Mass. 770 (1997); Simches v. Simches, supra; Shawmut Bank, N.A. v. Buckley, 422 Mass. 706, 709-710 (1996), citing Billings v. Fowler, 361 Mass. 230, 233-234 (1972). However, we have declined to decide cases in inappropriate circumstances, such as where no question of State law and only a question of Federal law is presented. See Kirchick v. Guerry, 429 Mass. 215 (1999)."

Walker v. Walker, 433 Mass. 581, 582 (2001). See Hillman v. Hillman, 433 Mass. 590 (2001); Fleet Nat'l Bank v. Mackey, 433 Mass. 1009 (2001). See also "Recent Cases Allow Tax Break Where Trusts Found Defective," Massachusetts Lawyers Weekly, April 2, 2001, at 1.

Sensing a possible increase in the frequency and scope of the cases that were being brought under the Bosch rubric, the court added in a footnote:

> "We are confident that litigants and attorneys who bring cases such as this before us do not do so lightly. We expect that, in the interest of conserving scarce judicial resources as well as their own resources, they will explore, whenever practicable, alternative resolutions satisfactory to the Internal Revenue Service. We also take this opportunity to remind litigants that, when they bring such cases before us, we require (as the parties in this case have provided) a full and proper record and the requisite degree of proof that they are entitled to the relief they seek."

Walker v. Walker, supra at 582 n.5.

Current state of the litigation in Massachusetts

The number and types of cases brought to this court under the Bosch rubric have increased dramatically since the court's early decisions in this area. The Supreme Court decided the Bosch case in 1967. During the three decades that followed – the 1970s, 1980s, and 1990s – there were approximately twenty-five cases decided by the Supreme Judicial Court in this category. In the single decade from 2000 to 2010, there were more than forty such cases decided by this court. The committee believes that the increase in the number and types of cases over time is attributable, at least in part, to an increased awareness among practitioners of the

willingness of this court to exercise its jurisdiction to hear Bosch cases, and, correspondingly, the desire of practitioners to employ Bosch proceedings to the fullest extent possible toward the end of ensuring favorable tax treatments for their clients. Since 2010, however, there has been a very noticeable decline in the number of new Bosch cases presented to the court, which the committee attributes, at least in part, to the substantial increase in the estate tax exemption and reduction in the top estate tax rate effected by the Federal Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. There are presently very few, if any, Bosch cases pending in this court.

It would be difficult, if not impossible, to categorize perfectly every Bosch case that has been decided by the court. That said, some generalizations can be made. A number of the early decisions involved questions implicating the marital deduction under Federal estate tax law. [9] Cases involving the marital deduction have continued to be common in more recent years as well. [10] Perhaps the most frequently occurring category of cases in recent years are the cases implicating the Federal generation-skipping transfer tax. Many of these cases involve a situation where a trustee, claiming a mistake in the drafting, seeks to divide a trust into two essentially identical subtrusts in order to take full advantage of the tax's personal exemption amount. [11]

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[9] See, e.g., Berman v. Sandler, 379 Mass. 506 (1980); Pastan v. Pastan, 378 Mass. 148 (1979); First Nat'l Bank v. First Nat'l Bank, 375 Mass. 121 (1978); Babson v. Babson, 374 Mass. 96 (1977); Boston Safe Deposit & Trust Co. v. Children's Hosp., 370 Mass. 719 (1976); Putnam v. Putnam, 366 Mass. 261 (1974); and Mazzola v. Myers, 363 Mass. 625 (1973).

[10] See, e.g., Shultz v. Shultz, 451 Mass. 1014 (2008); Gilpatric v. Cabour, 450 Mass. 1025 (2008); Sheinkopf v. Bornstein, 443 Mass. 1012 (2005); Seegel v. Miller, 443 Mass. 1007 (2005); D'Amore v. Stephenson, 442 Mass. 1027 (2004); Dassori v. Patterson, 440 Mass. 1039 (2004); and In re Substitute Indenture of Trust, 439 Mass. 1009 (2003).

[11] See, e.g., Bank of America v. Dudley, 455 Mass. 1012 (2009); Estate of Lunt, 448 Mass. 1004 (2007); Inderieden v. Downs, 445 Mass. 1011 (2005); Fiduciary Trust Co. v. Gow,

Other generation-skipping transfer tax cases involve different scenarios. [12] The court has also entertained cases in recent years that involve charitable remainder trusts, [13] powers of appointment, [14] irrevocable life insurance trusts, [15] disclaimers, [16] qualified personal residence trusts, [17] and grantor retained annuity trusts. [18]

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443 Mass. 1017 (2005); England v. Decker, 441 Mass. 1013 (2004); Fleet Nat'l Bank v. Kahn, 438 Mass. 1004 (2002); Fleet Nat'l Bank v. Marquis, 437 Mass. 1010 (2002); Riley v. Riley, 434 Mass. 1021 (2001); and Fleet Nat'l Bank v. Mackey, 433 Mass. 1009 (2001). With the enactment of the Massachusetts Uniform Trust Code, effective July 8, 2012, this type of division of trusts no longer requires judicial authorization. See G. L. c. 203E, § 417 (authorizing combination and division of trusts by trustees without court involvement, after notice to qualified beneficiaries, provided "the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trusts").

