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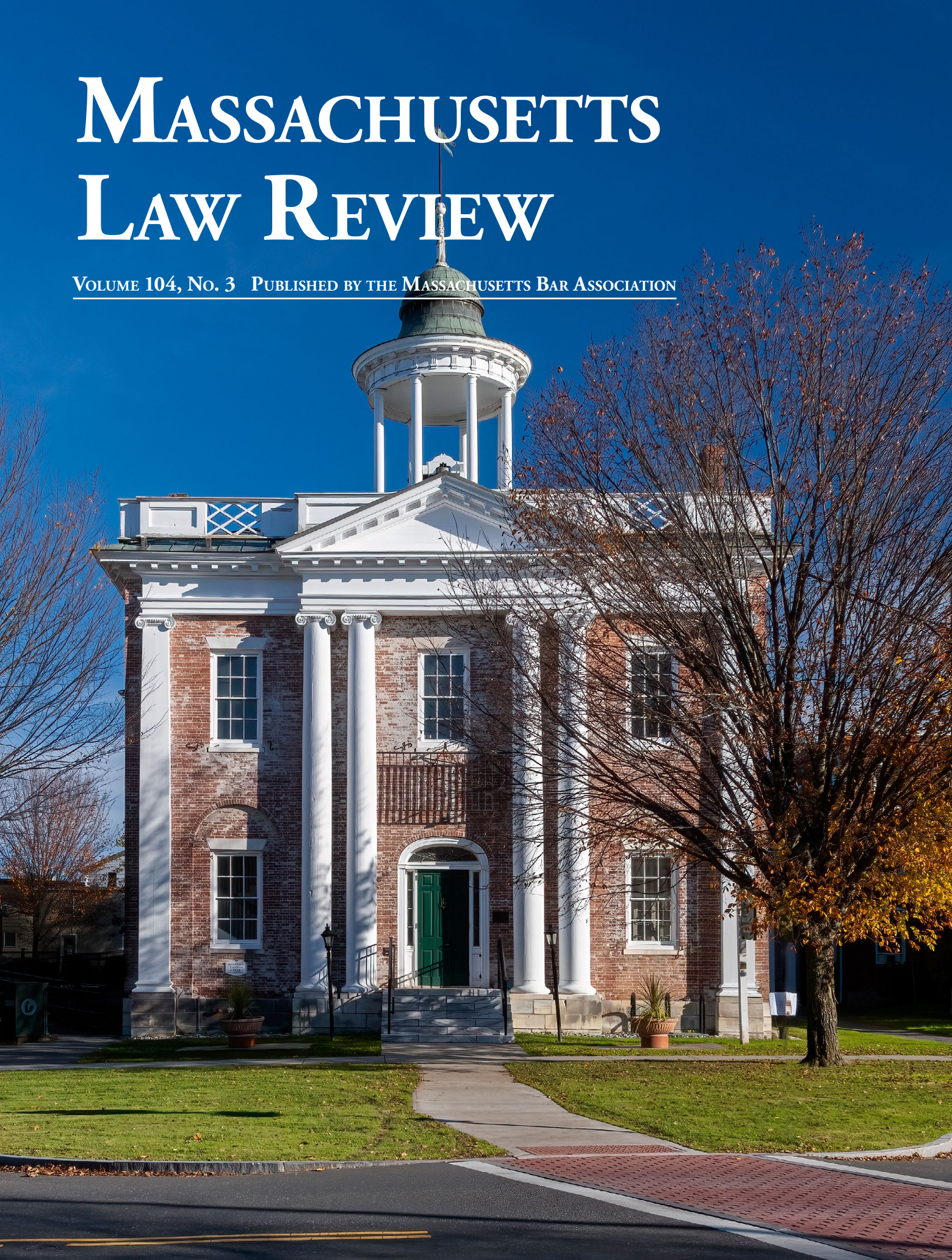

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Cover: Second Berkshire County Courthouse, Lenox, built 1815–16. Photo by Hon. David S. Ross.

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Trusts, Inheritances, Gifts and "Opportunities" in Divorce

By Hon. George Phelan (recall) and Lisa M. Cukier

INTRODUCTION

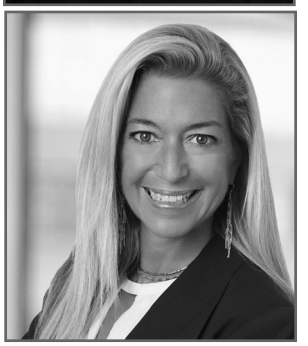
"I love you forever." After endearment eternally promised, what could go wrong? The possibilities abound: divorce, subsequent marriages, or death with no or uninformed prenuptial or postnuptial agreements; asset transfers by aging individuals or individuals suffering from diminished or diminishing capacity; and death of, or inheritance and/or gift from, a third party in the context of marriage followed by divorce. All these circumstances represent openings for divorce counsel and peril for unwitting estate planners. The concept of the marital estate in a divorce is expansive and may supersede estate plan documents and derail the estate plans of third parties who entrust to smart lawyers the succession of their assets to loved ones without impediment or drama.

WHY THE "DIVORCE ESTATE" AND "OPPORTUNITIES FOR FUTURE ACQUISITION" MAY MAKE CURRENT ESTATE PLANS VULNERABLE

There are mandatory considerations for judges in dividing the marital estate upon divorce: Conduct of the parties during the marriage; age; health; station; occupation; amount and sources of income; vocational skills and employability; estate; liabilities and needs; amount and duration of any alimony awarded; and opportunity for future acquisition of capital assets and income.[1] There is no mathematical formula to determine what weight judges should accord to any of the factors in § 34, nor is mathematical precision required in valuating those assets.[2] The judge's findings must reflect that all relevant factors in § 34 were considered and the judge's conclusions are apparent in the findings and rulings.[3] Further, the findings must show that the judge did not consider any irrelevant factors.[4] A judgment is reversed only when the judge's findings were clearly erroneous, as trial judges have broad discretion to weigh and balance the § 34 factors.[5] Judicial discretion in how assets are to be divided is distinct from what assets are subject to division. In making that latter determination, courts are not bound by traditional concepts of title or property.[6]

The divisible marital estate in a divorce consists of "all property to which a party holds title, however acquired."[7] A judge may even consider the circumstances of the parties prior to marriage and their contributions during a period of cohabitation.[8] This may include assets from a premarital economic time period.[9] The divisible marital estate may also include pension, retirement, and like assets acquired before marriage.[10] Absent fraud or some other nefarious event, the divisible marital estate does not include assets acquired after divorce.[11] Massachusetts legal authority imposes no "line in the sand" allocating which particular marital assets will be divided: "we continue to adhere to an expansive approach to inclusion of assets in the marital estate, that principle is not without limits."[12]

The parties' respective contributions to the marital enterprise, financial or otherwise, have been described as the touchstone of an equitable division of the marital estate.[13] The purpose of the division of marital property is to recognize and equitably recompense



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1. Mass. Gen. Laws ch. 208, § 34.
2. Fechtor v. Fechtor, 26 Mass. App. Ct. 859 (1989).
3. Bowring v. Reid, 399 Mass. 265 (1987).
4. Rice v. Rice, 372 Mass. 398 (1977).
5. Mass. R. Civ. P. 52(a); Kittredge v. Kittredge, 441 Mass. 28 (2004); Adams v. Adams, 459 Mass. 361 (2011).
6. *Rice*, 372 Mass. 398; Bernier v. Bernier, 449 Mass. 774 (2007); Baccanti v. Morton, 434 Mass. 787 (2001).
7. Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105 (2016); Williams v. Massa, 431 Mass. 619 (2000).
8. Liebson v. Liebson, 412 Mass. 431 (1992).
9. Connor v. Benedict, 481 Mass. 567 (2019).
10. Moriarty v. Stone, 41 Mass. App. Ct. 151 (1996).
11. Baccanti v. Morton, 434 Mass. 787 (2001).
12. D.L. v. G.L., 61 Mass. App. Ct. 488 (2004); Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985).
13. *Moriarty*, 41 Mass. App. Ct. 151.

the parties' respective contributions to the marital partnership.[14] A court is required to consider the comparative contributions of the parties to the fabric of the marriage. In marriages by which the spouses have made unequal contributions to the marital enterprise, or by which one spouse has been deficient and the other has been a super-contributor, the court might be inclined to award a disproportionate allocation of marital assets between the two spouses.[15]

Other Less Common Partial Interests

Joint accounts held with elder parents as a mere convenience to them and the non-elder joint holder may present a divorce divisibility issue.[16] While both/all joint account holders are still living, a financial institution may permit withdrawals, assignment, or transfer in whole or in part by any of the account holders.[17] Often these accounts were established as a "convenience" without future survivorship and without present donative intent with respect to the divorcing joint holder.[18] The question arises, then, as to what extent the funds in the account are marital assets. Powers of appointment are commonly included in trust and wills where the holder may decide to whom assets are subsequently devised, thus creating an issue of whether the assets over which the power exists should be included in the marital estate.

A power of appointment is the authority described in a trust or a last will (a "testamentary power") that allows a person holding the power to determine who will receive certain property over which the power is held.[19] When a divorcing party has a beneficial interest in an asset over which someone else holds a power of appointment, that beneficial interest will most likely be considered a mere "expectancy," too remote and speculative for inclusion in the marital estate because an exercise of the power may give ("appoint") the interest to someone else.[20] When a divorcing spouse was the settlor of a trust in which he reserved for himself the power to take back all the trust principal and income, in other words and in effect a general power of appointment, those trust assets belong in the divisible marital estate, up to the maximum to which the divorcing settlor could have reached.[21] The maximum distribution, or amount that the divorcing settlor has power to take back, is considered part of the marital estate potentially subject to equitable division by the divorce judge.

INHERITANCES

From the appellate decisions, some general analyses have emerged. How does the inheritance compare to the overall marital estate; how far into the marriage, or close to the end, was it received; whether and how it was woven into the fabric of the marriage;[22] and was it real estate, money, or assets that may appreciate or decline, such as stock? If the inheritance was cash, was the marriage frugally lived because the parties wanted the inheritance to fund their retirement lifestyle? If the interest is real estate, was it vested and presently possessory or must the divorcing party wait to enjoy it as in a remainder interest? Are there other inheritors of the same asset, now or perhaps in the future (an "open class"), such as siblings, which would affect inclusion in the divorce estate and complicate valuation of the asset?

Even if the inheritance was received before the marriage, the spouse may receive in a division the appreciation in value of that inherited asset during the marital coverture period.[23] The trial court may consider its source, each spouse's degree of oversight of the inherited asset, and whether the asset was woven into the marital fabric, kept separate by the inheriting spouse for articulable reasons, such as future retirement, or represented a future economic failsafe that caused the divorcing spouses to live beyond the means their income could have maintained during the marriage.[24] Even if not part of the divisible marital estate, a future inheritance may warrant disparate division of the assets because one party has a greater opportunity to acquire future income and assets post-divorce.[25] A party who seeks to retain a self-overvalued asset is asking for trouble. A party's inflated opinion of value may be relied upon by the court in arriving at an asset division that, while numerically equal, unfairly skews the bottom line of the overall marital division. In trying a case, divorce counsel should be aware that in the absence of professional or expert opinion as to valuation, a court may credit the testimony of one of the parties as to the value of inheritance, and a spouse's negligent mistake of fact as to value may still be used by the court to the detriment of the mistaken party absent expert testimony.[26]

While marriages are strong, the parties tend to share and treat inheritances as a gain to both spouses and the family unit. As a practical matter, given the reality of divorce rates, inheritances should be protected by prenuptial or postnuptial planning. Without such protection, inheritance, once woven into the fabric of the marriage, is subject to division in divorce, usually to the dismay of the spouse who received the inheritance.

Post-divorce income distributions, mandatory or discretionary, to beneficiaries from trust interests, inheritances and gifts may continue to be included in income for purposes of calculating child support orders, according to the Massachusetts Child Support Guidelines, which describe 29 types of income specifically including trust "distributions and income"[27] and "income from interest in an estate, either directly or through a trust."[28] Although divorcing parties may have unconditionally relinquished any and all rights to the other's assets through an agreement, income-producing assets,

14. Heacock v. Heacock, 402 Mass. 21 (1988).

15. Bacon v. Bacon, 26 Mass. App. Ct. 117 (1988).

16. Miles v. Caples, 362 Mass. 107, 114 (1972); Ball v. Forbes, 314 Mass. 200, 203-04 (1943).

17. *See generally* Mass. Gen. Laws ch. 167D.

18. Bakwin v. Mardirosian, 467 Mass. 631 (2014).

19. I.R.C. § 2041.

20. D.L. v. G.L., 61 Mass. App. Ct. 488 (2004).

21. Ruml v. Ruml, 50 Mass. App. Ct. 500 (2000).

22. D.L. v. G.L., 61 Mass. App. Ct. 488, 489 (2004) (Holding trusts held as husband's "personal portfolio," and those used to purchase a restaurant prior to marriage from which income was derived during marriage, had "never been a part of the fabric of [the] marriage."); Caruso v. Caruso, 71 Mass. App. Ct. 1105 (2008) (Finding a trust funded after the judge had found the marriage to have been broken down still "woven into the fabric of the marriage" due to the trust's interest being a multi-unit apartment building that the husband had managed and received income from throughout the entire marriage).

23. Ravasizadeh v. Niakosari, 94 Mass. App. Ct. 123 (2018).

24. Comins v. Comins, 33 Mass. App. Ct. 28 (1992).

25. Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985).

26. Dilanian v. Dilanian, 94 Mass. App. Ct. 505 (2018).

27. Child Support Guidelines, amended Aug. 2, 2021, and effective Oct. 4, 2021, at section I.A. 17.

28. Child Support Guidelines, amended Aug. 2, 2021, and effective Oct. 4, 2021, at section I.A. 24.

such as trusts and partnerships, cannot be excluded from one's income calculation in subsequent child support contests. These judgments have been reversed by appellate courts, which have held that they run against public policy because they bargain away a child's right to support, and any such countable income is not impermissible "double dipping."[29]

"TRACING" INHERITANCES AND PAST GIFTS AT TIME OF DIVORCE

The mandatory § 34 factor, "opportunity" to acquire future capital assets and income, has become a consideration for courts whenever potential future trust interests and expectable inheritances are present in a divorce, but are too remote or speculative to include in the marital estate.[30] This factor may alter the allocation of the divisible marital assets and cause an unequal, but still equitable, division.[31] In other words, equitable divisions may be mathematically unequal based on the "opportunity" factor.[32] There appears to be no bright-line "opportunity" rule, and outcomes are fact-specific for each divorce.

