APPENDIX A

LAWRENCE DANA & others, executors, *vs.*
FRANK MCQUESTEN GRING & others.

Middlesex. January 5, 1977. — December 28, 1977.

Present: HENNESSEY, C.J., QUIRICO, KAPLAN, WILKINS, & LIACOS, JJ.

Jurisdiction, State law affecting Federal tax. *Trust,* Trustee's discretion, Use of principal, Construction.

Executors of a will were entitled to maintain an essentially nonadversary proceeding in a Probate Court for instructions with respect to whether property held in trust for the testatrix was includible in her gross estate so that they could determine the value of the estate for Federal estate tax purposes and decide whether to pursue a Federal estate tax refund claim. [113-115]

A provision in a testamentary trust allowing the trustees to invade principal "as said Trustees . . . deem necessary or desirable for the purpose of contributing to the reasonable welfare or happiness of . . . [the testator's] daughter or of her immediate family" provided an objective, ascertainable standard which limited trustee discretion to distribute trust principal. [115-118]

In a provision in a testamentary trust which authorized the trustees, upon the request of a trustee-beneficiary, or "without such request when the other Trustees may deem it advisable, to pay over to her . . . such amounts of the principal . . . as said Trustees may deem necessary or desirable," the term "said Trustees" was construed to mean trustees other than the beneficiary. [118-119]

CIVIL ACTION commenced in the Probate Court for the county of Middlesex on November 10, 1975.

The case was reserved and reported by *Freedman,* J., to the Appeals Court. The Supreme Judicial Court granted a request for direct review.

Richard D. Leggat (*Lawrence I. Silverstein* with him) for the plaintiffs.

Myron C. Baum, Acting Assistant Attorney General, *Gilbert E. Andrews, William A. Friedlander, Jonathan S.*

Cohen, & Robert A. Bernstein, for the United States, amicus curiae, submitted a brief.

HENNESSEY, C.J. The plaintiffs, as executors of the will of Helen Barnet Gring (Gring), commenced this action in the Probate Court for Middlesex County by a complaint for instructions, seeking the proper interpretation of a testamentary provision contained in the will of Frank B. McQuesten, Gring's father. The executors sought instructions in order that they could (1) determine properly the value of Gring's gross estate for Federal estate tax purposes, and (2) determine their duties and obligations with respect to pursuing a Federal estate tax refund claim. Although the Internal Revenue Service (I.R.S.) was given timely notice and an invitation to intervene, it declined to participate in the probate proceedings.[1] The case was reserved and reported without decision to the Appeals Court on the pleadings and a statement of agreed facts. We granted direct appellate review on application by the plaintiffs.

Preliminarily this court must determine whether it is appropriate for us to decide this case, or whether we should dismiss the matter as a nonadversary proceeding. On the merits, the issue is whether property held in trust for Gring pursuant to a provision of her father's will is includible in her gross estate for the purpose of determining Federal estate tax liability. Under Int. Rev. Code of 1954, § 2041, the trust property is includible in Gring's gross estate if at her death it was held subject to a general power of appointment. Under the Internal Revenue Code, there is no general power of appointment if (1) the trustee's discretion to distribute trust principal to Gring during her lifetime was limited by an "ascertainable standard relating to . . . [her] health, education, support, or maintenance," Int. Rev. Code of 1954, § 2041(b)(1)(A), or if (2) Gring had no power to participate in any decisions related to distribution of principal to her. Although the I.R.S. argues that there is no

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[1]The United States did file an amicus curiae brief in this court subsequent to oral argument.

State law question directly in issue here, the plaintiffs urge this court to interpret the McQuesten will and to decide as a matter of State law that the terms of the trust set forth in that will (1) provided an ascertainable standard limiting trustee discretion to invade the principal, and (2) precluded Gring from participating in any decision concerning distribution of principal to her.

We conclude that it is appropriate for us to decide the issues raised. Further, as to the merits of those issues, we agree with both contentions asserted by the plaintiffs.

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The I.R.S. advised the plaintiffs, by an agent's examination report dated July 25, 1975, that the trust property was properly includible in Gring's gross estate for Federal estate tax purposes. The plaintiffs filed a refund claim on August 5, 1975, and by letter dated August 6, 1975, protested the agent's determination and requested consideration of the refund claim by the Appellate Division of the office of the Regional Commissioner of Internal Revenue. The complaint for instructions was filed on November 10, 1975.