[12] See, e.g., Slavin v. Beckwith, 456 Mass. 1013 (2010); Davis v. Slaughter, 438 Mass. 1008 (2002); Colt v. Colt, 438 Mass. 1001 (2002); and Simches v. Simches, 423 Mass. 683 (1996).

[13] See, e.g., Booth v. Kornegay, 452 Mass. 1005 (2008); Bank of America v. Sweeney, 450 Mass. 1006 (2007); McCance v. McCance, 449 Mass. 1027 (2007); Ratchin v. Ratchin, 439 Mass. 1014 (2003); Fleet Nat'l Bank v. Wajda, 434 Mass. 1009 (2001); and Putnam v. Putnam, 425 Mass. 770 (1997).

[14] See, e.g., Dwyer v. Dwyer, 452 Mass. 1030 (2008); Pierce v. Doyle, 442 Mass. 1039 (2004); Hillman v. Hillman, 433 Mass. 590 (1981); Walker v. Walker, 433 Mass. 581 (2001).

[15] See, e.g., Barker v. Barker, 447 Mass. 1012 (2006); Ryan v. Ryan, 447 Mass. 1003 (2006); Lordi v. Lordi, 443 Mass. 1006 (2005); Diwadkar v. Dilal, 439 Mass. 1011 (2003); Wennett v. Ross, 439 Mass. 1003 (2003); and Wright v. Weber, 437 Mass. 1001 (2002).

[16] See, e.g., Breakiron v. Gudonis, 452 Mass. 1008 (2008); and Kaufman v. Richmond, 442 Mass. 1010 (2004).

[17] See, e.g., Van Riper v. Van Riper, 445 Mass. 1009 (2005); Davis v. Slaughter, 438 Mass. 1008 (2002); and Simches v. Simches, 423 Mass. 683 (1996).

[18] See, e.g., Freedman v. Freedman, 445 Mass. 1009 (2005).

Cases from other jurisdictions

Several members of the committee reported that they believe the Supreme Judicial Court hears and decides substantially more cases of this type than any other State's highest court. Research confirms this. A fifty-State survey shows that the highest courts in several other States have also entertained this type of case, but that none has done so to the same extent as this court. Some representative cases from other jurisdictions are cited in the margin. [19]

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[19] For example, the South Carolina Supreme Court resolved in First Union Nat'l Bank of South Carolina v. Cisa, 293 S.C. 456 (1987), to decide a point of South Carolina law notwithstanding the fact that all parties before it were in agreement as to the result, because the Federal authorities would be bound only by a decision from the State's highest court. The court stated:

> "Appellants appeal the trial court's judgment seeking this Court's determination of the testator's intent under the will and the application of South Carolina law upon the will and the residuary trust. In Commissioner v. Estate of Bosch, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967), the Supreme Court held that federal tax authorities and the federal courts are not bound by a lower court's decision interpreting state law, but shall merely give such a decision 'proper regard.' Id. There was discussion during oral argument as to whether or not this matter was a case or controversy over which this Court had jurisdiction because the litigants appeared to be closely aligned with one another. The highest courts of North Carolina, Massachusetts, Connecticut, Pennsylvania and California, however, have allowed appeals of this nature. See, North Carolina Nat'l Bank v. Goode, 298 N.C. 485, 259 S.E.2d 288 (1979); Dana v. Gring, 374 Mass. 109, 371 N.E.2d 755 (1977); Babson v. Babson, 374 Mass. 96, 371 N.E.2d 430 (1977); Gimbel v. Gimbel Found., Inc., 166 Conn. 21, 347 A.2d 81, 84 (1974); Connor v. Hart, 157 Conn. 265, 253 A.2d 9, 12 (1968); In re Tibbetts' Estate, 111 N.H. 172, 276 A.2d 919 (1971); Worcester County Nat'l Bank v. King, 359 Mass. 231, 268 N.E.2d 838, 840 (1971). Cf., In re Estate of Merrick, 443 Pa. 388, 275 A.2d 18, 22-23 (1971); Wakefield v. Wakefield, 258 Cal. App. 2d 274, 65 Cal. Rptr. 664, 667, n. 6 (1968); Connecticut Bank and Trusts Co. v. Cohen, 27 Conn. Supp. 138, 232 A.2d 337, 338-39 (1967).
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> "Because the parties in the instant action seek a judicial determination of rights, we are of the opinion that the underlying purposes of the adversarial system have been met. See, Dana v. Gring, supra. Thus, we conclude that it is appropriate for us to decide the merits and render declaratory relief that turns on state law in this case."