While the comparative economic and noneconomic contributions traceable to one married party, such as those relating to child care or the maintenance of the marital home, are not a mandatory § 34 factor, appellate case law has acknowledged their potential to affect the asset division outcome.[33] The origin of a spouse's "contribution" of a particular inherited or gifted asset does not necessarily result in the asset becoming part of the originating spouse's divorce award.[34]

In instances where a marriage has lasted more than short term, significant premarriage inheritances often could be traced to one spouse who managed and nurtured their growth while the other spouse self-indulged to the detriment of their economic marital partnership. These facts justified an overwhelming disproportionate division of the marital estate to the spouse who inherited from his or her family.[35] This solution may be more problematic when the inherited assets are the bulk of the marital estate and the marriage is long term.[36] Payment from other joint assets toward significant tax obligations arising from inheritances may also compel a finding that the inheritance was treated by the parties during marriage as a marital asset from which they both intended to continue to benefit despite the trace source.[37]

Counsel should be wary when a party to ongoing or potential divorce exercises a disclaimer to reduce the marital estate.[38] Although usually estate tax- or gift tax-driven, disclaimers may be exercised by a divorcing spouse to avoid receiving an asset and thus remove the asset from the divisible marital estate or consideration as an expectancy. A disclaimer may be exercised even if there is an express or implied spendthrift clause in an instrument from which the disclaimed asset is passing.[39] This raises the question of whether the exercise of a disclaimer after either the filing or service of the divorce complaint violates the automatic restraint rule.[40] It is unclear whether such disclaimers must be disclosed in the parties' divorce financial statements.[41] Divorce counsel may want to pose formal discovery on this specific issue.

TRUSTS 101 FOR DIVORCE LAWYERS

The world of trust and trust terminology can be arcane if not unintelligible for those with only fleeting knowledge. These terms spill over into the real property world because many estate plans involve the contingent succession of real property interests. Divorce counsel must familiarize themselves with the following terms and concepts: Self-settled trusts by a divorcing party versus by a third party; trusts that are revocable, partly revocable, or irrevocable; remainder interests; vested versus non-vested; interests that are possessory or not; conditions precedent, such as outliving someone else; and potential interests, such as a will legacy, a testamentary trust legacy, or one through a power of appointment. When these issues are present in a divorce, certain vernaculars have become commonplace: Mere "expectancies" are too "remote or speculative," yet others may be "fairly certain." Other examples are: The identity of the trust "settlor"; the extent of "trustee discretion" as to income or principal "distributions" distinguished from "rights of withdrawal"; "ascertainable standards" as trustee "guides" to distributions; and beneficiaries as co-trustees and so-called "independent" trustees. Whether appearing premarriage, during marriage, and even after divorce, all this estate-world terminology has played a role in the courts' analyses of the division of marital assets; the outcomes may have surprised the donors of that largesse and chagrined the estate planners who drafted the documents.

WHETHER TRUST OR FUTURE INHERITANCE EXPECTANCIES ARE "OPPORTUNITIES"

When a divorcing party has the mere possibility of receiving an asset in the future, that attenuation is called an expectancy or an "opportunity" and may not be part of the divorce estate if it is "too remote and speculative," but instead may represent a § 34 "opportunity," a mandatory factor to be considered by the divorce judge when deciding how to allocate the assets that are subject to division.[42] In extreme circumstances, such "opportunities" may still be called a divisible asset.[43]

If a testator or third-party trust settlor is made aware that an inheritance or beneficial interest is imperiled by pending divorce, there is a motivation to amend the last will or trust. This motivation

29. Fehrm-Cappuccino v. Cappuccino, 90 Mass. App. Ct. 525 (2016).
30. Williams v. Massa, 431 Mass. 619 (2000).
31. Ketterle v. Ketterle, 61 Mass. App. Ct. 758 (2004).
32. *Id.*
33. Moriarty v. Stone, 41 Mass. App. Ct. 151 (1996).
34. Tanner v. Tanner, 14 Mass. App Ct. 922 (1982).
35. Bacon v. Bacon, 26 Mass. App. Ct. 117 (1988); *see also Williams*, 31 Mass. 619.
36. *Bacon*, 26 Mass. App. Ct. 117.
37. Denninger v. Denninger, 34 Mass. App. Ct. 429 (1993).
38. The logistics of perfecting such disclaimers are prescribed under the Massachusetts Uniform Probate Code, Mass. Gen. Laws ch. 190B, § 2 – 801, as well as the Internal Revenue Code § 2518.
39. Mass. Unif. Tr. Code § 2 – 801 (4)(i).
40. Probate and Family Court Supplemental Rule 411 on its face does not seem to require a divorce litigant to disclose a disclaimer made.
41. *See* Probate and Family Court Supplemental Rule 410.
42. Williams v. Massa, 431 Mass. 619 (2000).
43. Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985).

can last at least until the divorce is final and, barring any other future calamities in the divorce judgment, the testator and settlor, if still competent to do so, may re-modify the documents yet again to reinstate the original outcomes. That strategy may be effective to preclude divorce asset division of an asset if the testator/settlor is still competent and willing to incur the expense of such a procedure.

Despite its near ubiquity in divorce cases, there appears to be no case precedent definitively discussing the "opportunity" factor and how it affects a § 34 analysis and division of marital assets. This is probably because the weight to be accorded to each of the § 34 factors is within the judge's discretion, and that discretion will not be disturbed as long as the trial judge's findings show that all relevant § 34 factors were considered and the reasons for the judgment are apparent and flow rationally from the findings.[44] If the judge's findings reflect that all § 34 factors were considered, and the reasons for the judgment flow rationally from the findings, the judgment will not be disturbed.[45]

Ketterle v. Ketterle[46] contains a significant discussion of the "opportunity" criterion and sheds some light on how the opportunity factor influenced the ultimate divorce asset division. This case had as a party the winner of the 2001 Nobel Prize in Physics. The disparate futures of the divorcing parties led the court to give significant weight to the future opportunity factor and the corresponding disproportionate award of the divisible assets to the spouse who lacked such an opportunity.

Trust interests, which may not ripen until some future event date, will also probably be considered under the opportunity factor and not become part of the divisible marital estate. In *D.L. v. G.L,* the husband's family established seven trusts some 24 years before a marriage that lasted 10 years.[47] The husband's trust interests were too remote or speculative, but the husband's present interest in trust income, although subject to trustee discretion, was a stream of income that could be used to determine alimony and child support. The husband's family established numerous complex trusts, all at various times and prior to the parties' marriage. The wife did not make any significant financial contributions to the marriage, but she was primarily, if not exclusively, responsible for child-rearing, managing the household, overseeing substantial renovations to the marital home, and contributing to the preservation and maintenance of certain of the husband's assets. The trust principal had never been a part of the fabric of the marriage other than as a producer of income. Because payments of principal had never been made to the husband or anyone else from any of the trusts, and further because the husband's father had a specific power of appointment exercisable by his last will over the remaining principal of the trust, all seven trust principal interests were excluded from the marital estate. In addition, the trust was generational in nature because the beneficiaries included not only the husband but his issue and the spouses of such issue. This supported the finding that the trust was set up to benefit the long-term, not near-term, needs of the beneficiaries. The trust income, albeit subject to trustee discretion, was treated differently. Although alimony and property division serve different purposes, they are interrelated remedies that cannot be viewed apart.[48] The Alimony Reform Act incorporated type, duration and amount to the § 34 analysis. Because the husband had received 100% of trust income for 10 years during the marriage, distributed to him annually and automatically pursuant to standing instructions from the trustees, albeit subject to the discretion of the trustee, the court determined that income from the trusts should be included in calculating alimony and child support. As for child support, unlike in *Pfannenstiehl*,[49] past distribution history mattered. One of the trusts (the so-called generation-skipping trust) included a provision giving a beneficiary the right to withdraw up to 5% of the principal balance of the trust each year. Other than this brief mention, the court did not further discuss this right to withdraw, which figured prominently in *Levitan v. Rosen*.[50] Importantly, the court in *Cavanagh v. Cavanagh* cites the 2021 Child Support Guidelines in defining gross income as from whatever source, including to the extent that they represent a regular source of income.[51]

Contingent remainder trust interests have also been determined to be merely an opportunity but may nonetheless prominently factor in the disposition of divisible marital assets, causing a disparate division for the spouse without the interest.[52] In *McMahon v. McMahon*, the husband had advanced his career and education, spending significant periods of time away from the family on military duty. His career advancement gave him a greater financial opportunity. The court also considered the fact that the husband had dissipated marital assets, another set of circumstances justifying a disparate award of divisible assets in favor of the spouse without the interest.[53]

TRUST INTERESTS

The treatment of trust interests in a divorce can be conceptually confounding. The overarching analysis is to ascertain the trust settlor's intent and to effectuate it. Intent may be construed from the entire trust instrument and the underlying circumstances. We know generally that all property to which a spouse holds title, however acquired, is at risk of being divisible.[54] That determination is not constrained by traditional concepts of real estate title or property and their labels, such as the ones tied to various types of trusts.[55]

Careful scrutiny must be made of the nature of the beneficial trust interest of a divorcing party: it must have the characteristics of being "present," "enforceable," "vested," or not subject to contingencies, and capable of valuation, in order to be included in the divisible estate. In *Lauricella v. Lauricella*, the husband's beneficial interests in certain real estate held in a trust created by the husband's father were part of the divisible marital estate because they were present, enforceable, and susceptible of valuation.[56] The husband's father created a trust to hold title to a two-family home in which

44. Ross v. Ross, 385 Mass. 30 (1982); *Williams,* 31 Mass. 619.
45. *Williams*, 431 Mass. 619.
46. 61 Mass. App. Ct. 758 (2004).
47. 61 Mass. App. Ct. 488 (2004).
48. *See* Heins v. Ledis, 422 Mass. 477 (1996).
49. 475 Mass. 105 (2016).
50. 95 Mass. App. Ct. 248 (2019).
51. 490 Mass. 398 (2022).
52. Williams v. Massa, 431 Mass. 619 (2000).
53. McMahon v. McMahon, 31 Mass. App. Ct. 504 (1991).
54. Rice v. Rice, 372 Mass. 398 (1977).
55. S.L. v. R.L., 55 Mass. App. Ct. 880 (2002).
56. 409 Mass. 211 (1991).

the divorcing parties resided. The husband's father was the original trustee, and the husband's mother, the husband, and his sister were the beneficiaries. The interests of the beneficiaries were restricted by a spendthrift clause and a provision that permitted amendment upon a unanimous vote of the trustee (or trustees) and beneficiaries. The trust was also subject to termination by the trustee or trustees if the property were sold, in which case the beneficiaries were to receive the proceeds in equal shares. The court held that the husband had a present, possessory, enforceable and "equitable" right to use the trust property for his benefit, which he had exercised during the marriage by occupying one of the dwelling units as the marital residence. While the husband had a vested right to the future receipt of his share of the legal title to the trust property, it was "subject to divestment" if he did not survive until the trust terminated. At the time, he was only 26 years old, and the court, engaging in a bit of speculation, reasoned that it was likely he would survive to receive his share of the title. The court indicated that "the spendthrift clause is not a bar" and focused on the husband's interest being unlike a mere expectancy.

In *Williams v. Massa*, given the availability of other jointly produced assets, and recognizing the husband's far greater contributions to the marital partnership, the court saw no reason to divide the husband's inherited or gifted property and awarded certain inherited trust assets to the husband, and excluded certain of the husband's contingent remainder trust interests from the marital estate.[57] The case involved five separate family trusts in which the husband had varying interests (both vested and contingent remainders) and with differing purposes, including preservation of principal. The court did not include the husband's contingent remainder interest as part of the divisible marital estate due to a contingency that rendered that interest unvested, not clearly fixed or enforceable and thus constituting a mere expectancy, comparable to a future inheritance.

In *Comins v. Comins*, after a 48-year marriage between spouses then in their mid-70s, it was appropriate to include in the marital estate the wife's interest in a trust that had been settled and funded by her father, and in which the wife had a present, enforceable and equitable right to use for her benefit in view of the length of the marriage and considering the parties' mutual reliance during the marriage on the trust fund to enhance the couple's lifestyle.[58] The trust provided that all property received would be divided into two equal funds, one for each daughter, each fund to be held as a separate trust. The wife had a power of appointment to choose recipients of the trust corpus upon her death. Given the survivorship contingency and the respective ages of the husband and his father, the court concluded that the husband's acquisition of his trust interest was not fairly certain.

In *S.L. v. R.L.*, after a 32-year marriage, the wife was a beneficiary under five trusts, each with a twist, and all settled by third-party family members of the wife.[59] The wife's remainder interest in one of the five trusts was deemed not a divisible marital asset because it was vulnerable to future complete divestment if a power of appointment in her mother's last will were to be exercised. The wife's interests in the other four trusts were determined to be vested and did survive the § 34 marital estate division. The Appeals Court held that the challenging but not troublesome trial court decision to do an "if and when received" valuation of the wife's interests in the other four trusts was appropriate specifically because valuation at the time of divorce was uncertain. The reasons for the uncertainty were several, and depended on the provisions of each trust, all of which contained the contingency of the wife surviving her mother who was a lifetime income beneficiary; two of the trusts required that enough principal remain to generate certain income levels; one of the trusts carried an ascertainable standard tied to the lifestyle of the wife's mother but with a "spendthrift" provision. Another trust was also subject to a spendthrift clause and power of appointment in the wife's mother to assign her present or future income to the wife, her four siblings, and their issue, if any; another trust had a spendthrift clause for all beneficiaries. Other than mentioning, almost in passing, the presence of spendthrift clauses throughout the trusts, the Appeals Court made no mention of their significance, if any, to the § 34 analysis.