1. We conclude that it is appropriate for us to decide the merits of this case. First, there are questions of State law directly in issue. Although the decision whether to include the trust property in Gring's gross estate for the purposes of determining tax liability is undeniably a question of Federal tax law, see *Morgan* v. *Commissioner,* 309 U.S. 78, 80-81 (1940), a conclusion as to the extent of Gring's power under the terms of the trust involves the interpretation of a testamentary instrument, and, as such, clearly turns on questions of State law. See, e.g., *Mazzola* v. *Myers,* 363 Mass. 625, 633 (1973); *Old Colony Trust Co.* v. *Silliman,* 352 Mass. 6, 8 (1967); *Morgan* v. *Commissioner, supra* at 80; *Blair* v. *Commissioner,* 300 U.S. 5, 9-10 (1937); *Freuler* v. *Helvering,* 291 U.S. 35, 44-45 (1934); *Stedman* v. *United States,* 233 F. Supp. 569, 571 (D. Mass. 1964); *Pittsfield Nat'l Bank* v. *United States,* 181 F. Supp. 851, 853 (D. Mass. 1960). Following the above principle, this court on numerous occasions has allowed petitions for instructions concerning the interpretation of a will, where such questions arose in the context of a controversy with the I.R.S. See, e.g., *Mazzola* v. *Myers, supra* at 634; *Woodberry* v. *Bunker,* 359 Mass. 239, 240 (1971); *Old Colony Trust Co.* v. *Silliman, supra* at 8; *Watson* v. *Goldthwaite,* 345 Mass. 29, 31 (1962). See also *Persky* v. *Hutner,* 369 Mass. 7, 8 (1975); *Putnam* v. *Putnam,* 366 Mass. 261, 262 (1974) (declaratory relief granted).

Second, we have decided such questions of State law even where, as here,[3] all immediate parties sought the same result or, in other words, where there were no real "adversaries" before this court.[4] See *Persky* v. *Hutner*, *supra* at 8; *Putnam* v. *Putnam*, *supra* at 265-266; *Old Colony Trust Co.* v. *Silliman*, *supra* at 8. Although in this case the interests of the plaintiff-executors and defendant-appointees are essentially the same (see note 3, *supra*), the parties have submitted concrete questions of State law which grow out of an actual, live dispute. Further, the I.R.S. was given timely notice of the proceedings and an opportunity to intervene, but declined to do so. In light of these considerations, we find that the "nonadversary" nature of this proceeding should not preclude our review.

The United States argues in its amicus brief that the instant case is distinguishable from those where we have answered questions of State law arising from Federal tax disputes, in that a decision here would not "directly . . . [affect] the nature of state property interests." Although the I.R.S. is correct in pointing out that any decision by this court would not "[enlarge] the estate or trust shares of one beneficiary or class of beneficiaries as against those of another," this fact is not determinative. A decision in this case will serve to define clearly the nature of the property interest which had passed to Gring under her father's will, thereby answering an important question concerning the proper administration of the Gring estate. As such, a determination of the merits is consistent with past cases holding that a petition for instructions properly may be entertained where trustees or executors have some present duty to perform with respect to trust funds. See generally *Dumaine* v. *Dumaine*, 301 Mass. 214, 217 (1938); *Cronan* v. *Cronan*, 286 Mass. 497, 499 (1934); *Hull* v. *Adams*, 286 Mass. 329, 331-332 (1934); *Boyden* v. *Stevens*, 285 Mass. 176, 180 (1934); *Saltonstall* v. *Treasurer & Receiver Gen.*, 256 Mass. 519, 528 (1926).

Third, our decision with respect to the State law questions in this case will be dispositive both for purposes of our own subsequent decisions, see *Old Colony Trust Co.* v. *Silli-*

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[3] In the instant case, the plaintiff-executors include Gring's son and daughter and Lawrence Dana. The defendant-appointees are, again, Gring's son and daughter. The Attorney General for the Commonwealth, also named as a defendant, essentially has taken a position of neutrality.

[4] This type of "nonadversary" proceeding is not new to Massachusetts courts. Often a stakeholder or trustee needs an answer to a current problem, files for instructions, and obtains a determination where no one else appears.

man, 352 Mass. 6, 9 (1967), and for purposes of any further Federal litigation concerning this estate. See *Putnam* v. *Putnam*, 366 Mass. 261, 262 n.2 (1974); *Mazzola* v. *Myers*, 363 Mass. 625, 633-634 (1973); *Worcester County Nat'l Bank* v. *King*, 359 Mass. 231, 233 & n.1 (1971). See also *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967). As we stated in *Babson* v. *Babson*, *ante*, 96, 103 n.5 (1977), "We are mindful of the suggestion of the Supreme Court in *Freuler* v. *Helvering*, 291 U.S. 35, 45 (1934), that the conclusiveness of a State court construction in subsequent tax litigation may depend on its being made in the course of an 'adversary' proceeding. But see *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967). We conclude, however, that where all interested adverse parties were notified and given an opportunity to be heard, where the parties before the court seek a judicial determination of rights rather than a mere consent decree, and where the matter arose in a regular manner, with no suggestion of collusion or fraud, the underlying purposes of the 'adversary' requirement have been met."