Types of relief sought and burden of proof

The relief sought in a Bosch case might be the equitable remedy of reformation of an instrument, the interpretation of the terms of an instrument, or instructions to the trustee as to how to proceed. In a typical reformation case, the trustee (and the settlor, if he or she is living) alleges that the trust instrument as written does not reflect correctly what the settlor intended, i.e., that the instrument as written has produced or will produce results that are inconsistent with the settlor's tax objectives. See Putnam v. Putnam, 425 Mass. 770, 772 (1997); Berman v. Sandler, 379 Mass. 506, 509-510 (1980) ("The fact that we are influenced in our interpretation of the amendment by 'a consideration of the [settlor's] tax intentions' is in no way improper"). "[A] mistake by the settlor concerning the Federal estate and gift tax consequences of a provision of the trust justifies reformation." Simches v. Simches, 423 Mass. 683, 687 (1996). Cf. Pastan v. Pastan, 378 Mass. 148, 149-150 & 155 (1979) (recognizing that court's interpretation of

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Id. at 460-461.

In addition to the jurisdictions cited by the South Carolina court – California, Connecticut, Massachusetts, New Hampshire, North Carolina, and Pennsylvania – the highest courts in other States have also decided cases in a similar posture. There are, for example, similar decisions from Indiana and Oklahoma. See Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos, 895 N.E. 2d 1191 (Ind. 2008); and Griffin v. Griffin, 832 P.2d 810 (Okla. 1992). The Kansas Supreme Court has also issued a number of decisions like this in recent years. See, e.g., In re Trust D Created under Last Will and Testament of Darby, 290 Kan. 785 (2010); In re Paul Suhr Trust, 222 P.3d 506 (Kan. 2010) (unpublished); In re Cohen, 203 P.3d 734 (Kan. 2009) (unpublished); In re Fee Trust, 109 P.3d 1254 (Kan. 2005) (unpublished); In re Biggs Charitable Remainder Trust, 109 P.3d 1253 (Kan. 2005) (unpublished); In re Estate of Simons, 86 P.3d 1021 (Kan. 2004) (unpublished); In re Estate of Smith, 80 P.3d 71 (Kan. 2003) (unpublished); In re Harris Testamentary Trust, 275 Kan. 946 (2003); and In re Estate of Keller, 273 Kan. 981 (2002).

However, no other State supreme court has entertained as many of these cases throughout the years as the Massachusetts Supreme Judicial Court.

provisions of marital deduction trust "may be influenced or weighted by a consideration of the testator's tax intentions"), and cases cited. [20] The drafting attorney's failure correctly to accomplish the settlor's purpose is said to be a "scrivener's error" that is correctable by reformation.

In other cases, the claim is not that the trust instrument, when it was drafted, failed to effectuate the settlor's intent, but that circumstances have changed since the drafting, e.g., there has been an unanticipated change in the law that has frustrated the settlor's intent. Two examples are Grassian v. Grassian, 445 Mass. 1012, 1013 (2005), and Freedman v. Freedman, 445 Mass. 1009, 1010 (2005). See also BankBoston v. Marlow, supra. [21]

It is incumbent on the parties to demonstrate to the court's satisfaction that the relief sought is warranted. "The existence of a mistake in the drafting of a trust instrument must be established by 'full, clear, and decisive proof.' That standard is similar to proof by 'clear and convincing evidence.' See Restatement of Property (Donative Transfers) § 12.1 (Tent. Draft No. 1, 1995). The point is not, however, so much that the burden of proof is heightened as it is that the judge who considers the reformation must make thorough and reasoned findings that deal with all relevant facts and must demonstrate a conviction that the

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[20] The new Massachusetts Uniform Trust Code codifies the concept of reformation to correct mistakes. See G. L. c. 203E, § 415 ("The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that the settlor's intent or the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement").

[21] Courts are now expressly authorized by the new Massachusetts Uniform Trust Code to "modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification shall be made in accordance with the settlor's probable intent." G. L. c. 203E, § 412.

proof of mistake was clear and well-founded." Putnam v. Putnam, supra at 772-773 (citations omitted). "To ascertain the settlor's intent, [the court looks] to the trust instrument as a whole and the circumstances known to the settlor on execution." DiCarlo v. Mazzarella, 430 Mass. 248, 250 (1999), quoting Pond v. Pond, 424 Mass. 894, 897 (1997). The settlor's tax saving intent might be determined from the text or the nature of the instrument itself. See, e.g., Simches v. Simches, supra at 688. The court has also been willing to accept extrinsic evidence in the form of an affidavit from the settlor, if living, or from the drafting attorney, if available. See, e.g., Inderieden v. Downs, 445 Mass. 1011, 1011 (2005); Walker v. Walker, supra at 587-588 (2001); Putnam v. Putnam, supra at 772 ("Indeed, the crucial evidence of intent and mistake may well be available from the lawyer who drafted [or misdrafted] the instrument rather than from the settlor").