In *Child v. Child*, the husband was beneficiary of two trusts: one gave the trustees sole discretion to distribute income and principal to him or for his benefit; the second required the trustees to distribute the income to the husband but gave them sole discretion to distribute principal.[60] With the exception of the right to receive income from one trust, the husband did not appear to have a present enforceable equitable right to use either of the trust properties for his benefit.[61] That said, it is not a foregone conclusion that a party's beneficial interest in a trust, the distributions of which are subject to trustee discretion, renders that interest too remote or speculative for divorce division.[62] Judicial discretion is necessary so the courts may handle a myriad of factual situations.[63]

If a trust is revocable and "self-settled" by a divorcing party, its assets will generally be considered part of the divisible marital estate rather than being considered owned by the trust as a separate entity. Even in this circumstance, the attributes of a particular asset within that self-settled type of trust or the circumstances of how it got there may render it exempt, such as in the inheritance or gifts categories.[64]

For interests in trusts not created by either divorcing party, counsel must scrutinize the identity of the trustee, the distribution terms, and trust language distinguishing trustee discretion to make distributions from the divorcing beneficiary's right to command distributions.[65] If a trust is revocable, but created by a third party as opposed

57. 431 Mass. 619.
58. 33 Mass. App. Ct. 28 (1992).
59. 55 Mass. App. Ct. 880 (2002).
60. 58 Mass. App. Ct. 76 (2003).
61. Child v. Child, 58 Mass. App. Ct. 76 (2003).
62. Bianco v. Bianco, 371 Mass. 420 (1976); Lauricella v. Lauricella, 409 Mass. 211 (1991).
63. Putnam v. Putnam, 366 Mass. 261 (1974); Mahoney v. Mahoney, 425 Mass. 441 (1997) (enforceable contractual right in divisible pension); Hanify v. Hanify, 403 Mass. 184 (1988) (enforceable right to lawsuit proceeds); Baccanti v. Morton, 434 Mass. 787 (2001) (enforceable right to delayed stock options).
64. D.L. v G.L., 61 Mass. App. Ct. 488 (2004).
65. Levitan v. Rosen, 95 Mass. App. Ct. 248 (2019).

to having been "self-settled" by the grantor, especially one with a familial relationship to one of the divorcing parties, the provisions of the trust, the nature of the assets therein, the extent of beneficial interests thereto, and dispositive provisions must all be analyzed in the divorce proceeding. For a revocable trust that is created by the opposing divorcing party, all trust assets will likely be treated as being in the divisible marital estate subject to creditors, except if the assets therein were inherited or gifted. In such a case, issues would arise as to how long ago the assets were received, the nature of such assets, and the length of marriage, as well as other relevant variables that would have to be explored to determine whether these trust interests were "woven into the fabric of the marriage."[66]

An irrevocable trust's assets are generally beyond the claw back reach of the settlor if the settlor gave up ownership of the assets held by the trust.[67] If the settlor of an irrevocable trust is getting divorced, the assets therein should be invulnerable to asset division unless the assets were transferred to the trust in contemplation of divorce.[68]

An irrevocable, testamentary, or *inter vivos* trust may still be revocable as to the settlor in ways separate from the irretrievable assets transferred thereto, such as retention of right to income only or retention of a power of appointment. Even so, if the trust settlor is getting divorced but retained rights either to income only or power of appointment to other persons, any of these might make at least the income, and perhaps even the assets contemplated within the power of appointment, vulnerable in the settlor's divorce for support calculations, if not also vulnerable to equitable asset division. The divorcing trust settlor's retention of the right to change trustees may raise red flags if a different trustee is named shortly before or in the midst of divorce who takes actions such as decanting assets to a new trust whose new terms block the transfer of assets to the divorcing spouse.

A testamentary trust will be effective and funded only at the death of the testator of the subject will.[69] In a testamentary-type trust, the eventual assets or income therefrom might be considered as "opportunity to acquire future assets and income" of a divorcing beneficiary of the testamentary trust.[70] However, divorce counsel for the divorcing testamentary trust beneficiary may argue that in cases where the testator still has the capacity to modify the testamentary trust provisions of that last will, this interest is not an actual opportunity because the testator can wait until the divorce is final and then re-amend the testamentary trust. Even if lacking testamentary capacity, a court-appointed conservator may amend or revoke those dispositions, and thus the inclusion of assets is at best speculative and contingent, as will be discussed further below.

If there is trustee discretion in a trust settled by a third party, counsel must analyze: whether distributions could be made to either divorcing party; what were the nature (income, principal or both) and timing of past distributions (regular, periodic, random or unpredictable); whether there exists an ascertainable standard to guide or limit the trustee's discretion; whether there are sole or multiple non-beneficiary trustees and whether the trust requires unanimity of trustee decision to distribute; whether the trustees have historically and generously exercised discretion upon request; whether the divorcing parties depended significantly on that generosity during the marriage and relied on it for future security; whether the spouses live a higher standard of living as a result of trust distributions; whether any of the beneficiaries are disabled and whether the nature of the trust is intended to function as a supplemental needs trust; whether those same distributions terminated around the proximate date when the beneficiary's divorce action was filed; whether the value of trust assets in which the divorcing party may have a non-speculative interest is presently calculable with some certainty; and whether the class of current and future beneficiaries is still open to expansion by future joiners or has already closed. These issues become even less susceptible to characterization when the interest of the divorcing beneficiary is only a future contingent interest predicated on the happening of a particular event.

Sometimes beneficial interests are "present" and "vested." Other interests, while vested, are still subject to some future contingency, such as survivorship where the interest cannot be divested but may not ripen to unfettered use and enjoyment. Such use and enjoyment must instead await some contingency, such as reaching a particular future date or the death of someone holding a concurrent life estate interest in real property. Vesting during the marriage is not a requirement for inclusion of an interest in the divisible estate.[71] Only when the life estate holder dies will the vested remainder interest become unconditional. And a power of appointment held by another person may subject a granted beneficial interest to potential divestiture.

Remainder interests saddled with survivorship contingencies may, depending on the comparative ages or health circumstances of the beneficiaries, be too speculative and thus may not constitute a present interest includable in the marital estate; such interests can nonetheless still be considered as an opportunity to acquire assets in the future.[72] Terms like "life estate," "remainder interest," "retained power of appointment," "present interest" and "possessory interest" abound in direct deed conveyances as well as in the context of a trust owning the real estate. Massachusetts real property law is clear that a remainder interest is vested[73] because it cannot be taken away unless a power of appointment to do so is specifically reserved or granted in the creating document; it is "subject to divestment," in which case the remainder interest is not only not presently "possessory" due to the life estate, but its potential to vest may be diverted. Trust provisions may contain possessory exotica (for example, rather than a life estate terminating on the date of the death of the life

66. *D.L.*, 61 Mass. App. Ct. 488; *Lauricella*, 409 Mass. 211; Comins v. Comins, 33 Mass. App. Ct. 28 (1992).

67. Ferri v. Powell-Ferri, 476 Mass. 651, 658 (2017).

68. Mass. Gen. Laws ch. 109A, the Massachusetts enactment of the Uniform Fraudulent Transfer Act.

69. *Testamentary Trust*, Bouvier Law Dictionary (6th ed. 1856) (defining testamentary trust as, "a trust created in a decedent's last will and testament, which designates assets to be conveyed to a trustee for the benefit of some named or designated individual, individuals, or entity.").

70. Williams v. Massa, 431 Mass. 619 (2000).

71. Baccanti v. Morton, 434 Mass. 787 (2001) (involved stock options whose vesting would happen upon the passage of time, and a particular kind of "contingency" that was "fairly certain" to happen).

72. Williams v. Massa, 431 Mass. 619 (2000); D.L. v G.L., 61 Mass. App. Ct. 488 (2004); S.L. v. R.L., 55 Mass. App. Ct. 880 (2002).

73. Dell'Olio v. Assistant Sec. of the Off. of Medicaid, 96 Mass. App. Ct. 691 (2019).

estate holder, a tenancy is given only for a specific number of years or time period extinguishing on a future date certain), in which case the interest is vested but not yet possessory.

In cases where a divorcing party has a vested remainder interest not in peril of divestment, the current age or health of the life estate holder whom the divorcing party must outlive may render the interest fairly certain rather than remote or speculative. Irrespective of age or health factors, if the interest does not belong to the divisible marital estate, it will be considered under the "opportunity" factor.

Although not a divorce case, *Dell'Olio* is instructive because it involved a life estate and a remainder interest devised in a last will that constituted "present" but "not yet possessory" interests and addressed a "vesting" issue.[74] This holding has implications for asset division in a divorce when other individuals besides the divorcing party hold remainder interests in real property. In a Probate Court petition for partition, the commonwealth filed a MassHealth creditor claim. The decedent, Emily, was only 8 years old and among seven grandchildren to whom a grandfather's last will, dated in 1956, devised remainder interests in real property, subject to life estates to various family members. Emily died over 50 years later, in 2008, while some original life tenants as well as remainder holders were still living. All life estate holders had died by the year 2013, and two years later, three of the six surviving grandchildren, all of whom were living at the property at the time, filed a petition to partition. The disputed issue concerned the date of vesting of Emily's remainder interest obtained via the last will: (1) whether it occurred when the testator dies; or (2) upon the remainder contingent survival of all life estate holders. If vesting occurred when the testator died, then Emily's remainder would be subject to creditor claims both before and after her death.

The court ruled that Emily's remainder vested when the creator of that interest, the last will testator, died. The court ruled that the interest was not extinguished when Emily died without having outlived all life estate holders.[75] Where a testator devises a remainder interest to a direct descendent whom he knew to be living at the time the will was executed, courts are to apply a strong presumption that the testator intended that interest to vest upon the testator's death. That presumption may be overcome only by showing that the provisions of the will manifested a different intent, specifically, that the vesting be postponed until the death of all life tenants.[76] The court reasoned that an interest may be "vested in possession" not only when there is a right to present enjoyment, but also when it does not carry a right to immediate possession if it confers a fixed right of taking possession in the future.[77] If remainder interests created under a will are not contingent on future events, they are said to vest "in interest" upon the death of the testator.[78] This constitutes a present interest, but not yet possessory. Once the beneficiary has gained the right to occupy and enjoy the property, that interest is said to be "in possession."[79]

The court also addressed the issue of valuation. In this case, the class of remainder holders increased over time by the terms of the remainder language, creating an open class where there were two "after joiners" at the time the grandfather testator died. Although remainder interests devised via last wills vest upon the testator's death, and are not subject to divestment by the remainder holder's death before all life tenants, the value of the vested, but not yet possessory, remainder interest is subject to a decrease in value — in effect a partial divestment — by the subsequent birth of new family members in the relevant class of beneficiaries.[80] Thus, the vesting percentage interest is open to downward fluctuations in value if there are new joiners, or an increase in value if the remainder interest holders died before vesting and the remainders were then to take per capita.

Fortunately, the case of *Skye v. Hession* discusses many of these real property interest "buzzwords" in a readily understandable decision.[81] This case involved a real property deed where the grantor reserved not only a life estate for herself, with remainder interest to others, but also reserved a special power of appointment in the deed instrument. In contrast with the general power of appointment, the special power of appointment does not permit the holder to appoint the property to herself, her creditors, her estate or estate creditors.[82] The retention of such power rendered the interests of the remainder persons merely a "defeasible interest": although the remainder interest presently existed, possession and unfettered enjoyment would only happen after the life estate interest was gone.[83] Future enjoyment was even further contingent upon the failure to exercise a particular power: the power of appointment. Counsel should be careful to note that the possession or retention of a special power of appointment itself, due to the exclusion of the power to appoint to oneself, does not represent a legal interest in the property.[84]

DATE TO VALUATE DIVISIBLE ASSETS

Complicated or uncertain valuation of an asset does not necessarily preclude trust or inheritable assets from any consideration in divorce or from inclusion in the divisible marital estate, even though they may be relegated to the "opportunity" factor. Courts prefer division at the time of divorce rather than waiting for some date or event in the future ("if and when received").[85] Asset divisions in the divorce judgment may not see effect until some later time, leading to unintended results.[86] If there is no expert valuation testimony, then the court may rely on the testimony of one of the litigants in the divorce, even if erroneous. In *Dilanian v. Dilanian*, it was undisputed that the husband's actual inheritance was lower than that found by the trial judge, but the error was caused by the husband's own testimony and the judge reasonably could attribute the error to the

74. *Id.*
75. *Id.* at 698.
76. *Id.* at 695.
77. *Id.* at 696.
78. *Id.*
79. Dell'Olio v. Assistant Sec. of the Off. of Medicaid, 96 Mass. App. Ct. 691, 697 (2019).
80. Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105 (2016).
81. Skye v. Hession, 91 Mass. App Ct. 423 (2017).
82. I.R.C. § 2041.
83. *Skye*, 91 Mass. App Ct. at 425.
84. Estate of Rosen, 86 Mass. App. Ct. 793 (2014).
85. Dewan v. Dewan, 399 Mass. 754 (1987).
86. *Id.*; S.L. v. R.L., 55 Mass. App. Ct. 880 (2002).

husband's negligence, especially when the exact amount of the inheritance was not particularly important to the division of assets.[87]

A court is not required to accept the opinion of the experts and is entitled to credit all, part or none of their valuation testimony.[88] Although these issues are often resolved by testimony from business valuation experts, courts may permit self-evaluation of present business value based on a reliable degree of business acumen and experience in the absence of expert opinion otherwise.[89] Unless clearly erroneous, the court's determination of value will stand.[90] "A division of marital assets anticipates a final and equitable property owned by the parties at the time of the divorce…."[91] Counsel must remember that divorce asset divisions are not subject to future modification unless there was fraud.[92]

Several variables should be considered with respect to real estate valuation issues arising from the existence of single-family, multi-family or vacation homes, or commercial property such as restaurants. Other marital trust or inheritable assets prove even more problematic and subject to expert opinion, such as medical practices with partners, limited liability companies with other members, discounts for minority shareholders in corporate entities, and other one-of-a-kind assets.

There are several possibilities when arguing what date of valuation should be used to divide the marital estate, such as the most recent financial statements submitted with the court. But in multi-day trials that sometimes take place on nonconsecutive days occurring over a period of months, this may be challenging. The date of trial (beginning or end) may be used unless circumstances dictate otherwise, like market forces intervening within that time, especially if that is of particularly long duration.[93] The date of separation may also be used, but one should be mindful of how much time has elapsed between separation and trial date. When there is a long period of time between separation and divorce, questions arise as to how to treat asset value increases or decreases during that period of time.[94] In a divorce case involving a two-year marriage supplemented by a six-year premarital economic enterprise where the parties shared and acted as part of a married, economically interdependent effort, the Supreme Judicial Court (SJC) provided a date of trial valuation based on the parties' contemporaneous financial statements.[95] The date for temporary orders may also be argued. Again, in any litigation from date of filing to date of disposition, counsel should be prepared to make arguments concerning market-type fluctuations, such as in equity stock assets.

THE "NOMINEE" TRUST

The customary usefulness of a nominee trust is to protect the identities of beneficial interest holders, typically of real property.[96] The record title trust instrument is recorded at the county Registry of Deeds but need not contain the names of the beneficial interest owners who are instead listed in a separate non-recorded document called a "schedule of beneficiaries," a privacy afforded in real estate transactions. The type of asset and the nature of the interest are critical questions that determine whether a beneficial interest in a nominee trust held by a divorcing party as described in the schedule of beneficiaries will be deemed part of the divisible estate or instead considered a "future opportunity."

The "nominee" trust itself does not own any beneficial interest in any assets, but it does hold legal title to its assets. It is a mere holding entity.[97] *Roberts v. Roberts* explains the purposes and features of such a nominee trust and emphasizes that the trustees have no power to independently act regarding the trust property but may act only at the direction of the beneficiaries.[98] The trustees have only perfunctory duties, possess only nominal incidents of ownership, and are agents for the mere convenience of the beneficiaries.[99] The trustee may also be a beneficiary himself, and beneficiaries may terminate the trust at any time and thus receive legal title to the trust property as tenants-in-common in proportion to their beneficial interests.[100]

Goodwill Enterprises, Inc. revisited the attributes of a nominee trust. In this bankruptcy case, the court reasoned that "there is logic in treating the beneficiaries of a nominee trust as the true owners of the property for purposes of liability as well as benefit."[101] The trustees are merely agents of the beneficiaries in whom "ultimate control and authority resided at all times," and the beneficiaries' interest in the nominee trust is an undivided interest in real property notwithstanding that the beneficiary may not have a controlling majority vote in what happens to that property.[102] Thus, the co-holders of beneficial interests are no different than co-owners of property held as tenants-in-common, and liability attaches as well as true ownership.[103]

DECANTING AS DIVORCE-PROOFING

Whereas a trustee of a self-settled revocable trust by its terms and by its nature may be permitted to transfer trust assets freely, the irrevocable trust may present some barriers to unconstrained transfers of assets either out of the trust completely or to different beneficiaries other than the one who is undergoing a divorce. The concept of

87. Dilanian v. Dilanian, 94 Mass. App. Ct. 505 (2018).

88. Vedensky v. Vedensky, 86 Mass. App. Ct. 768 (2014).

89. *Dilanian*, 94 Mass. App. Ct. at 512.