Finally, we are mindful of the fact that an alternative procedure exists whereby the plaintiffs could obtain an opinion of this court on the questions of State law at issue here. After administrative resolution of the case, the plaintiffs could pursue their refund claim in a United States District Court. Under S.J.C. Rule 3:21, § 1, 359 Mass. 790 (1971), 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 thereby resolve the entire controversy between the plaintiffs and the I.R.S. Thus, a decision on the merits is warranted here.

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APPENDIX B

DONALD P. BABSON & others, executors, *vs.*
SUSAN A. BABSON & others.

Suffolk. September 15, 1977. — December 28, 1977.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, & WILKINS, JJ.

Jurisdiction, State law affecting Federal tax, Declaratory relief. *Devise and Legacy,* Taxes, Marital trust. *Trust,* Taxation, Marital deduction trust.

Despite the nonadversary nature of the proceeding, it was proper for this court to render declaratory relief in an action brought by the executors of a will pursuant to G. L. c. 231A seeking a declaration of the testator's intent with respect to provisions of the will which concerned the Federal estate tax marital deduction. [98-103]

Considering a will as a whole, with the accomplishment of identifiable tax objectives as an aid in the interpretation of the will, this court found that the testator intended to take advantage of the maximum estate tax marital deduction, notwithstanding the fact that the testator did not use the word "maximum" in the provision establishing the marital deduction trust. [104-106]

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on December 20, 1976.

The case was reserved and reported by *Quirico,* J.

Allan van Gestel (*Thomas E. Peckham* with him) for the plaintiffs.

HENNESSEY, C.J. This is an action brought under G. L. c. 231A by the executors of the will of Paul T. Babson seeking declarations of the testator's intent with respect to those provisions of his will which concern the Federal estate tax marital deduction and which affect the amount of such tax. The action is brought against: (1) all legatees and beneficiaries under the Babson will, including two remote contingent legatees or beneficiaries whose interests may be affected by the amount of the disputed tax; (2) trustees of all trusts either established by or named in the will; (3) the Attorney General of the Commonwealth; and (4) the Commissioner of the Internal Revenue Service. Although process was served on all named defendants, none has appeared.[1] At the request of the plaintiffs, the single justice reserved and reported the case to the full court.

[1] In addition, the office of the regional counsel for the Internal Revenue Service informed counsel for the plaintiffs by letter, with copies furnished to this court, (a) that, by virtue of the doctrine of sovereign immunity, the Commissioner is immune from suit in the courts of the Commonwealth and that he cannot be required to appear and answer to this action, (b) that he has not waived that immunity, and (c) that he does not intend to appear or to intervene in this action.

The preliminary issue to be determined is whether the court should decide this case, in light of its nonadversary nature. On the merits, the issue is whether it was the intention of Babson, as shown by his will, to receive the benefit of the maximum possible Federal estate tax marital deduction. More particularly, this case raises the question whether or not provisions in the will direct the executors to charge inheritance taxes attributable to property in the marital deduction trust to the residue of the estate. Without such direction, the value of the marital deduction trust property would be reduced for Federal estate tax purposes by the amount of inheritance taxes attributable to it. See, e.g., Int. Rev. Code of 1954, § 2056(b)(4); *Jackson* v. *United States*, 376 U.S. 503 (1964).

We are advised that it is the position of the Internal Revenue Service (I.R.S.) that such maximum benefits were not intended because the Babson will did not contain the words "maximum estate tax marital deduction." The executors argue that, although the testator did not use these precise words, a conclusion that he intended to take advantage of the maximum deduction is compelled by the provisions of the will as a whole.

For the reasons discussed below, we conclude that it is appropriate to render declaratory relief in this case, notwithstanding the fact that no adversaries appeared before this court. Primarily, we conclude that the case presents a bona fide controversy because the issues posed to us are directly related to the nature and extent of property interests passing to Babson's wife on one hand, and to the residuary legatees and beneficiaries on the other. On the merits, we hold that articles Seventh, Twelfth, and Eighteenth of the Babson will evidence an intent to receive the maximum possible benefit of the estate tax marital deduction. In particular, article Twelfth clearly directs the executors to charge all taxes and assessments to the residue of the estate, and not to the marital deduction trust property.