The parties are required to provide the court with a "full and proper record" on which their request for reformation is based. Walker v. Walker, supra at 582 n.5. See also Putnam v. Putnam, supra at 773 n.4 (criticizing the record in the case as "unnecessarily scant"; stating that "the requirement of clear and decisive proof in such cases counsels that a full factual record supporting reformation be made"). The parties should furnish an agreed statement (or other suitable evidence) of the relevant facts and written assents to the relief sought from all identifiable beneficiaries. In several recent cases, either in a single justice's reservation and report or in the court's order allowing the application for direct appellate review, language has been included specifically reminding the parties of their obligations, in the hope of avoiding a situation where a case comes before the court on a deficient record.

In most of the cases the parties successfully satisfy their burden of proof, demonstrating to the court's satisfaction that the relief sought is appropriate. In cases where the requested relief

is not shown to be warranted, however, the Supreme Judicial Court has not hesitated to deny the parties' request. For example, the court has declined to reform instruments, interpret them, or provide instructions as requested when no State law issue is presented, see Kirchick v. Guerry, 429 Mass. 215 (1999); when the record put before the court is insufficient to meet the parties' burden of proof, see Fiduciary Trust Co. v. Gow, 440 Mass. 1037 (2004); when the facts turn out to be other than as represented, see Florio v. Florio, 445 Mass. 1004, 1006 (2005); when the applicable law, either as a matter of statute or by a choice of law provision in the document, is or may be that of another jurisdiction, see id. at 1005 & 1006-1007, and State Street Bank & Trust Co. v. Alden, 445 Mass. 1011 (2005); when a requested reformation would be surplusage and not strictly necessary to effectuate the settlor's intent, see Hillman v. Hillman, 433 Mass. 590, 595 n.10 (2001), and Walker v. Walker, supra at 589; and when a proposed reformation might in fact contravene the settlor's intent, see Florez v. Florez, 441 Mass. 1004, 1005 (2004).

Disposition of the cases by the Supreme Judicial Court

Prior to 2001, the court resolved all or almost all of the Bosch cases with full opinions. This was true even when the cases involved only minor points of law. See, e.g., BankBoston v. Marlow, 428 Mass. 283 (1998); First Agric. Bank v. Coxe, 406 Mass. 879 (1990) (characterizing the relief granted in the case as mere "fine tuning of the administration of the trusts" that would reduce, if not eliminate, unintended application of onerous generation-skipping transfer tax). Since 2001, however, the vast majority of these cases have been decided with short rescript opinions. Rescript opinions are especially appropriate for many of these cases, because they require only the application of routine legal principles to a specific set of facts, and because they have few if any ramifications beyond the particular facts and parties involved. Some of the opinions have been only a paragraph or two. See, e.g., Wennett v. Ross, 439 Mass. 1003 (2003);

Davis v. Slaughter, 438 Mass. 1008 (2002). Additionally, in most of the cases since 2001, the parties have elected to waive oral argument, preferring instead to submit the case on a single brief joined by all the parties.

Regardless whether a case is to be decided by a full or rescript opinion, the court thoroughly reviews the brief and the record to determine whether the parties are entitled to the relief they are seeking.

Possible alternative methods of disposition

The committee considered a variety of alternative ways for this court to process Bosch cases going forward, five of which are presented below. The general consensus of the committee is that the Supreme Judicial Court no longer needs to hear and decide every one of these cases, and that many of the cases can be left to the Probate and Family Court for resolution. This is explained in greater detail in alternative 5, at pp. 19-23 below.

1. The first alternative is for the court to do nothing differently and to continue to hear and decide these cases in the manner it currently does. If the case is pending in the Appeals Court, on report from the Probate Court, the court would grant the parties' application for direct appellate review, as it does now. If the case is pending in the county court, having been commenced there by the parties, the single justice would reserve and report it to the full court, as he or she does now. The case would then be briefed in the full court – typically there would be one brief only – and argued or submitted at one of the court's regular monthly sittings. The consensus of the committee is that this approach, having the Supreme Judicial Court hear and decide each and every one of these cases, is no longer necessary to fulfill the objective of facilitating the parties' dealings with the Internal Revenue Service.