90. Downing v. Downing, 12 Mass. App. Ct. 968, 969 (1981). *See also* Sarrouf v. New England Patriots Football Club, Inc., 397 Mass. 542, 550 (1986); Fechtor v. Fechtor, 26 Mass. App. Ct. 859 (1989).

91. Heins v. Ledis, 422 Mass. 477, 483-84 (1996).

92. Sahin v. Sahin, 435 Mass. 396 (2001).

93. Moriarty v. Stone, 41 Mass. App. Ct. 151 (1996).

94. Savides v. Savides, 400 Mass. 250 (1987), presented unusual facts: 10 years passed during which one party made exclusive and significant contributions to the marital estate. *See also Moriarty,* 41 Mass. App. Ct. 151 (date of trial for valuation); Davidson v. Davidson, 19 Mass. App. Ct. 364 (1985) (case-by-case analysis is required and trust interest and expectancy under a last will were both obtained after date of divorce and thus not part of § 34 estate but a remainder interest in a trust despite a survivorship requirement and a spendthrift clause was includible).

95. Connor v. Benedict, 481 Mass. 567 (2019).

96. Goodwill Enter., Inc. v. Kavanagh, 95 Mass. App. Ct. 856 (2019).

97. Roberts v. Roberts, 419 Mass. 685 (1995).

98. *Id.* at 687.

99. *Id.* at 688.

100. *Goodwill Enter.,* 481 Mass at 861.

101. *Id.* at 860.

102. Goodwill Enter., Inc. v. Kavanagh, 95 Mass. App. Ct. 856, 862 (2019).

103. *Id.* at 861.

decanting allows one to amend an otherwise unamendable trust. By decanting, the trustee removes assets from a trust supposedly irrevocable (that is, where modifications are not permitted) and transfers them to another trust whose provisions are designed to prevent, or at least obstruct, those transferred assets from being lost in the divorce of a beneficiary, even if the beneficiary is the same under both trust instruments.[104] This is an extraordinary power to create a brand-new trust into which to transfer the trust corpus, in its entirety, so as to meet a present need or strategic interest that was not contemplated at the time the trust was drafted.

Although Massachusetts has no specific statute, pre- or post-Massachusetts Uniform Trust Code (MUTC), permitting such a maneuver, our state has famously approved such even in the midst of divorce litigation and on the basis of an affidavit purporting to capture the settlor's intent of nearly three decades earlier.[105] This was a case where one trust was decanted into an entirely new trust, after divorce was filed, to deprive a spouse of an interest in the trust. It was a deliberate tactical play to preserve the trust corpus for the intended beneficiary to the exclusion of his wife who otherwise had an interest in it.

Occurring in a non-divorce context, broad language, from which one could infer trustee authority and settlor intent to do decanting, was relied upon to support that decanting[106] because it was determined to be in the best interest of the beneficiaries. Drafting counsel should be cautioned not to rely on such interpretive largesse by appellate courts in the future, especially given the *Morse v. Kraft* court's remarks, which are clearly a signal that post-*Kraft*-drafted trust instruments are expected to contain specific decanting authority if such is sought.[107] *Morse v. Kraft* gives us two fundamentals about decanting: (1) decanting may be allowed and (2) no specific decanting language is required.[108] But the intent to decant must be reasonably inferable in the trust instrument via broad language or provable by other evidence of intent.[109] Counsel should be cautioned not to rely on parole or extrinsic evidence to be admissible on this issue at any trial. The elephant in this litigation room is whether Massachusetts public policy should tolerate decanting in a divorce asset division, child support, or alimony context, and whether decanting after filing and service of a complaint for divorce violates the automatic restraining order under Rule 411.

Morse v. Kraft hinged on the fortuity of a 2012 affidavit rendered by a septuagenarian purporting to explain his intent of 30 years earlier that there was, albeit unstated, authority in his 1982 trust for the trustee to decant to new trusts without the consent or approval of any beneficiary or court. Luckily, Mr. Kraft was still alive to attest to that belated manifestation of intent. The 1982 trust contained four separate sub-trusts for the benefit of four Kraft sons, then minors. The upshot of *Kraft* is that a trustee with decanting power has the authority to amend what is, on its face and by its terms, an unamendable trust.

Although a Connecticut case, *Ferri* yields potential public policy issues for divorces under Massachusetts law; indeed, the facts seemed egregious enough to demand an equitable, if not statutory, remedy that could thwart a decanting that occurred mid-divorce and unabashedly for the purpose of spiriting away marital assets from the clutches of the divorce estate.[110] Instead, the SJC and the divorcing husband relied on the memory of an octogenarian who wrote a present-day affidavit detailing his thoughts of nearly 30 years prior. The belated affidavit claimed a past intent to prevent a spouse divorcing a beneficiary under the settlor's trust from having access to trust assets in the divorce. The Massachusetts SJC was asked by the Connecticut Supreme Court to answer certified questions arising from declaratory judgment and summary judgment complaints concerning the authority of a trustee to distribute (that is, to decant) substantially all of the assets from one irrevocable trust into a new and second irrevocable trust.[111]

The questions arose out of a divorce proceeding in Connecticut between the defendant and her husband, who was the beneficiary of the Massachusetts irrevocable trust. In essence, a Massachusetts irrevocable trust with a spendthrift clause was used to decant into a second irrevocable trust also with a spendthrift clause.[112] The first trust was created in June 1983 by the divorcing husband's father for the sole benefit of his son who at that time was 18 years old. The trust was created in Massachusetts and governed by Massachusetts law. There were two methods established in the 1983 trust by which trust assets were distributable to the beneficiary (son). First, the trustee was authorized to pay to or "segregate" trust assets for the beneficiary; second, and only after he had reached age 35, the beneficiary husband could request withdrawals of fixed percentages of trust assets increasing from 25% of principal at age 35 to 100% after age 47.[113] The divorcing parties were married in 1995 when the husband was 30 years old. The divorce was filed 15 years later in 2010 when the husband was about age 45. Within four or five months after the filing of the divorce, the same trustees of the first trust established a new trust and did so specifically to protect the trust corpus for the husband in his ongoing divorce. The trustees were the husband's brother and another individual. They transferred substantially all the assets of the 1983 trust to themselves as trustees of the 2011 trust. In both trusts, the husband was the sole beneficiary. The 2011 trust included a spendthrift clause giving the trustee complete authority over when and whether to make payments to the beneficiary, if at all, and the beneficiary was deprived of the "power to demand payment" of trust assets.[114]

The trustees acknowledged a specific decanting purpose: to prevent the husband from losing trust assets in the divorce. The trustees

104. Morse v. Kraft, 466 Mass. 92, 95 (2013).

105. Ferri v. Ferri-Powell, 476 Mass. 651 (2017); Mass. S.D. 732, 2021 Gen. Ct. Mass., 192nd Sess. (2021). (Proposing the Massachusetts Uniform Trust Decanting Act to allow a trustee to distribute property from one trust to another.)

106. Morse v. Kraft, 466 Mass. 92 (2013).

107. *Id*. at 101.

108. *Id*. at 100.

109. Ferri v. Ferri-Powell, 476 Mass. 651, 658 (2017).

110. *Ferri*, 476 Mass. 651.

111. *Id*. at 652.

112. *Id*. at 651.

113. *Id.* at 652.

114. *Id.* at 653.

claimed, somewhat unbelievably, that the decanting was done without the husband's knowledge or request,[115] an assertion difficult to accept under the facts and circumstances. It appears that at the time of the decanting, the terms of the 1983 trust gave the husband a "right to request a withdrawal" of up to 75% of the principal.[116] Unfortunately, the exact language of this withdrawal provision was not included in the SJC's certified answers. The SJC, however, referred to the husband's interest as a "vested interest" maturing into 100% of the assets when he reached age 47.[117] The settlor, fortuitously still alive, filed an affidavit in July 2012, some 29 years later, and during the divorce proceedings. Extrinsic evidence was admitted based on trust ambiguity to explain the drafting history, intention of the settlor, and whether decanting was authorized.[118] The SJC underscored the principle that when the instrument displays broad trustee authority, then specific representation of authority to decant need not be expressly written therein.[119] The 2012 affidavit explained the settlor's 1983 intent, evinced when the beneficiary husband was then just 18 years old. The SJC found particularly noteworthy trust language stating that the trustees could "segregate" funds for later payment to the beneficiary.[120]

The court found that the decanting was not inconsistent with the spendthrift provision because the spendthrift clause evidenced the settlor's intent to protect the trust income and principal from invasion by the beneficiary's creditors.[121] Thus, the spendthrift clause was vanquished under these facts by broad trustee powers akin to decanting in this divorce context. The court rejected the wife's argument that the husband's right to request a withdrawal was inconsistent with the authority to decant, holding that the two were not mutually exclusive.[122] They rejected the argument that the settlor intended to prevent decanting after the beneficiary gained withdrawal rights at age 35, no doubt swayed by the belated affidavit of intent.[123] In his concurring opinion, a shot across the bow to those anticipating a rush to decant in Massachusetts divorces by sympathetic third-party trustees of irrevocable trusts, the late Chief Justice Ralph Gants emphasized that the SJC had specifically not decided whether it will permit trustees in Massachusetts to create a new spendthrift trust and decant to it all the assets from an existing non-spendthrift trust when the sole purpose of the transfer is to remove the trust assets from the marital estate even if trust language specifically so authorizes.[124] Chief Justice Gants pointed out that the MUTC prescribes that a trust may be created only to the extent its purposes are lawful and not contrary to public policy.[125]

In light of Chief Justice Gants' concurring opinion, query whether decanting and creation of a new spendthrift trust solely for the purpose of depriving a divorcing spouse-creditor of assets is contrary to Massachusetts public policy and violative of § 404. The SJC declined to weigh in on the wife's argument that under Massachusetts law, a party to a divorce is not a mere "creditor" under the spendthrift provision.[126] It should be noted that although the MUTC at § 404 is clear that a trust cannot be created for a purpose contrary to public policy, there is no counterpart provision that a trust cannot be modified for such a purpose. Would such modification resulting in a radically different outcome constitute not just modification of an existing trust, but the creation of an entirely new one that seemingly violates not only the MUTC at § 404, but also the automatic restraining order on assets during divorce?

DECANTING, SPENDTHRIFT CLAUSES, THE MUTC AND PUBLIC POLICY

MUTC "default and mandatory" rules prescribe that the terms of a trust (that is, the settlor's intent) shall prevail over any other provision of the MUTC except: § 5 of the spendthrift provision and the rights of certain creditors to reach a trust, as further provided in Article 5; and the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice.[127] This latter section may provide grounds for the public policy argument against a last-minute decanting in the context of a divorce that in effect permits a spouse to not only preclude and shelter assets from division, but to evade alimony and other support obligations otherwise justifiable under the facts.

Much of the controversy in the appellate cases has come from the "spendthrift" clause contained in testamentary or *inter vivos* trusts.[128] The MUTC gives deference to the enforceability of spendthrift provisions.[129] Such a clause is commonly inserted when the settlor fears future misadventure (such as divorce or personal injury liability) of a beneficiary therein, such as an adult child of the settlor. The purpose of spendthrift clauses is to preempt alienation, pledging, assignment, attachment, execution on, and garnishment of assets held in trust from the reaches of antagonists, notably the divorcing spouse of the trust beneficiary.[130] This purpose also extends to restraining principal or income distributions to, or demands by, a beneficiary who may become ensnared in a contentious divorce or other litigation.

If there is a spendthrift clause in the trust, lawyers must ask whether it supersedes all other distribution provisions, even rights of a beneficiary to demand withdrawals. There is no Massachusetts case or statute under which divorcing spouses enjoy preferred creditor status. This lack of status is problematic when a divorcing spouse tries to claim a share of assets from the spouse who has a right as a beneficiary to assets held in a trust settled by a third party. The beneficiary spouse will claim that the settlor, most often a parent or other ancestor, did not intend to leave trust assets vulnerable to a divorce for the benefit of a divorcing son-in-law or daughter-in-law as in *Ferri*. A spendthrift clause will be invoked to support such a defense.

115. Ferri v. Ferri-Powell, 476 Mass. 651, 653 (2017).
116. *Id.*
117. *Id.*
118. *Id.* at 654.
119. *Id.* at 655.
120. *Id.* at 657.
121. Ferri v. Ferri-Powell, 476 Mass. 651, 659 (2017).
122. *Id.* at 660-61.
123. *Id.* at 661.
124. *Id.* at 664.
125. Mass. Gen. Laws ch. 203E, § 404.
126. Ferri v. Ferri-Powell, 476 Mass. 651, 664-65 (2017).
127. Mass. Gen. Laws ch. 203E, § 105.
128. Pemberton v. Pemberton, 9 Mass. App. Ct. 9 (1980).
129. *Mass. Gen. Laws* ch. 203E, § 502(c).
130. *Ferri,* 476 Mass. at 659, quoting Bank of New England v. Strandlund, 402 Mass. 707, 709 (1988).

Analysis of case law over the past 20 years reveals that the value of spendthrift clauses is disintegrating in the context of equitable division of assets in divorce. The decisions seem to be lining up along the thesis that it is simply inequitable to deprive a spouse, who has contributed to the bond of matrimony, of assets held in trust based only on a spendthrift clause that has its roots in the protection of assets against creditors. The status of a spouse is not akin to that of a creditor. Our matrimonial statutes and case law require fairness in support over a lifetime, whether married or divorced.

If the spendthrift intent of the settlor is not prescribed within the trust document, but instead in a side letter, it seems an obvious imperative that the affidavit be contemporaneous with the execution of the trust document rather than run the risk of having to compose such an affidavit nearly three decades later as happened in *Kraft*[131] and *Ferri*.[132]

Pfannenstiehl[133] had a nuclear effect on the family law bar, divorce practice, and trust/estate planning bars. The outcome in this case put aside what was the traditionally reliable "woven into the fabric of the marriage" analysis. In this case, the court grappled with whether the present value of the husband's beneficial interest in a 12-year-old discretionary spendthrift trust settled by his father a few years after the parties married should be included in the divisible marital estate where the marriage was 10 years in length. The court held that such present value may not be included because it was "so speculative as to constitute nothing more than an expectancy," and thus that it is "not assignable to the marital estate."[134] The class of beneficiaries was thus still open to future joiners.