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The plaintiffs paid the asserted Federal estate tax deficiency on December 4, 1974, and thereafter filed a refund claim in the amount of $57,415.20, plus interest. This amount represented the increased tax liability due to the partial disallowance of the marital deduction claim. The district director of the I.R.S. notified the plaintiffs on June 17, 1976, that the I.R.S. intended to disallow the refund claim. The plaintiffs filed a protest and requested a conference with the Appellate Division of the Office of the Regional Commissioner. On August 31, 1976, the appellate conferee tentatively agreed that he would recommend that the plaintiffs' refund claim be granted if the highest court of the Commonwealth were to determine that it was Babson's intention, as shown by his will, to receive the benefit of the

1. We conclude that it is appropriate for us to decide the merits and render declaratory relief in this case. First, we are mindful of the fact that the amount and "availability of the marital deduction is a matter to be decided under Federal tax law, and that any determination of that issue by us would not be binding on the Federal tax authorities." *Mazzola* v. *Myers,* 363 Mass. 625, 633 (1973). See *Morgan* v. *Commissioner,* 309 U.S. 78, 80-81 (1940); *Estate of Wycoff* v. *Commissioner,* 506 F.2d 1144, 1149 (10th Cir. 1974). It is clear, however, that the controversy between the plaintiffs and the I.R.S. turns on the proper interpretation of the Babson will. See discussion, *supra.* See, e.g., *Boston Safe Deposit & Trust Co.* v. *Children's Hosp.,* 370 Mass. 719, 722-723 (1976); *Putnam* v. *Putnam,* 366 Mass. 261, 262 (1974). Thus, the plaintiffs are not seeking our determination of any Federal tax question. Rather, their questions regarding the interpretation of Babson's will, and, more particularly, their questions concerning Babson's intent with respect to the marital deduction, are "clearly . . . matter[s] of State law upon which this court may properly make declarations." *Mazzola* v. *Myers, supra* at 633. See generally *Fulton* v. *Trustees of Boston College,* 372 Mass. 350, 351-352 (1977); *Boston Safe Deposit & Trust Co.* v. *Children's Hosp., supra* at 722-723; *Persky* v. *Hutner,* 369 Mass. 7, 8 (1975); *Putnam* v. *Putnam, supra* at 262 n.2. Cf. *Commissioner* v. *Estate of Bosch,* 387 U.S. 456, 465 (1967).

Second, declaratory relief is an appropriate vehicle by which to raise these issues of State law. General Laws c. 231A, § 1, inserted by St. 1945, c. 582, § 1, empowers this court to "make binding declarations of right, duty, status and other legal relations . . ., either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen." General Laws c. 231A, § 2, as amended by St. 1974, c. 630, § 1, extends this procedure to parties who seek "determinations of right, duty, status or other legal relations under . . . wills."

These provisions were "intended to expand, at least in the discretion of the court, prior provisions for the interpretation of written instruments." *Billings* v. *Fowler,* 361 Mass. 230, 234 (1972). As such, they are to be "liberally construed." *Id.* at 234. G. L. c. 231A, § 9. Pursuant to our liberal construction of G. L. c. 231A, we have in the past found sufficient "controversy" between parties so as to render declaratory relief even where "no direct, immediate interest of a present life beneficiary will be affected," *Billings* v. *Fowler, supra* at 233-234, and even where all parties to the proceeding urged the same result. *Persky* v. *Hutner, supra* at 8. *Putnam* v. *Putnam, supra* at 265-266.

In the instant case, an immediate controversy has arisen with respect to Babson's intent in establishing a marital deduction trust. More particularly, there is a question whether Babson expressed an intention in his will to shift

the inheritance tax burdens of his estate to the residue, or whether the tax burden must be apportioned in part to the marital trust. This controversy has "an important bearing upon prudent present action" by the executors of Babson's estate. *Billings* v. *Fowler*, *supra* at 233. "What the executors should now do in respect of Federal taxes is presently at issue and in doubt." *Old Colony Trust Co.* v. *Silliman*, 352 Mass. 6, 8 (1967). These circumstances alone are sufficient to warrant declaratory relief.[4]

Third, we note that all interested parties, including the I.R.S., were given notice and an opportunity to be heard. The fact that the named defendants chose not to participate should not preclude our review under G. L. c. 231A.