2. A second alternative would be for the Massachusetts courts to simply stop entertaining Bosch cases altogether, which would leave the parties to litigate their differences with the Federal authorities in Federal courts, including matters of State law. One of the committee members favors this approach. The other members believe that this would be a harsh and unnecessary departure from the current practice; these members are of the view that even though the Supreme Judicial Court does not need to decide every Bosch-type case, there is value in having the Probate and Family Court hear and decide the cases, and that there will continue to be select occasions when it would be appropriate for the Supreme Judicial Court to decide such a case, such as when the case raises a novel and unresolved point of Massachusetts law. See, e.g., Morse v. Kraft, 466 Mass. 92 (2013). [22]

3. The third alternative concerns those Bosch cases that are commenced in the Probate and Family Court and are reported without decision to the Appeals Court. It has been suggested that it might be sufficient for Bosch purposes if those cases were left in the Appeals Court and

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[22] In Dana v. Gring, 374 Mass. 109, 113-115 (1978), the court considered and rejected alternative 2. The court stated, among other things: "[W]e are mindful of the fact that an alternative procedure exists whereby the [taxpayers] could obtain an opinion of this court on the questions of State law at issue here. After administrative resolution of the case [before the Internal Revenue Service], the [taxpayers] could pursue their refund claim in a United States District Court. Under S.J.C. Rule 3:21, § 1, 359 Mass. 790 (1971) [now S.J.C. Rule 1:03, as appearing in 382 Mass. 700 (1981)] the District Court then has the power to certify questions of State law to us if 'it appears to the certifying court there is no controlling precedent in the decisions of this court.' Such a proceeding is a relatively lengthy and expensive one, in light of the fact that a decision by this court will conclusively determine the State issues, and may therefore resolve the entire controversy between the [taxpayers] and the I.R.S." Dana v. Gring, supra at 115.

The committee member who favors stopping Bosch decisions altogether would prefer to have the disputed State law issues resolved before the I.R.S. and in the Federal courts in this fashion, with certification of issues to this court when there is no controlling precedent. To accept this alternative would require overruling the holdings in cases such as Dana v. Gring and Babson v. Babson, and followed in the long line of cases since then, that it is appropriate to entertain cases like this.

decided there, the parties then applied for further appellate review, and the application were denied. The result, so the theory goes, would be that the parties receive a decision on the merits that, having been touched by this court, would be treated by the Federal authorities "as a sufficient expression of views by the highest State court." The court itself raised the possibility of this approach in dicta in Berman v. Sandler, 379 Mass. 506, 509 n.5 (1980) ("We assume that if the Appeals Court of this Commonwealth decided a matter and this court thereafter denied a petition for further appellate review, the Federal authorities would accept that process as a sufficient expression of views by the highest State court").

With due respect, the committee does not subscribe to this approach. The Bosch decision stands for the proposition that the Internal Revenue Service will be bound on a matter of State law only by a decision from the State's highest court. See Bosch, supra at 465 (noting that Federal authorities are not necessarily bound "even by an intermediate [S]tate appellate court ruling"). A decision of the Appeals Court, even if an application for further appellate review were filed and denied, is simply not a decision of the highest court in Massachusetts. It is also well-settled as a matter of Massachusetts law that this court's denial of an application for further appellate review does not signal an affirmation on the merits of the reasoning or result of the Appeals Court. Ford v. Flaherty, 364 Mass. 382, 387-388 (1973) ("Such an order merely shows that, after consideration of the applicable statutory standards as set forth in G. L. c. 211A, § 11, we have determined not to grant further review. Only a rescript or rescript and opinion from this court, after further review, should be considered as a statement of our position on the legal issues concerned"). The Appeals Court's decision may be final and binding on the parties, and it may constitute legal precedent in the State trial courts of Massachusetts, but the committee thinks it is

doubtful that it would qualify as a decision of the State's highest court for Federal Bosch purposes.

4. A fourth alternative concerns those Bosch cases that are commenced in the county court. Rather than reserving and reporting the case to the full court, as is done now, the single justice might decide the matter on the merits, perhaps with the assistance of thorough proposed findings and rulings submitted by the parties. Having the single justice decide the matter arguably would serve the dual purposes of conserving some of the court's resources by eliminating the need for the other Justices, the reporter of decisions, and other full court staff to become involved, and keeping a spot available for another, more meaningful case on the full court docket.

There are drawbacks to this approach, however. Most significantly, it treats litigants having similar types of claims differently, depending on the court in which they commence their action. Parties who begin in the Probate Court, request that their cases be reported to the Appeals Court, and then obtain direct appellate review, would have their cases decided by the full court. [23] Parties who begin in the county court would have their cases decided by a single justice. In other analogous situations, the court has held that litigants having similar types of claims should receive uniform treatment. See Zullo v. Goguen, 423 Mass. 679, 681-682 (1996) ("We see no reason why the avenue for review of an order made pursuant to G. L. c. 209A should turn on the fortuity of where the plaintiff initiated the action"); Department of Revenue v. Jarvenpaa, 404 Mass. 177, 180-181 (1989) ("Uniformity of treatment of litigants and the

[23] This assumes, for the purposes of discussion, that the Supreme Judicial Court continues to allow such applications for direct appellate review, as is the current practice, and does not adopt alternative 3.

development of a consistent body of law will be encouraged by placing all G. L. c. 209C appeals in one court"). The principle of uniformity of treatment of litigants thus counsels against this alternative.