The trustees in the case were a non-beneficiary family attorney and the husband's brother who was also a trust beneficiary. The trust provided that any distributions to beneficiaries were entirely discretionary in the trustees and may be made only with the approval of both trustees, who were additionally bound by an ascertainable standard applying to the entire beneficiary class. The 2004 trust also contained a typical spendthrift provision, which stated that "neither the principal or income of any trust created hereunder shall be subject to alienation, pledge, assignment or other anticipation by the person for whom the same is intended, nor to attachment, execution, garnishment or other seizure under any legal, equitable or other process."[135] Before the divorce was filed, the husband and his siblings had received many, and sometimes regularly timed, trust distributions, and those distributions to the divorcing parties supported their marital lifestyle (thus typifying the "woven into the fabric of the marriage" argument), in the husband's case by a total of $800,000. Upon the September 2010 divorce complaint filing, the trustees shut off the husband, but not the other beneficiaries, suggesting that the trustees were aware of and attempting to protect trust property from being subject to the lawful divorce process. The SJC rejected a fractional division based on the then-number of total beneficiaries. Although concluding that the interest was a "mere expectancy" subject to trustee discretion, and notwithstanding the historical track record of regularly timed distributions woven into the parties' lifestyle, the SJC held that the husband's "expectancy" interest nonetheless may be considered under the § 34 factor of "opportunity."[136] Besides holding that the trust interest was not fixed, current and enforceable, the court noted that the husband could not "compel" distributions.[137] The expectancy status was further supported by the potential fluctuation in value over time due to unequal distributions or additional beneficiaries as well as trustee obligation to be aware of long-term needs of the entire class of beneficiaries.[138] Thus, even the presence of the ascertainable standard provision (whose purported purpose is to guide or limit the trustee's discretion to a calculable amount of periodic support) was not sufficient to render the husband's interest non-speculative.

TRUSTEE DISCRETION: "DISTRIBUTIONS," "RIGHTS" AND "DEMANDS"

Counsel may encounter trust provisions that are written in terms of a beneficiary's right to demand a withdrawal in contrast to a right to receive or to request trust distributions. Does a beneficiary's right to demand an annual 5% withdrawal constitute an ascertainable standard guide as to that beneficiary? Is a "demand" right an imperative that supersedes a spendthrift clause and trustee discretion? Counsel must assess whether these are significant, how the terms relate to the facts, and whether they are distinctions without a difference that are still ultimately trumped by a spendthrift provision. In a profession that demands language precision, lawyering that does not heed these distinctions runs the risk of malpractice.

Counsel must scrutinize trust provisions to determine what distributions are truly discretionary by the trustee or mandatory if "demanded," or unilaterally taken, by a beneficiary either individually or as a co-trustee, spendthrift clause be damned. Does such unilateral withdrawal constitute *de facto* trust modification? Counsel should also assess whether it is trust income or trust principal, or both, that can be either distributed or outright demanded.

There is innate tension in a trust instrument that contains either a spendthrift clause as well as a "five and five" ($5,000 annually or 5% of trust corpus) right of withdrawal clause (in itself an ascertainable standard) or a separate "ascertainable standard" to guide trustee discretion, all three of which are typically found in estate planning documents. Settlor intent and priority and the question of which provision supersedes may be reasonably discernible from the trust instrument or, if not, extrinsic evidence may be required.

The question of which provision prevails was answered, for now, in the case of *Levitan v. Rosen*, which featured the spendthrift clause, trustee discretion, unilateral withdrawals seemingly unauthorized by trust language, and the beneficiary's annual 5% right to demand.[139] The apparent conflict among these provisions was put to rest and only under the specific facts. This was a divorce case consolidated with an equity action between the parties and included the third-party independent trustee. The wife's father was the settlor

131. 466 Mass. 92, 97 (2013).

132. 476 Mass. 651, 653 (2017).

133. 475 Mass. 105 (2016).

134. *Id.* at 106, quoting Adams v. Adams, 459 Mass. 361, 374 (2011).

135. *Id.* at 108, quoting the 2004 discretionary spendthrift trust.

136. *Id.* at 116.

137. *Id.* at 115.

138. *Id.* at 114; Mass. Gen. Laws ch. 203E, § 414(e) (2012) (Allowing modification or termination of an uneconomic trust regardless of any spendthrift or similar protective provision).

139. 95 Mass. App. Ct. 248 (2019).

of this 1984 trust. The parties were married in 1997, and thus the trust was already 13 years old. The complaint for divorce was filed 16 years later in 2013. The wife's father died in 2007. The wife was one of three beneficiaries. The court acknowledged that pursuant to the terms of the trust, Florida law controlled its interpretation.[140] The court also noted that Florida had a public policy favoring spendthrift provisions in trusts protecting a beneficiary's trust income.[141]

The trust involved was a Florida trust requiring Florida law to be applied to both the administration and, more importantly, the interpretation of the trust, including the spendthrift clause.[142] However, Massachusetts divorce law applied the § 34 factors to the division of marital assets.[143] The beneficiary class was already closed to future joiners, thus permitting more certainty to valuation and lack of reduction in that valuation.[144] This discretionary family trust contained not only a spendthrift provision but also a "right" by the wife to annually "withdraw" 5% of her share of the trust principal.[145] The trust required the wife's share to be continued to be held in trust for her lifetime with remainder distributed to her issue after her death after all remainder persons reached age 25. The wife's trust interest was managed by two trustees: the wife and an "independent" trustee who was given the "sole discretion" to "distribute" "as much of the income and principal" to the wife as he "deems advisable" (which the court declined to recognize as an "ascertainable standard").[146] The only prerequisite to exact this 5% "right" was that the wife notify the independent trustee; once notified, the trust instrument required that the independent trustee "shall" make such "distribution" to the wife."[147]

The wife exercised such right of withdrawal post-divorce filing in three successive years, 2014, 2015 and 2016, receiving a total of some $270,971, of which, by court order, half was given to the husband. The trust, however, contained a separate spendthrift provision prohibiting "distribution" of the wife's share to creditors and other third parties, including a spouse.[148] The trust authorized the independent trustee to "withhold any payment or distribution of income or principal (even though such payment or distribution is otherwise required hereunder) if the independent trustee in his sole discretion deems that such payment or distribution would not be subject to full enjoyment by the wife."[149] The wife's trust interest was certain and quantifiable at time of divorce at $1.67 million. The two main issues in the case were whether the wife's trust share was a marital divisible asset and, if so, whether the spendthrift provision excluded it as well as the wife's 5% withdrawal right. The primary intent of the settlor was to benefit his adult daughter, the wife in the divorce action, and not future generations. Inconsistent with those intentions was the fact that the wife was a co-trustee along with a described independent trustee who was not a beneficiary of the trust.[150] The trust language also gave the wife a special power of appointment to direct distributions.[151] As beneficiary, the divorcing wife had made annual requests for distributions (but not "five percent" demands) in the three years after the divorce litigation began, and the independent trustee, pursuant to the trial court's temporary orders, had complied.[152] The Appeals Court construed the wife's 5% demand right as a "distribution," and distributions were at the sole discretion of the independent trustee.[153] There was also no discussion in the appellate decision of the fact that the wife was a co-trustee, nor any mention of the undisputed findings of fact that the wife had previously acted unilaterally to make distributions to herself that were not later contested by the independent trustee. Instead, the Appeals Court reasoned that the withdrawal demand was a form of distribution, and all distributions were controlled by the spendthrift clause.[154]

Levitan gives us other instructive points. With respect to settlor intent, non-Massachusetts law applies to the "scope" of the spendthrift clause.[155] Where trust provisions are ambiguous or contradictory, the trust instrument should be considered as a whole to discern the settlor's intent.[156] The entire trust was considered by the Appeals Court to be part of the divisible marital estate, but had to be given ("equitably divided") solely to the wife because the spendthrift clause prohibited it from going to the husband in his status as divorce creditor.[157] The court reasoned that the trustee's discretion was only "guided" (akin to an ascertainable standard) by the 5% withdrawal demand right, and although such a metric gives "predictability" to the distribution calculation, it was still subject and inferior to the spendthrift clause because it was a "distribution."[158] Thus, the court ruled that the wife's interest, though guided by and fairly certain of calculation by the 5% provision, was a mere expectancy, and the spendthrift clause prevailed to defeat any interest in the trust by the husband as divorce creditor.[159]

Levitan v. Rosen pointed to the ambiguity in how the spendthrift provision should apply when the court referred to the "facial conflict" between the wife's right of withdrawal and the independent trustee's discretion under the spendthrift provision to withhold "any payment or distribution of income or principal even though such payment or distribution is otherwise required hereunder."[160] Interpreting the absence of concrete ascertainable standard language to guide the trustee's exercise of discretion (as he "deems advisable"), the court explained that the absence did not strengthen the argument for inclusion in the divisible marital estate: "the mere fact that a trustee's discretion is 'uncontrolled,' (i.e., not governed by an ascertainable standard) does not necessarily preclude a trust's

140. *Id.* at 249.
141. *Id.* at 251.
142. *Id.*
143. *Id.* at 253.
144. *Id.* at 254.
145. Levitan v. Rosen, 95 Mass. App. Ct. 248, 251 (2019).
146. *Id.* at 254.
147. *Id.* at 250.
148. *Id.*
149. *Id.*
150. *Id.* at 249.
151. Levitan v. Rosen, 95 Mass. App. Ct. 248, 250 (2019).
152. *Id.* at 256, n.5.
153. *Id.* at 252.
154. *Id.*
155. *Id.* at 253.
156. *Id.* at 251.
157. Levitan v. Rosen, 95 Mass. App. Ct. 248, 255 (2019).
158. *Id.* at 254-55.
159. *Id.* at 255.
160. *Id.* at 251.

inclusion in the marital estate."[161] The Appeals Court also noted that "though the independent trustee's discretion is not guided by an ascertainable standard, there is some degree of predictability built into the trust by virtue of the wife's annual right to withdraw five percent of the trust principal …"[162] This rationale appears to be circular: the vesting and predictability make the wife's trust interest includible in the marital estate, yet the entire interest is blocked by the spendthrift clause, and thus the division of the trust interest runs entirely into the wife's column. This rationale appears to create a subcategory of assets divisible in the marital estate but directed to one party only due to the spendthrift provision.

In *D.L. v. G.L.*, decided only 15 years before *Levitan v. Rosen,* one of the trusts (the so-called generation-skipping trust) included a provision giving a beneficiary the right to withdraw up to 5% of the principal balance of the trust each year.[163] Other than this brief mention, the court did not further discuss this 5% withdrawal right as a distribution, its status as an ascertainable standard guide, its strength against trustee discretion, whether there was a facial conflict, or what, if any, difference it made in the division of the marital estate or "opportunity for the future acquisition" of assets.

THE "ASCERTAINABLE STANDARD" AS A TRUSTEE "GUIDE" FOR DISCRETIONARY DISTRIBUTIONS

Trustee discretion to make distributions to a divorcing party is often tied to, or at least superficially guided by, the so-called "ascertainable standard." Such outcomes have varied, however, and the "ascertainable standard" has taken a back seat to other more prominent factors, such as trust provisions that permit the numbers of beneficiaries to increase as time passes (an "open class").[164] The prospect of later class joiners complicates the court's ability to valuate that interest. That valuation uncertainty is magnified when an "open class" provision is coupled with malleable "ascertainable standard" language, thus relegating the non-divisible expectancy to a future non-guaranteed "opportunity."

Though called "guides" by appellate courts, standards for distributions of income and/or principal are often not quantifiable, or even intelligible, and are expressed so generically or cryptically as to be of little use in putting a number to them. The so-called "ascertainable standard" suffers from a lack of any degree of certainty or mathematical precision, and the typical language is not readily translatable in a trust/divorce context to an amount or fraction helpful to a trial judge who by statute is tasked to do the divorce math. The ascertainable standard is a progeny of estate tax law.[165] Although its corollary intended purpose may be to guide trustee discretion, such provisions are not particularly precise, nor do they lead to readily calculable dollar values.

Trusts may imbue in a trustee full or only partial discretion depending on innumerable variables that often involve the nuances of family dynamics. Even apparently boundless complete discretion to supply the "needs of health, education, maintenance and support" is suspect in the implementation, and unsurprisingly may lead to disputes about exercising discretion excessively or meagerly. In *Marsman v. Nasca,* the ascertainable "guidance" distribution standard for the trustee was to pay the beneficiary thereunder distributions "as they deem advisable for the comfort, support and maintenance" of the beneficiary and to maintain the beneficiary in a standard of living "normal for him before he became a beneficiary of the trust."[166] Another trustee distribution verbal guidepost was discretion to "pay to the wife so much or all of the income and principal of the trust as in its discretion it deems advisable to provide for the comfort, welfare, support, travel and happiness of the wife."[167] Such a standard does not always interfere with a finding that the underlying interest is present, vested and calculable for inclusion in the divisible marital estate. In *Pfannenstiehl*, the trustees were directed to

> pay to, apply for the benefit of, the class composed of any one or more of the donor's then living issue such amounts of income and principal as the trustee, in its sole discretion, may deem advisable from time to time, whether in equal or unequal shares, to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class.[168]

TRUSTS WHERE THIRD-PARTY SETTLORS ARE INCAPACITATED OR UNDER CONSERVATORSHIP WHEN BENEFICIARY'S DIVORCE UNFOLDS

Conservatorship law provides tools enabling a court-appointed fiduciary to exercise, on behalf of an incapacitated trust settlor, the power to tactically deprive or divest trust interests from a beneficiary who is a party to divorce to protect the assets from division to benefit a soon-to-be former spouse. To assess this issue, counsel needs to be aware of the distinction between mental incapacity to manage financial affairs and incapacity to manage personal affairs because each implicates a different type of lack of cognition.

A guardian may be appointed by the Probate and Family Court to make personal decisions for an incapacitated person due to incapacity that exists when a person has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety or self-care, even with appropriate technological assistance. This does not include advanced age as a basis for such incapacity.[169]

In contrast, the court appoints a conservator when an individual needs protection and requires a decision-maker to make financial decisions. Such decisions may concern how to manage property and business affairs effectively due to a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological

161. *Id.* at 254.

162. *Id.*

163. D.L. v. G.L., 61 Mass. App. Ct. 488 (2004).

164. *See* Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105, 114 (2016).

165. An estate tax marital deduction is not allowed for terminable property interests unless they are "qualified" terminable interest property (or "QTIP") held to a standard regulating distributions to health, education, support or maintenance. I.R.C. § 2041(a)(2), (b)(1)(A) at United States Code Title 26.

166. Marsman v. Nasca, 30 Mass. App. Ct. 789 (1991).

167. Comins v. Comins, 33 Mass. App. Ct. 28 (1992).

168. *Pfannenstiehl*, 475 Mass. at 108.

169. Mass. Gen. Laws ch. 190B, § 5-101(9).

assistance, or instances where the individual is detained or otherwise unable to return to the United States and the person has property that will be wasted or dissipated unless management is provided, or where money is needed for the support, care and welfare of the person or those entitled to the person's support, and protective action is necessary or desirable to obtain or provide the money.[170] A probate court determination that a basis for appointment of a conservator or other protective order exists is not necessarily a determination of incapacity of the protected person.[171] Incapacity must be specifically found and adjudicated through formal proceedings. Importantly, the appointed conservator shall have custody of all wills, codicils, and other estate planning documents executed by the protected person.[172] Thus, a duty implicitly exists to evaluate the protected person's estate plan and to update it or revise it to effect the intentions of the protected person to the best that those intentions can be ascertained.