Finally, declaratory relief by this court will be dispositive of the State law questions presented, both for purposes of our own subsequent decisions, see *Old Colony Trust Co.* v. *Silliman*, *supra* at 9, and for purposes of any further Federal tax litigation concerning this issue. See *Fulton* v. *Trustees of Boston College*, 372 Mass. 350, 351-352 (1977); *Putnam* v. *Putnam*, *supra* at 262 n.2; *Mazzola* v. *Myers*, 363 Mass. 625, 633-634 (1973); *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967).[5] As such, our determination will serve to "afford relief from uncertainty and insecurity with respect to rights [and] duties" under the Babson will, in accordance with G. L. c. 231A, § 9.

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[4] Although the executors' interest in resolving a present question with respect to the proper administration of the Babson estate is sufficient to warrant declaratory relief, we note further that a decision in this case also affects the nature of State property interests in an ongoing trust. In resolving the present controversy between the plaintiffs and the I.R.S., we also determine the nature and extent of property passing to Babson's wife, on one hand, and to the residuary beneficiaries, on the other.

[5] We are mindful of the suggestion of the Supreme Court in *Freuler* v. *Helvering*, 291 U.S. 35, 45 (1934), that the conclusiveness of a State court construction in subsequent tax litigation may depend on its being made in the course of an "adversary" proceeding. But see *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967). We conclude, however, that where all interested adverse parties were notified and given an opportunity to be heard, where the parties before the court seek a judicial determination of rights rather than a mere consent decree, and where the matter arose in a regular manner, with no suggestion of collusion or fraud, the underlying purposes of the "adversary" requirement have been met. Cf. *Commissioner* v. *Estate of Bosch*, *supra* at 463; *id.* at 471 (Douglas, J., dissenting); at 481 (Harlan, J., dissenting); and at 483-484 (Fortas, J., dissenting); *Blair* v. *Commissioner*, 300 U.S. 5, 10 (1937); *Freuler* v. *Helvering*, *supra* at 45; Stephens & Freeland, The Role of Local Law and Local Adjudications in Federal Tax Controversies, 46 Minn. L. Rev. 223, 247 (1961); Colowick, The Binding Effect of a State Court's Decision in a Subsequent Federal Income Tax Case, 12 Tax L. Rev. 213, 221-222 (1957); Oliver, The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings, 41 Cal. L. Rev. 638, 664-666 (1953). But cf. Cahn, Local Law in Federal Taxation, 52 Yale L. Rev. 799, 818-819 (1943).

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

NO. SJ-2012-360

HOLIDAY M. COLLINS[1] and another[2]

vs.

HOLIDAY COLLINS STORCK and others[3]

MEMORANDUM AND ORDER

The plaintiffs bring this action pursuant to G. L. c. 215, § 6, to reform a trust instrument, the Blencathra Trust, in order, they state, to conform the trust to the intent of the settlor, the plaintiff Holiday M. Collins, and in order to maximize Federal transfer tax savings. They allege that as a result of mistake, the Trust as drafted does not achieve the settlor's purpose, and therefore reformation is necessary. They also claim that it is necessary for the full court to entertain this action, because the Internal Revenue Service (IRS) is bound only by a decision of a State's highest court, citing Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465 (1967).

I am mindful of the abundant case law holding that the IRS and Federal courts are not absolutely bound by decisions of lower State courts adjudicating matters of State

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[1] Settlor of the Blencathra Trust, dated December 16, 1992.

[2] David S. Collins, Trustee of the Blencathra Trust, dated December 16, 1992.

[3] Jennifer Collins Moore, Nathaniel Sebastian Storck, Harold McCutchin Moore, and the Commissioner of Internal Revenue.

substantive law. See, e.g., Walker v. Walker, 433 Mass. 581, 582 (2001). I also recognize, however, that under the Supreme Court's Bosch decision, the IRS and Federal courts are obligated to give "proper regard" to the decisions of the lower State courts on such matters. Commissioner v. Estate of Bosch, supra at 463-465. There is nothing in the material before me suggesting that the Federal authorities would not give proper regard to a decision of the Probate and Family Court in this case, and I am hopeful that they would in fact honor a decision from the Probate and Family Court in a case such as this just as fully as they would honor a decision from this court. The parties do not suggest that there are novel or unsettled issues of Massachusetts law involved that require resolution by this court; it appears that the case requires only an application of settled Massachusetts legal principles to this set of facts.

If the plaintiffs are entitled to the reformation they seek -- as to which I express no view -- a judge of the Probate and Family Court has full authority to grant them this relief. See G. L. c. 215, § 6. Accordingly, pursuant to G. L. c. 211, § 4A, this matter is to be transferred to the Probate and Family Court for final disposition.

ORDER

It is **ORDERED** that this matter be transferred to the Probate and Family Court Department for further proceedings and final disposition.

Margot Botsford
Associate Justice

Dated: October 17, 2012