A second drawback is that at least some attorneys who practice in this area appear skeptical that a single justice decision would carry the same weight as a full court decision in their dealings with the I.R.S., and have indicated that they are not content to accept a single justice resolution. [24]

5. The fifth alternative, which is the approach endorsed by a majority of the committee, is for the court to begin to scale back on the number and type of Bosch cases it decides, and to leave many of these cases to be decided by the Probate and Family Court. The sense of the committee, based on the experiences of some members coupled with the information received from the committee's conversation with Mr. Murray described in n.2, supra, is that it is not necessary for Federal purposes always to have a decision from the State's highest court. When, for example, the applicable principles of State law are settled, and the only job of the State court

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[24] A case in point is E. Virginia Walker & another vs. E. Virginia Walker & others, Supreme Judicial Court for Suffolk County, SJ-97-462. The complaint in the county court sought equitable relief, namely the reformation of a trust, to which all the parties consented. The parties, as is typical, filed a joint motion requesting that the case be reserved and reported to the full court. Justice Greaney initially denied that motion and asked the parties to submit a proposed judgment. The parties then submitted along with their proposed judgment a "motion for affirmation" by the full court. They apparently were not content to go before the I.R.S. armed only with a decision of the single justice. The single justice in that case eventually just reserved and reported the matter to the full court.

A "motion for affirmation," though innovative, has no basis in the rules. It is unlike an appeal, since no party is aggrieved by the single justice's decision. Moreover, if an "affirmation" is to be anything other than the mere administrative rubber-stamping of a single justice's decision, at least four other Justices (a quorum) would need to become involved, which, if that were to happen, would defeat the conservation of judicial resources that the single justice had hoped for in the first place.

is to apply settled legal principles to a given set of unremarkable facts, a decision from the Probate and Family Court should, as a practical matter, be sufficient for Federal purposes. There should be no need in that situation for the Supreme Judicial Court to be the court that applies the settled Massachusetts law to the facts of the case. The role of this court could be more limited – to hear and decide only those Bosch cases that raise a novel and unresolved issue of Massachusetts law or are significant for some other reason. Taking this approach would make the court's role in Bosch cases more consistent with its role overall in the Massachusetts judiciary: to focus primarily on cases of first impression and cases of significant public interest. It would leave to other courts the comparatively more routine role of applying settled Massachusetts law to the facts of a case.

Following this approach would also leave intact the ample case law from this court, discussed above, which holds that Bosch cases can be decided by Massachusetts courts despite the absence of a dispute among the parties who appear before the court. And it would preserve the primary role of Massachusetts State courts in deciding matters of State law, instead of leaving the resolution of State law issues in tax cases primarily to the Internal Revenue Service and Federal courts. The consensus of the committee is that parties in Bosch cases would continue to benefit from having decisions from the State courts on State law issues. Following this approach would depart from the longstanding Massachusetts practice of having the Supreme Judicial Court decide every one of these cases, however, because the committee members are of the view that a decision from this court on every case is no longer necessary. With such a well-developed body of Bosch law already existing in Massachusetts, the Probate and Family Court will have abundant guidance as to how to proceed; the Federal authorities will be in a good position to see that the Probate and Family Court has made a proper application of the existing

Massachusetts law, and therefore will be in a good position to give the requisite "proper regard" to the Probate Court's resolution of the cases; [25] and this court's resources will be preserved for those Bosch cases that truly require its attention, i.e., those that present new and significant issues of Massachusetts law.

The logistics of this new approach would be as follows. The courts will be called on to distinguish between the types of Bosch cases that require the Supreme Judicial Court's attention and those that can adequately be resolved by the Probate and Family Court. In cases commenced in the county court, the single justice, acting in the role of gatekeeper, would make that determination. It would be the same kind of determination the Supreme Judicial Court regularly makes when it acts on an application for direct appellate review or votes to transfer a case on its own initiative from the Appeals Court. See G. L. c. 211A, § 10 (listing the statutory criteria for transfer of cases from Appeals Court to Supreme Judicial Court for direct review). If the single justice determines that the case presents a novel or otherwise significant issue warranting the full court's attention, and that the record is suitable for consideration by the full court, he or she will reserve decision and report the case to the full court. See Mass. R. Civ. P. 64 (a), as amended, 423 Mass. 1410 (1996) (identifying circumstances in which single justice may report case to full court). If the single justice determines that the case does not present an issue requiring the full court's attention, he or she will transfer the case to the Probate and Family Court for a decision