A petition for appointment of a conservator may be filed in the probate court by the protected person or any person "interested" in the protected person's welfare, or for "good cause" (for example, the divorcing spouse of a protected person who is a trust beneficiary).[173] The MUPC does not define "good cause." After appointment as conservator, title to the protected person's property vests in the conservator, and subsequent transfers directly by the protected person are considered ineffective.[174] Implicitly, the conservator has estate planning powers if the protected person or a beneficiary thereof is undergoing a divorce.[175] Divorce counsel should consider requesting a guardian ad litem to represent the protected person or to report to the court on potential estate plans.

The conservator has certain authorities that present opportunities for counsel representing a divorcing beneficiary of a protected person.[176] These include the power to make gifts; transfer, convey and disclaim property and interests; exercise or not exercise powers of appointment; create trusts; change life insurance beneficiaries or surrender policies for cash; and exercise rights in the estate of a deceased spouse. Significantly, the conservator has the authority to make, amend or revoke the protected person's last will;[177] create a revocable or irrevocable trust or amend or revoke a revocable trust;[178] execute a disclaimer to prevent receiving an asset;[179] convey, release or disclaim contingent and expectant interests in property, including marital property rights and any rights of survivorship incident to joint tenancy or tenancy by the entireties;[180] and exercise or release a power of appointment.[181] Presumably, the conservator may even decant to amend an otherwise unamendable trust. The test for all these actions is: what would the protected person do if he or she were not suffering the statutorily defined inability?[182] Note that the probate court, through litigation, cannot "reform" the last will of an already deceased person but may only determine that a clause therein is "ineffective."[183]

Through the actions of a court-appointed conservator, with court approval, the still-living but now "mentally incapacitated" protected person may still engage in estate planning to change a last will or trust either before the beneficiary's divorce or even in the midst of the ongoing divorce of the beneficiary thereunder, and then reinstate those same dispositive documents after the divorce is final. This could be analogous to a decant, but with court approval. Although the result of such planning may be regarded as unseemly, there is no law to prohibit it and it would seem a leap to suggest that public policy should outweigh the dispositive intent of persons who are not party to a beneficiary's divorce. Long-term nursing home placement and its considerable cost may compel Medicaid planning by the conservator; such planning may work to the detriment or benefit of the divorcing spouse. The Massachusetts Medicaid/MassHealth regulations[184] are complex and will not see in-depth examination here. But divorce counsel should be aware that certain transfers of assets countable against Medicaid pay eligibility may nonetheless fit an exception if ordered by the court within the context of divorce. By contrast, if it is the protected person who may soon become involved in a contested divorce, such an estate plan petition on the protected person's behalf, and subsequent modification of dispositive provisions and documents, may constitute an asset transfer, assignment, removal, or disposition of marital property that is prohibited by Supplemental Rule 411.[185]

FRAUDULENT CONVEYANCE ARGUMENT

Fraudulent conveyance may be an alternate litigation strategy if the trustee decanting a potential divorce asset is not a party to the divorce.[186] This is fraught with ethical issues and its viability untested. A similar statutory action is to "reach and apply" fraudulently conveyed property.[187] A constructive trust may arise when property is conveyed in fraud of third-party creditors (such as a divorcing spouse) rather than in fraud of the transferor or transferee.[188] A constructive trust is a flexible tool of equity designed to prevent unjust enrichment resulting from fraud or a violation of a fiduciary duty or confidential relationship; the plaintiff in a fraudulent transfer action must establish the debtor's actual or implied fraudulent intent.[189]

A recent federal case may have breathed new life into the potential public policy argument that a divorcing spouse, victimized by transfers of divorce assets effected by third parties or trustees,

170. Mass. Gen. Laws ch. 190B, § 5-401(c).
171. Mass. Gen. Laws ch. 190B, § 5-407(f).
172. Mass. Gen. Laws ch. 190B, § 5-407(g).
173. Mass. Gen. Laws ch. 190B, § 5-105(3).
174. Mass. Gen. Laws ch. 190B, §§ 5-419(a) & (b).
175. *See* Mass. Gen. Laws ch. 190B, §§ 5-415 & 416.
176. *See* Mass. Gen. Laws ch. 190B, §§ 5-407(d), 423, 424, 407(e)(1-8).)
177. Mass. Gen. Laws ch. 190B, § 5-407(d)(7)).
178. Mass. Gen. Laws ch. 190B, § 5-407(d)(4).
179. Mass. Gen. Laws ch. 190B, § 5-407(d)(6).
180. Mass. Gen. Laws ch. 190B, § 5-407(d)(2).
181. Mass. Gen. Laws ch. 190B, § 5-407(d)(3).
182. Mass. Gen. Laws ch. 190B, § 5-407(e).
183. Barounis v. Barounis, 87 Mass. App. Ct. 667 (2015).
184. *See generally* 130 CMR 520.001 et. seq., Mass. Gen. Laws ch. 118E, 42 U.S.C. § 1396.
185. Supplemental Rules of the Probate and Family Court 411.
186. Mass. Gen. Laws ch. 109A is the Massachusetts enactment of the Uniform Fraudulent Transfer Act.
187. Mass. Gen. Laws ch. 214, § 3 (8).
188. Mass. Gen. Laws ch. 109A, § 5-6.
189. Mass. Gen. Laws ch. 109A, § 5-6; Cavadi v. DeYeso, 458 Mass. 615 (2011).

qualifies as a creditor with standing to make claims under the fraudulent transfer ambit.[190] In *Foisie v. Worcester Polytechnic Institute*, after 50 years of marriage, a Connecticut divorce was resolved by stipulated agreement in 2011 that included division of marital assets. The husband admitted post-divorce that he failed to disclose his interest in a $4.5 million trust and another $10 million of promissory notes. About five years after the divorce, the husband transferred much of his trust interest and $3 million worth of promissory notes to the academic institution. The husband died in 2018. Upon discovering the chicanery, the wife, then a Florida resident, sued the educational institution, a Massachusetts corporation, in federal court. The First Circuit sent the case back to the district court for determination of what state's version of the Uniform Fraudulent Transfer Act applied (Connecticut or Massachusetts). The court noted that Massachusetts has recognized spouses as creditors only when the alleged fraudulent transfers occurred while the divorce proceedings were either ongoing or imminent.[191] The court thus distinguished fraudulent transfers occurring before or during a divorce from those occurring after divorce.[192] In a backhanded and cryptic nod, the court noted: "Although the right to payment asserted by a spouse facing divorce is urgent and concrete (as the marital estate is about to be divided), this does not mean that every claim submitted by an ex-spouse is necessarily speculative."[193] The importance of this decision for divorce law practitioners is a tacit recognition that spouses may qualify as creditors with cognizable claims involving trust transfers, such as the one above, which may even justify a post-divorce re-division of the marital estate under either Connecticut or Massachusetts law.

PRENUPTIAL AND POSTNUPTIAL AGREEMENTS: ADVANCED DIRECTIVES TO DISSOLUTION OF MARRIAGE

Massachusetts recognizes premarital contracts and permits parties at any time before marriage to make a written contract providing that, after marriage, such property shall remain or become the property of one spouse or the other according to the terms of the contract and may include limitations, such limitations taking effect at the time of the marriage.[194] Postnuptial agreements have also been recognized as not violating public policy and may be enforced in the same way as premarital agreements and subject to the same analysis.[195] The Probate and Family Court has jurisdiction to enforce these agreements.[196] The case law recipe for testing the validity of prenuptial agreements is well settled.[197] Most important to an asset analysis, a fair and reasonable agreement need not approximate a property division award under § 34, and such agreements, if valid, may result in asset divisions far different than what § 34 might require.[198] Such prenuptial and postnuptial agreements offer statutory opportunities to preempt the marital division and cause considerable confusion regarding questions of opportunity, inheritance, gifts, contingencies, the "ascertainable standard," and spendthrift clauses, all imbroglios appearing time and again in the appellate arena. Estate planners should consult with family law practitioners in advance of document drafting to inquire whether such marital agreements should form a basic part of the estate plan.

To the extent that the law recognizes that spouses hold far greater status than creditors such that spendthrift clauses are of questionable value to protect trusts from division in divorce, there is even greater need for prenuptial planning to shield trusts and postnuptial planning to accommodate failure to plan before marriage for distributions made after marriage. It is only through this type of planning that gifts, inheritance, and trust distributions can be proactively immunized from division in divorce. Marital planning is as important as estate planning. Indeed, prenuptial agreements are increasingly drafted by a team of both matrimonial lawyers and trust and estate draftspersons.

FINGER TO THE APPELLATE WIND

Two significant cases have been decided since 2018 that implicate the symbiosis of divorce practice and estate planning. The cases illustrate the uncertainty of estate planning in ultimately accomplishing the settlor's or testator's intent when divorce of a beneficiary beckons.

In *Calhoun v. Rawlins*, the court looked past a nominal trust settlor who followed statutory procedure in creating a trust instrument to find that a different individual was the *de facto* settlor.[199] This Superior Court personal injury lawsuit successfully pierced a trust irrevocable by its terms, and notwithstanding its standard spendthrift clause designed to protect the former husband who was the defendant in the lawsuit. The former husband had guardians due to a traumatic brain injury. Pursuant to his 2007 divorce-separation agreement, his former wife, as settlor, created a trust to hold assets divided in their 2007 divorce, for the benefit of the divorcing husband during his lifetime, with the parties' children as remainder beneficiaries. The trust instrument met all statutory formalities for a valid enforceable trust and was executed by the former wife. By its terms, the trust was irrevocable and included a spendthrift clause against future creditors of the husband. The trust also gave trustees, an initial one being the former husband's sister, complete discretion to distribute, or not, principal to the husband during his lifetime. Pursuant to the separation agreement and the divorce, a mix of marital assets was transferred into the trust ownership, the far greater portion (97%) having been what the court characterized as traceable to the wife's pre-divorce assets. The plaintiffs in the lawsuit sought to pierce the irrevocable trust notwithstanding the spendthrift clause.

The court ruled that although the former wife was the nominal settlor, the trust was "self-settled" by the husband as *de facto* settlor, and creditor access to trust assets was not limited to just the

190. Foisie v. Worcester Polytechnic Institute, 967 F.3d 27 (1st Cir. 2020).

191. *Id.,* at 36-37, citing Du Mont v. Godbey, 382 Mass. 234 (1981); *see also* Welford v. Nobrega, 30 Mass. App. Ct. 92 (1991); Yacobian v. Yacobian, 24 Mass. App. Ct. 946 (1987).

192. *Foisie*, 967 F.3d at 38.

193. *Id.* at 40.

194. Mass. Gen. Laws ch. 209.

195. Ansin v. Craven-Ansin, 457 Mass. 283 (2010).

196. Mass. Gen. Laws ch. 231A, § 1.

197. *See* Knox v. Remick, 371 Mass. 433 (1976); DeMatteo v. DeMatteo, 436 Mass. 18, 26 (2002), citing Osborne v. Osborne, 384 Mass. 591 (1981) and further quoting the fair disclosure rules explained in Rosenberg v. Lipnick, 377 Mass. 666, 672 (1979).

198. Eyster v. Pechenik, 71 Mass. App. Ct. 773 (2008).

199. 93 Mass. App. Ct. 458 (2018).

assets in the trust traceable to the husband's pre-divorce assets because all assets that eventually made their way to the trust formed the contractual consideration for the separation agreement.[200] This asset-tracing theory appears to have sidestepped decades of domestic relations case law supporting the concept of the combined divisible marital estate, the joint "marital enterprise" that supposedly contains all marital assets, as well as the notion of probate court approval, and the necessity of the finality of judgments. Despite the spendthrift clause, despite the so-called irrevocable nature of the trust by the nominal settlor ex-wife, and despite the fact that the parties' children were remainder beneficiaries, the court held that the husband's lawsuit creditors may access the maximum amount that the former husband as *de facto* trust settlor may access.[201] The court cited MUTC section 505(a)(2).[202] This ruling upended long-held propositions in law relating to trust execution, the spendthrift clause, the combined divisible marital estate, joint marital enterprise, the negotiated and court-blessed separation agreement, and the notion of depending on trust irrevocability.

There may be some strategies for trust drafters to immunize or minimize the potential vulnerability of irrevocable trust assets from post-divorce creditors who are allowed to play matador with the venerable spendthrift clause, as cited in the MUTC, when it comes to the future divorces of trust beneficiaries. Rather than leave distribution to the complete discretion of a sole independent trustee, counsel may consider limiting a beneficiary's right to demand and a trustee's discretion to distribute to a specific and limited percentage of trust corpus annually or some other time frame; state specifically whether this provision overrides or remains inferior to any spendthrift clause and trustee discretion; distinguish a beneficiary's right to demand a distribution if the intent is to let that demand right override the spendthrift clause; and, as part of prenuptial or postnuptial drafting, include a provision that allows either party to direct decanting of some or all assets into a different trust with a spendthrift clause specifically proscribing asset transfers to a divorcing spouse.

The most recent case in the realm of irrevocable trusts with spendthrift clauses is *De Prins v. Michaeles*.[203] The SJC addressed multiple issues but also raised further and still-unresolved questions for estate planners and divorce practitioners. Though not decided on the basis of the MUTC, the SJC did cite the code as well as case law, statutes and, above all, equity. The facts of the case are tragic and singularly egregious, and they ultimately demanded an equitable solution.

The case discusses several trust concepts: self-settled trusts, irrevocability, spendthrift clauses, donative intent, and a non-settlor trustee's discretion to distribute some or all assets to the settlor during the settlor's life.

Mr. Belanger and Mrs. Belanger were Massachusetts residents until the year 2000. They then moved to Arizona to retire. Their neighbors, Mr. and Mrs. De Prins, fought and prevailed against the Belangers in a 2007 Arizona state court lawsuit over shared water rights. Distraught, Mrs. Belanger killed herself in October 2008. In November 2008, Mr. Belanger created an irrevocable trust that by its terms could not be altered, amended, revoked or terminated. He declared it to be a Massachusetts trust, despite not having lived there since the year 2000. Mr. Belanger made himself sole beneficiary during his lifetime with his daughter as his sole beneficiary post-death. Mr. Belanger transferred substantially all of his assets to his self-settled trust. The trustee did not make any pre-death distributions to Mr. Belanger, a fact not unusual on its face considering the brief duration of the events as they unfolded. On March 2, 2009, Mr. Belanger killed both the De Prins, and on March 3, 2009, he killed himself. Under this chronology, from trust creation to double homicide elapsed only four months, and this compressed time frame figures prominently in the SJC's rationale as evidence of what they called "a single scheme."