[25] The Supreme Judicial Court cannot require, as a matter of law, that Federal authorities give the same weight to Probate and Family Court decisions as they give to decisions of the Supreme Judicial Court, because that is a matter of Federal law. That said, the court should trust and expect that Federal authorities will abide by the Bosch decision, which requires them to give "proper regard" to the decisions of a State's lower courts, particularly when the applicable law is settled – as it has been for many of the Bosch cases in Massachusetts, as a result of this court's indulgence in deciding so many of these cases throughout the years – and a case involves a mere application of settled law to the facts.

on the merits there. See G. L. c. 211, § 4A. [26] For a recent case in which a single justice took this approach, see SJ-2012-360, Holiday M. Collins & another vs. Holiday Collins Storck & others (order dated October 17, 2012). [27]

For cases commenced in the Probate and Family Court, the probate judge will be required to make the determination in the first instance whether to decide the case or report it without decision to the Appeals Court. The judge would reserve and report only those cases that present novel, unresolved, or otherwise significant issues of Massachusetts law that require a final determination by the State's highest court; the judge would decline to report, and would decide on the merits, the cases that involve settled principles of Massachusetts law. No longer would a

[26] With limited exceptions not applicable here, the Supreme Judicial Court and its single justices have the authority under G. L. c. 211, § 4A, to transfer to another court any case filed in the Supreme Judicial Court that is within the concurrent jurisdiction of the Supreme Judicial Court and the other court and that is more appropriately decided by the other court. Under this proposal, the Supreme Judicial Court would be exercising this authority in Bosch cases just as it does in other cases.

The committee recognizes that the Superior Court, like the Probate and Family Court, has jurisdiction in equity and declaratory judgment cases. Nevertheless, when Bosch cases are transferred from the Supreme Judicial Court pursuant to G. L. c. 211, § 4A, they should be sent to the Probate and Family Court and not the Superior Court. The Probate and Family Court is the more appropriate department of the trial court for hearing and deciding these cases because Bosch cases often originate in the Probate and Family Court and are often part and parcel of estate proceedings that are pending there; the Probate and Family Court is the court with jurisdiction to hear and decide such matters under the Uniform Trust Code, G. L. c. 203E; and historically, unlike in the Probate and Family Court, there is no established practice of Bosch cases being heard and decided in the Superior Court.

[27] A copy of the order issued by Justice Botsford in that case is attached hereto as appendix "C."

probate judge report the case solely for the reason that the Federal authorities are bound only by a decision from the Supreme Judicial Court. [28]

Under current practice, the cases commenced in the Probate Court are typically reported to the Appeals Court without decision, and the parties then file an application for direct appellate review that is routinely granted by the Supreme Judicial Court. Under the approach being proposed by the committee, most of these cases would be decided on the merits by the Probate and Family Court. If, instead of deciding the case, the judge reported it to the Appeals Court without decision, the parties could still file an application for direct review, but it would no longer be presumed that the application will be granted. Instead, the Supreme Judicial Court would evaluate the application as it does every other application, on the substantive merits, to determine whether it presents a novel or otherwise significant legal issue warranting consideration by the Supreme Judicial Court. Where the application is denied, the case would remain in the Appeals Court. [29, 30]

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[28] The committee believes that it may be helpful for the parties, and could provide useful guidance to litigants and judges in future cases, if the single justice or probate judge were to briefly explain his or her reasons for deciding to transfer or report a case (or not). The court may therefore want to encourage single justices and probate judges to do so where feasible.

[29] The Appeals Court might decide the case on the merits, if the report is in proper order and the case warrants a decision from an appellate court in the first instance, or it might discharge the report and return the case to the Probate and Family Court if the report is defective or a decision from an appellate court in the first instance is not warranted. See Transamerica Ins. Group v. Turner Constr. Co., 33 Mass. App. Ct. 446, 447-448 n.2 (1992) (discouraging trial court judges from reporting cases without decision to appellate court "unless the question is one of exceptional novelty, would be determinative in other pending cases, has some significance beyond the immediate case, or presents a situation when an expedited resolution at the appellate level is required").

[30] Likewise, if the probate judge were to decide the matter on the merits in a way that leaves the parties aggrieved, the parties might appeal to the Appeals Court and, if they wish, file

Expectations going forward

Regardless whether a future case is decided by the Supreme Judicial Court, the Probate and Family Court, or the Appeals Court, the court should apply the same rigorous standards that the Supreme Judicial Court has applied in its decisions to date. Before relief can be granted, each court deciding a Bosch case must insist on a "full and proper record" that includes the requisite "full, clear, and decisive proof" of entitlement to relief. No court should ever grant relief merely because the parties have requested it and all parties before the court are in agreement. In short, a court's analysis in a Bosch case should be no less rigorous than if it were deciding a more traditional, contested case.