Mr. Belanger's trustee, his attorney, filed to probate Mr. Belanger's estate in Arizona state court on June 10, 2010. The De Prins' son sued Mr. Belanger's personal representative in a wrongful death action that was removed to the Arizona Federal District Court. In November 2014, the De Prins' son filed a separate "reach and apply" lawsuit against Mr. Belanger's trust in the Arizona Federal Court. The wrongful death claim was settled in July 2015. The parties stipulated in the Arizona state probate court case that recovery by the De Prins would be exclusively against trust assets via the reach and apply lawsuit.

The parties next agreed to transfer the reach and apply lawsuit to Massachusetts Federal District Court, which ruled that the three required elements of a reach and apply claim under Massachusetts state law had been established: (1) the creditor has secured a judgment; (2) the creditor has sought unsuccessfully to execute on the judgment; and (3) there was property that could not be taken on execution. On appeal, the First Circuit Court of Appeals certified a question to the Massachusetts SJC: would the assets of a self-settled irrevocable trust, with a spendthrift clause whose terms allowed unlimited lifetime distributions to the settlor, be protected after the settlor's death from a reach and apply lawsuit by the settlor's pre-death creditors?[204] In deciding "no," the SJC reasoned that Belanger's course of conduct amounted to a "single plan" involving an attempt to insulate assets from the aftermath of homicide.[205] The SJC ruled that Belanger's trust lacked the "donative intent" required for application of the MUTC provisions to give power to the spendthrift clause.[206] Thus, common law, not the MUTC, applied to the facts. The SJC, in any event and in the alternative, also offered its analysis under the inapplicable MUTC. There were several subsidiary holdings in the case, all important to the estate planning and divorce bar. The SJC suggested that even if the MUTC did apply, it would reach the same result.[207]

The SJC referred to MUTC § 505 (a)(2): "with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit…." Thus, the SJC interpreted this provision as defeating or disregarding not only the spendthrift clause § 105 (5) "default/

200. *Id.* at 464.
201. *Id.* at 468.
202. *Id.* at 462.
203. 486 Mass. 41 (2020).
204. *De Prins*, 486 Mass. 41 (2020).
205. *Id.* at 49.
206. *Id.* at 46-47.
207. *Id.* at 45-46.

mandatory" rule, but also § 506(b).[208] "Mandatory distribution shall not include a distribution subject to the exercise of the trustee's discretion even if: (1) the discretion is expressed in the form of a standard (that is, a so-called ascertainable standard); or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction."[209]

Thus, the question can fairly be raised whether spendthrift clauses in the MUTC can be reconciled with the decision in *De Prins:* that is, notwithstanding the spendthrift clause, the creditor can reach self-settled trust assets when the trust is not truly irrevocable despite its label because the trustee could have distributed any and all trust assets to the settlor while the settlor was still alive. The SJC also observed that neither the text of the MUTC nor its legislative history answers the question about post-death recovery against a self-settled irrevocable trust.[210] Interestingly, the SJC cited to a couple of vintage trust creditor cases for the principles that creditors may reach the maximum amount that the trustee can pay to the settlor per the terms of the trust[211] and that assets in a self-settled trust cannot be hidden from creditors.[212] The SJC honed in on what it described as the reasonable inference that Belanger's sequential actions were part of a "single plan" to deprive the De Prins of recovery in the water rights lawsuit, and thus that the creation of the trust after deciding to (but before) murdering the De Prins was "contrary to public policy." Equity appears to have been the essence of the SJC rationale: in the last page of its decision, the court wrote that "(t)he equities here simply do not allow…."[213]

It was unclear whether there was an ascertainable standard for the trustee to measure distributions to Mr. Belanger while he was still alive and, if so, whether it would have made a difference in the face of the "single plan" finding. Numerous other questions arise. What if the homicides did not happen for years instead of four months later? What if the beneficiary class could have been expanded while Mr. Belanger was still alive? What if there were language instructing the trustee to consider preserving assets for Mr. Belanger's daughter before making distributions to Mr. Belanger? Would these provisions have weakened the rationale that the trust lacked "donative intent?" Would evidence that the trustee was waiting for Mr. Belanger's post-trust lifestyle expenses to develop before making distributions have added to "donative intent"? Should such distributions be made *pro forma* from time to time to distance the trust from a finding of no donative intent and to bring the trust under the ambit of the MUTC's spendthrift clause?

CONCLUSION

The appellate courts have treated so-called irrevocable trusts in divorce in ways that should concern the trusts and estates bar. Estate planners need to know how divorce law treats trust interests, gifts, inheritances and expectancies (called "opportunities for future acquisition of assets" by the courts), and how to value them so that their drafted instruments can survive appellate scrutiny. Conversely, divorce counsel and those advising on prenuptial and postnuptial agreements need to know the anatomy of trusts, their peculiar vernacular, and the fundamentals of the MUTC.

Traditionally, trust and will drafting were focused on the client sitting across the desk. How many estate planners ever envisioned, let alone drafted defensively for, the inclusion of trust principal and income in divorce asset divisions, alimony, and child support calculations of estate planning beneficiaries whom the drafter never met? This is happening with a frequency of which estate planners should be aware because the divorce bar has already picked up the mantle.

There is uncertainty for future will and trust drafters and divorce counsel about the vulnerability of last wills and trusts, even so-called irrevocable ones, notwithstanding the venerable MUTC spendthrift clause and the presence of ascertainable standards. Equitable division of trust-like interests in divorce, and to what extent they are shielded from or vulnerable to inclusion in the divisible marital estate, will depend on countless variables.

There are endless potential antagonists, in and outside divorce, whose misfortunes will trigger analysis of assets and the documents that control disposition. The battle will be joined along family lines. Death and inheritance therefrom will pit heirs against surviving joint owners and life estate, remainder or contingent interest holders. At termination of first marriage, the spouses' tussle will often ensnare third parties, such as parents who thought they had planned decades ago for harmonious asset succession. Second, or even subsequent, marriage implosions will foment the ire of first-marriage adult children and stepchildren. Adding aging or nearly incapable elders whose assets are at risk in someone else's divorce, trustees, personal representatives, and others with discretion to distribute assets to this combustible mix almost guarantees discomfort, protracted litigation, and malpractice exposure to estate planners for failure to draft and to divorce counsel for failing to spot issues.

Estate and trust drafting counsel must know what assets and income therefrom may become vulnerable to current and future divorce of the beneficiaries and advise their clients accordingly. They should at least make their estate plan clients aware of the pitfalls and offer the opportunity to plan defensively so counsel and client do not get caught *in flagrante delicto* by the "unforeseeable" future divorce of a beneficiary. Similarly, divorce counsel must not act like deer in the headlights when the case demands exploration of the intestines of turgid trust terminology like "presently vested but not possessory and still contingent" interests, which may nevertheless figure prominently in divorce asset division and support orders. At a minimum, counsel should request a "*Vaughan*" affidavit.[214]

Recent case law erodes the notion that a trust is irrevocable notwithstanding settlor intent and actual text. Even assets in what were labeled and drafted as irrevocable trusts with a spendthrift clause

208. Mass. Gen. Laws ch. 203E, § 105 says that the terms of the trust (that is, the settlor's intent) shall prevail over any provision of this chapter except(b)(5). Section 506(b) states that "[w]hether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal … if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date."

209. *Id.* at § 506(a).

210. De Prins v. Michaeles, 486 Mass. 41, 44 (2020).

211. Ware v. Gulda, 331 Mass. 68 (1954).

212. Forbes v. Snow, 245 Mass. 85 (1923).

213. *De Prins*, 486 Mass. at 18.

214. Memorandum from the SJC re. Samuel Vaughan v. Elizabeth Vaughan (Nov. 25, 1991).

may be vulnerable to future creditors, including the divorcing spouse of a former client or the client's intended future beneficiaries. The assets of someone else's irrevocable trust, such as a parent's, may be included in the divorce of a trust beneficiary. All of this occurs before divorce counsel even has the chance to argue about valuation of marital assets.

If the facts are bad enough, the "irrevocable" trust will leak, the "spendthrift" clause may lose its luster, and equity may be invoked to supersede written trust language and settlor intent. So far, this seems to be confined to the personal injury/tort arena, not divorce. Language precluding the ability to "amend, modify or revoke" is not enough to make assets in a trust, albeit irrevocable by its terms, invulnerable to creditors before or even after the settlor's death. Even the inclusion of the spendthrift clause is not enough to shield trust assets from creditors before or after the settlor's death when the facts perhaps call instead for an equitable remedy.

Many questions are thus raised. Does the irrevocable trust retain legal vitality only when the trust language specifically prohibits any lifetime distributions at all to the divorcing party who is the trust settlor? What about permissible distributions of income but not principal? Does the power of the court to "take such action and exercise such jurisdiction as may be necessary in the interests of justice" supersede the spendthrift provision and all things irrevocable when dealing with a trust that does exhibit true donative intent? What if the trust prohibits any principal distributions to the self-settled trust divorce party during lifetime but requires total distribution after the settlor dies to the settlor's probate estate instead of to named beneficiaries? If contentious divorce litigation is protracted, does this make the trust assets vulnerable to slow-walked "reach and apply" claims not thereafter made within the one-year date of death creditor claims statute?[215] Most importantly, what is the impact on trust administration when a trust contest and trust assets languish for more than a decade as in the *De Prins* case?

To arm all Massachusetts domestic relations practitioners and estate planners with sufficient knowledge to advise their clients, the bar needs to pay attention to future cases that make their way up to the SJC or the Appeals Court, so they will be able to predict, anticipate, and advise clients about reliable tools to either access trust assets or shield trusts from invasion in divorce.

215. Mass. Gen. Laws ch. 190B, § 3-803.

Case Comment

The Rights to Assembly and Free Speech Prevail Over Civility in Public Forums

Barron v. Kolenda, 491 Mass. 408 (2023)

Which is more important in Massachusetts — the rights to assembly and free speech or civility? According to the Supreme Judicial Court's (SJC) recent decision in *Barron v. Kolenda*, the rights to assembly and free speech must prevail.[1] This comment will examine the SJC's ruling and its implications for public officials and residents throughout the commonwealth.

Kolenda had its genesis in the town of Southborough's enactment of a "'public participation at public meetings' policy" to govern public comments at meetings of its board of selectmen.[2] The code, reproduced in the SJC's opinion, required, among other things, that "all parties … act in a professional and courteous manner" and "[a]ll remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks. Inappropriate language and/or shouting will not be tolerated."[3]

The public meeting that gave rise to this action was admittedly unpleasant. The plaintiff, Louise Barron, objected to alleged "open meeting law violations and other municipal actions in a public comment session" of a Southborough board of selectmen meeting.[4] In doing so, she criticized "proposed budget increases" and alleged violations of the open meeting law, claiming that "the town '[h]ad been spending like drunken sailors' and was 'in trouble.'"[5] These comments led to a back-and-forth exchange with defendant Daniel Kolenda, who was acting as the board's chair, and culminated in Barron stating, "'Look, you need to stop being a Hitler,'" and continuing with, "'You're a Hitler. I can say what I want.'"[6] The board then declared a recess.[7] Thereafter, "Kolenda turned off his microphone, stood up, and began pointing in Barron's direction, repeatedly yelling at her, 'You're disgusting!' Kolenda told Barron that he would have her 'escorted out' of the meeting if she did not leave."[8]

In the aftermath of the meeting, Barron, her husband, and another Southborough resident filed suit against Kolenda in his individual capacity and the town of Southborough, claiming that Kolenda's actions violated Barron's rights under art. 19 of the Massachusetts Declaration of Rights.[9] In framing their claim, the plaintiffs also referenced Barron's free speech rights under art. 16 of the Massachusetts Declaration of Rights.[10] Kolenda's actions, claimed the plaintiffs, violated the Massachusetts Civil Rights Act. The Superior Court, Frison, J., granted the defendants' motion for judgment on the pleadings.[11] The SJC transferred the case on its own initiative from the Appeals Court.[12]

In an opinion authored by Justice Scott L. Kafker, the SJC held that Southborough's public comment policy was unconstitutional:[13]

> Although civility, of course, is to be encouraged, it cannot be required regarding the content of what may be said in a public comment session of a governmental meeting without violating both provisions of the Massachusetts Declaration of Rights, which provide for a robust protection of public criticism of governmental action and officials.[14]

The court began its analysis with a reminder that this was "a State, not a Federal, constitutional challenge."[15] Noting that art. 19 of the Massachusetts Declaration of Rights "has served an

1. Barron v. Kolenda, 491 Mass. 408, 424-25 (2023).
2. *Id.* at 409.
3. The policy was set forth in its entirety in the footnote. *Id.* at 411 n.5.
4. *Id.* at 409.
5. *Id.* at 412.
6. *Id.* at 413.
7. *Barron*, 491 Mass. at 413.
8. *Id.*
9. *Id.* at 409. While the factual recitation in an appellate opinion reviewing a lower court's decision to grant a motion for judgment on the pleadings is typically limited to the facts as the plaintiff has pleaded them, here, the court had the benefit of "the board's public comment policy and the video recording of the board's December 4, 2018 meeting, both of which were included in the record and considered by the judge below." *Id.* at 410.
10. *Id.* at 409. The case followed an interesting procedural path. Initially, the plaintiffs included First Amendment and other federal claims in the complaint. After the case was removed to federal court, those federal claims were dropped, and the federal court remanded the case back to the Superior Court. *Id.* at 413-14. Thus, the case was before the state court on strictly Massachusetts state claims.
11. *Id.* at 414.
12. *Id.* The court had the benefit of amicus briefs from the Massachusetts Association of School Committees, the American Civil Liberties Union of Massachusetts Inc., the Massachusetts Municipal Lawyers Association and PioneerLegal LLC. *Id.* at 409.
13. *Id.* at 409-10. Six members of the SJC heard the case (Justice Serge Georges Jr. did not participate in the decision). *Barron*, 491 Mass. at 409.
14. *Id.* at 410.
15. *Id.* at 414.

important, independent purpose for much of the history of Massachusetts government, as there was no free speech provision in the original Declaration of Rights,"[16] the court observed that art. 19 "reflects the lessons and the spirit of the American Revolution."[17] That legacy was a "fierce opposition to governmental authority, and [art. 19] was designed to protect such opposition, even if it was *rude, personal, and disrespectful* to public figures…."[18] With this context, the court turned to "the words and actions" of John Adams (the author of Article 19) and his cousin Samuel Adams (who assisted him in that effort) for guidance.[19,20]

Art. 19, argued the Adams cousins, was based upon the right to assembly.[21] Summarizing John Adams' views, the court stated that, according to Adams, "the right of assembly was a most important principle and institution of self-government…."[22] Against this backdrop, Southborough's public comment policy failed to pass constitutional strict scrutiny.[23] Since it "sought to control the *content* of the public comment," it attempted to prohibit protected speech and thus could not stand.[24]

Separately, the civility code also ran afoul of art. 16, which guarantees the right of free speech.[25] Any content-based restrictions on speech must serve a "compelling" purpose and be "narrowly drawn…."[26] The code met neither test; indeed, its demand for polite speech "appears to cross the line into viewpoint discrimination: allowing lavish praise but disallowing harsh criticism of government officials."[27] Such "viewpoint discrimination," like "content discrimination," is unconstitutional.[28]

While the court's ruling was broad, it was clear that the rights to assemble and free speech are not absolute. As the court wrote:

> This is not to say that restrictions cannot be imposed on public comment sessions consistent with arts. 16 and 19. Reasonable time, place, and manner restrictions could include designating when and where a public comment session may occur, how long it might last, the time limits for each person speaking during the public comment session, and rules preventing speakers from disrupting others and removing those who do.[29]

So, for example, those running public meetings can decide whether and when to have public comment at all.[30] If public comment is allowed, its duration can be limited.[31] Plus, speakers have the right to be heard without disruption from others.[32]

The court also noted that not all speech is protected: "personally insulting comments may rise to the level of fighting words, that is, 'face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace,' which are not protected speech."[33] But the court cautioned that the "fighting words" exception is narrow and stated that "[w]e further emphasize that elected officials are expected to be able to respond to insulting comments about their job performance without violence."[34]

Although not discussed in the opinion, one can assume that speech designed to cause a clear and present danger, such as, to use the famous analogy of Justice Oliver Wendell Holmes Jr., shouting fire in a crowded theatre, is not permitted.[35] Nor would specific, direct threats of targeted physical violence. But where should we draw the line:

- Will using derogatory phrases directed against public officials based on their religion, national origin, skin color, or sexual orientation be permitted?