The courts deciding these cases must also be guided by the well-developed body of decisional law from the Supreme Judicial Court in this area. Indeed, as stated above, it is the committee's belief that the existence of such a rich body of case law from the Supreme Judicial Court in Bosch cases, thanks to the Supreme Judicial Court having decided so many of these cases throughout the years, is what makes it possible to experiment with this new paradigm of having the other courts now decide many of these cases, while maintaining the expectation that the decisions of the lower State courts will be afforded "proper regard" by the Federal authorities, as mandated by the Supreme Court.

Among other important things, the courts deciding these cases should look for the following:

> • The I.R.S. should either be named as a party or notified of the pendency of the action and given copies of the pleadings. While the I.R.S. cannot be compelled to appear in State court actions such as this, and routinely does not appear, naming or notifying the I.R.S. will assure the court that the agency at least

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an application for direct appellate review, but there would be no assurance or presumption that the application would be allowed.

has notice and the opportunity to appear and take a position if it wishes, as it has on occasion. If the plaintiff chooses not to name the I.R.S. as a party, he or she must demonstrate that the I.R.S. has been notified and provided with copies of the pleadings.

• The record before the court should include a statement of facts, agreed to by all parties, that is sufficient to support the relief sought. The record should also include the written assents of all identifiable beneficiaries to the relief sought.

• Copies of the relevant trusts, wills, amendments, codicils, and other instruments, as well as any permissible extrinsic evidence that the parties are proffering to meet their burden of proof, such as an affidavit of the drafting attorney where applicable, should be included in the record.

• The record should disclose whether the parties are presently engaged in a dispute with the I.R.S. concerning the matter that is the subject of the action, and if so, the status of the matter before the I.R.S. The parties should also indicate, where applicable, any alternative resolutions that they have explored that may be satisfactory to the I.R.S.

• If possible, the parties should offer calculations based on presently available information of the amount of the tax that would be due under the instrument as written and the amount to be saved under the requested reformation, in order to demonstrate that the amount at issue is sufficiently significant to justify the court's intervention and to warrant the relief sought.

Whenever minor, unborn, incapacitated, or unascertained beneficiaries of a trust can be affected, it is preferable for the parties to supply the court with a favorable report from a guardian ad litem who has been appointed to represent those interests. Fiduciary Trust Co. v. Gow, 440 Mass. 1037, 1038 n.7 (2004) ("When a trustee requests the reformation of a trust that may affect the interests of minor, unborn, unascertained, or incompetent beneficiaries, it is preferable that this court be furnished with and have the benefit of an independent guardian's opinion concerning the possible consequences of the reformation for those beneficiaries"). This gives the court an independent assurance that the rights of these individuals are protected and will not be adversely affected. Many of the reported trust reformation decisions specifically note that the record includes a guardian's report. A guardian ad litem's report is especially important

in uncontested cases because, absent an investigation by an independent source in behalf of minors, unborn, and unascertained, the court is left only with the assurances of the parties, all of whom have a stated interest in having the request for reformation approved.

In a few cases, where it was patently obvious that the interests of minor, unborn, incapacitated, or unascertained beneficiaries would not be adversely affected, the court acted on the proposed reformation without a report from a guardian ad litem. This should be considered the exception and not the rule. If counsel wishes the court to act on a reformation request without the benefit of a guardian's report, counsel must file a motion asking to waive the requirement of a guardian ad litem report, and must support the motion with a compelling reason why a report is not needed. [31]

Recommendations

The committee recommends that the Supreme Judicial Court adopt and begin to implement a new approach to Bosch cases. The proposed approach is described at pp. 19-23 above. No longer would this court hear and decide every Bosch case in Massachusetts. The cases instead would be allocated between the Supreme Judicial Court and the Probate and Family Court, based on the nature of the issues involved. Under the proposed approach, the Supreme Judicial Court would concentrate on those cases that involve novel or unsettled issues of Massachusetts law or are otherwise of significance beyond the parties and the specific facts of the case.

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[31] The newly-enacted Massachusetts Uniform Trust Code similarly recognizes that there are some circumstances – in cases of so-called virtual representation – in which the appointment of a guardian ad litem is unnecessary. See, e.g., G. L. c. 203E, §§ 302-305. The committee anticipates that judges acting on motions to dispense with guardians ad litem will give careful consideration to the requirements of the statute, and will grant such motions only when satisfied that all interests are indeed represented adequately by parties who have no conflict of interest with the persons represented.

The committee also recommends that copies of this report be made available to the affected segments of the bar, so that attorneys practicing in this area can understand and plan for the new approach. This can be easily accomplished by posting a copy of the report on the court's web site, and by distributing it electronically to the chairs of the Probate Law section of the Massachusetts Bar Association and the Trusts and Estates section of the Boston Bar Association, with a request that it be distributed to the members of their respective sections and elsewhere as they see fit.

Finally, the committee recommends that the court be willing to revisit the matter periodically, and to accept input from the affected segments of the bar, in order to assess whether the changes in this area of practice have satisfied the intended objectives.