16. *Id.* at 414. Article 19 states that "The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer." *Id*. at 415.

17. *Barron*, 491 Mass. at 416.

18. *Id.* at 409-10 (emphasis added).

19. *Id.* at 416.

20. John Adams and Samuel Adams have been the subject of numerous biographies. Two noteworthy ones are Pulitzer Prize-winners: David McCullough, *John Adams* (2001); and Stacy Schiff, *The Revolutionary: Samuel Adam*s (2022).

21. Barron v. Kolenda, 491 Mass. 408, 416-17 (2023).

22. *Id.* at 416.

23. *Id.* at 418-22. Strict scrutiny was the appropriate constitutional test. As the court explained:

> "[w]e need not decide whether we would find the [United States] Supreme Court's public, nonpublic, and limited public forum classifications instructive in resolving free speech rights under our Declaration of Rights" in the instant case. Indeed, "we need not enter that fray because, under our Declaration of Rights, the applicable standard for content-based restrictions on political speech is clearly strict scrutiny."

Id. at 420 (citations omitted).

24. *Id.* at 419 (emphasis added).

25. *Id.* at 420-22.

26. *Barron*, 491 Mass. at 421 (citations omitted).

27. *Id.*

28. *Id.* at 420-22.

29. *Id.* at 422-23.

30. There can be important institutional reasons not to provide opportunity for public comment in certain instances. For example, when public comment has been taken before a committee of the governmental body, there is no need to have additional comment when the full deliberative body votes on the matter. Likewise, to have free, unfettered opportunities for debate among members of a governing body, having public comment may not be practical, especially because there are other ways of expressing one's views, such as letters or emails. But when a public hearing is required by law, or public comment is taken as a matter of practice, the rules set forth in *Barron* will apply.

31. It is common in public meetings to limit public comment to no more than a few minutes. Such a restriction is a matter of common sense. Without it, meetings could go on for many hours and interfere with the rights of all speakers to be heard.

32. So, for example, heckling when a member of the public is speaking or otherwise interfering with the speaker's ability to speak uninterrupted can be prohibited and the offender removed from the meeting.

33. *Barron*, 491 Mass. at 423 n.15 (quoting O'Brien v. Borowski, 461 Mass. 415, 423 (2012)).

34. *Id.*

35. Schenck v. U.S., 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

- What are the words or phrases that constitute "fighting words"?
- What if the comments are made at a public forum run by a school principal rather than a meeting of a school board?
- Should a heightened standard be applied to elected as opposed to appointed public employees?
- Can members of the public hold signs at a public meeting to express their views and what if, in doing so, they block the ability of other attendees to view the proceedings?
- Can members of the public boo or clap in response to public comment by others?

There are no easy answers to these questions, which are likely to be decided on a case-by-case basis. That said, here are some thoughts to guide public bodies and future judicial rulings:

- Public bodies can, and should, set clear, impartial rules for public comment that are content-neutral. As the SJC explicitly held, reasonable limits on time, place and manner are allowed.[36]
- Derogatory phrases, while personally offensive, probably are permissible, although the courts will have to draw the line between such language and "fighting words."[37]
- The context of the forum should matter. A meeting convened by a school principal is not the archetypal public meeting since attendance, by definition, can be limited to members of the school community. But an open meeting convened by the community's building commissioner to discuss a new school building would be a meeting governed by the *Barron* rules.
- The *Barron* decision concerned *elected* officials. One can make a logical distinction between meetings run by elected officials and appointed officials. After all, elected officials are directly accountable to the voters and voluntarily place themselves in positions of authority. But the better rule will be that elected and appointed officials should be treated equally for at least two reasons: (a) appointed officials can wield immense governmental authority; and (b) as a matter of policy, we do not want elected officials using appointed officials as a shield from unpleasant public comment.
- If the rules are uniform, rational, and not content-based, reasonable restrictions on the sizes of signs, booing or applause should pass muster since they are designed to ensure that all are heard and able to hear others speak and not meant to limit or otherwise thwart public comment.

Public officials also will need to be more wary of their statements in response to public comments at meetings in order to not run afoul of the Massachusetts Civil Rights Act.[38] Here, the court ruled that Kolenda was not entitled to the benefit of qualified immunity (which protects governmental officials for liability for discretionary actions that do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known") because "[i]n the instant case, the contours of the rights are sufficiently clear, and a reasonable public official [Kolenda] would understand that his response to the exercise of those rights was unlawful."[39] While Kolenda's anger may have been understandable, as a public official, he is held to a higher standard such that his anger was not justification for "accusing [Barron] of slandering the board, screaming at her, and threatening her physical removal" from the meeting, all of which arguably interfered with her right to comment.[40]

Many local elected and appointed officials serve for little or no pay, attending meetings at night in addition to their day jobs. These government officials already can be the target of attack, especially

36. *Barron*, 491 Mass. at 410.

37. The SJC has explained that "[t]he 'fighting words' exception to the First Amendment is limited to words that are likely to provoke a fight: face-to-face personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace." O'Brien v. Borowski, 461 Mass. 415, 423 (2012). "Fighting words thus have two components: they must be a direct personal insult addressed to a person, and they must be inherently likely to provoke violence. As such, the fighting words exception is 'an extremely narrow one.'" *Id.* (citation omitted).

38. Mass. Gen. Laws c. 12, §§ 11H-11I.

39. *Barron*, 491 Mass. at 424-25.

40. *Id.* at 425.

through social media. Will the court's ruling have a chilling effect on residents' willingness to serve in local office? What about the ability to hire government employees, particularly in positions that require regular interaction with residents at public meetings? Will it require public officials to exercise extraordinary restraint in the face of hostile, even personally offensive, comments? Perhaps so. But that may be the price we have to pay to ensure that the right of all people to address their government officials remains secure.[41] Public officials will need to accept being the target of unpleasant, indeed boorish, comments that would not be tolerated in many other forums. As the SJC held, in Massachusetts, that is how our democracy works.[42]

The SJC reached the correct result. While civility standards may be designed to heighten the level of public discourse and shield public officials from rude and offensive comments, those goals are not sufficient to overcome the near-absolute protections that the rights to assembly and free speech accord. Public officials, especially elected officials, will need to understand and accept the importance of the rights to assembly and free speech in order to protect and promote the democracy that our founders established.

— Marc C. Laredo

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41. The concept of public comment on governmental affairs — and the importance of all voices having an opportunity to be heard — is firmly imbedded in the American psyche. A prime example is Norman Rockwell's iconic painting "Freedom of Speech" — with the ordinary citizen standing up and voicing his opinion at a town meeting.

42. The court's opinion also serves as a reminder of the importance of the Massachusetts Constitution and its Declaration of Rights — separate and apart from the federal constitution — in protecting the rights of Massachusetts residents.

Case Comment

Tracer Lane II Realty, LLC v. City of Waltham, 489 Mass. 775 (2022)

As the climate crisis has spurred the growth of renewable energy facilities, courts are grappling with zoning conflicts that have inevitably arisen over siting. In *Tracer Lane II Realty, LLC v. City of Waltham,* the first foray by a Massachusetts appellate court into such disputes, the Supreme Judicial Court ("SJC") considered the protection from zoning regulation afforded to solar energy systems by the Massachusetts Zoning Act, General Laws chapter 40A ("Chapter 40A"). The decision struck down Waltham's prohibition of a utility-scale solar project proposed for a residentially zoned lot, but did not resolve the full scope of municipal authority to regulate solar facilities. A subsequently decided case, *PLH, LLC v. Town of Ware,*[1] an unpublished decision under Rule 23 of the Massachusetts Appeals Court Rules, provides additional clarity, but still leaves some questions unresolved.

I. Protection for Solar Under Chapter 40A

The Home Rule Amendment to the Massachusetts Constitution[2] empowers municipalities to enact zoning requirements provided they do not contravene the federal or state constitution or law. Chapter 40A[3] establishes standardized procedures and imposes various restrictions on municipal zoning authority.[4] Section 3 of Chapter 40A ("Section 3") limits municipal power to regulate various categories of protected uses,[5] including solar energy systems. The ninth paragraph of Section 3 provides:

> No zoning ordinance or bylaw shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.[6]

Chapter 40A defines a solar energy system as "a device or structural design feature, a substantial purpose of which is to provide daylight for interior lighting or provide for the collection, storage, and distribution of solar energy for space heating or cooling, *electricity generating,* or water heating."[7] Solar energy systems can be roof-mounted or ground-mounted and come in a variety of sizes. The Massachusetts Department of Energy Resources divides them into small-scale, medium-scale and large-scale based on the amount of surface area the facility covers and its corresponding energy capacity.[8]

Before examining the court's analysis in *Tracer Lane*, it is worth noting the curious language used in the ninth paragraph of Section 3 of Chapter 40A. The language suggests that a municipality *may* "unreasonably regulate" solar facilities where doing so is "necessary to protect the public health, safety or welfare,"[9] but this appears to be nonsensical. As every zoning regulation must be "reasonable" to pass muster,[10] no zoning

1. No. 22-P-347, 2022 WL 17491278 (Mass. App. Ct. Dec. 8, 2022).

2. Mass. Const. amend. art. 89, § 6. *See* CHR General, Inc. v. City of Newton, 387 Mass. 351, 356 (1982) ("'[T]he zoning power is one of a city's . . . independent municipal powers included in [Home Rule Amendment] § 6's broad grant of powers . . . for the protection of the public health, safety, and general welfare.'") (quoting Board of Appeals v. Hous. Appeals Comm., 363 Mass. 339, 359 (1973)). Section 7 provides additional limitations on local powers, including the ability to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power. *See* Mass. Const. amend. art. 89, § 7.

3. The Zoning Act does not apply to Boston. Boston's Zoning Enabling Act appears in chapter 665 of the Acts of 1956, as amended through Nov. 30, 2001. *See* 1956 Mass. Acts 610.

4. Section 2A of chapter 808 of the Acts of 1975, which enacted Chapter 40A, provides that it is intended to "facilitate, encourage, and foster the adoption and modernization of zoning ordinances and bylaws . . . and to achieve greater implementation of the powers granted to municipalities [by Article 89 of the Amendments to the Constitution]." 1975 Mass. Acts 1114. Section 2A aims to standardize "procedures for the administration and promulgation of municipal zoning laws." *Id.* It suggests various objectives for zoning and sets out a non-exclusive list of matters that zoning regulations may restrict, prohibit, permit or regulate. *Id.*

5. *See* Mass. Gen. Laws ch. 40A, § 3 (West, Westlaw through 2022 2nd Annual Session). Perhaps the most well-known and widely litigated provision of § 3 is its second paragraph, which protects religious and educational uses and structures (the so-called "Dover Amendment"). *Id.* Other paragraphs in Section 3 protect agriculture, silviculture, horticulture, floriculture and viticulture (hereinafter collectively referred to as "agricultural uses"); child care facilities; mobile homes used as temporary residences following a disaster; handicap access ramps; certain congregate living arrangements for disabled persons; and antennas for amateur radio operations. *Id*.

6. The adoption of para. 9 predated current concerns with the climate crisis. It was added by chapter 637 of the Acts of 1985, which also included several other provisions to enhance access of a solar energy system to direct sunlight. *Compare* Mass. Gen. Laws ch. 40A, § 3 (West, Westlaw through 2022 2nd Annual Session) *with* 1985 Mass. Acts 988. In particular, chapter 637 added § 9B to Chapter 40A, which authorizes municipalities to "encourage the use of solar energy systems and protect solar access" through various measures, including buffer zones, requirements relating to planting and trimming of vegetation, and exemptions from setback, building height, roof, and lot coverage restrictions. 1985 Mass. Acts 988-89. Moreover, § 9B allows zoning codes to "provide for special permits to protect access to direct sunlight for solar energy systems." *Id.*

7. Mass. Gen. Laws c. 40A, §1A (West, Westlaw through 2022 2nd Annual Session) (emphasis added).

8. *See* Commonwealth of Mass. Exec. Off. of Env't Aff., Dep't of Energy Res., Model Zoning for the Regulation of Solar Energy Systems (Dec. 2014).

9. Mass. Gen. Laws ch. 40A, § 3 para. 9 (West, Westlaw through 2022 2nd Annual Session).

10. *See, e.g.*, Andrews v. Town of Amherst, 68 Mass. App. Ct. 365, 368, 369 (2007), 449 Mass. 1101 (2007); W.R. Grace & Co.-Conn. v. Cambridge City Council, 56 Mass. App. Ct. 559, 566 (2002).

regulation would survive a court challenge if it were found to "unreasonably regulate" a use or structure.[11] And, no regulation that is "necessary to protect the public health, safety or welfare" — a phrase that encompasses the full scope of a municipality's police powers[12] — could be deemed to "unreasonably regulate" a use or structure. As discussed below, the court largely avoided attempting to construe each term in this provision, and instead applied a balancing test similar to the one that has been applied to other Section 3 provisions.

II. The Court's Opinion in *Tracer Lane*

Tracer Lane II Realty, LLC ("Tracer Lane") owned commercially zoned land in Lexington on which it proposed to construct a one-megawatt solar energy system that would supply energy to the electric grid. The proposed system was large, covering approximately 413,600 square feet, or more than nine acres. Because the Lexington land lacked street frontage, Tracer Lane planned to use an adjoining residentially zoned parcel it owned in Waltham to construct an access road for construction vehicles and maintenance. Tracer Lane proposed to place utility poles and wires in the access road to connect the solar energy system to the electric grid.[13] Substantial traffic was expected over the eight-month construction period, with subsequent use of the road limited to occasional access for maintenance.[14] The Waltham building inspector advised that, because the city's zoning prohibited large solar facilities in residential districts, Tracer Lane could not use its residential land in Waltham to access such a use in Lexington.[15] In response, Tracer Lane sought a determination in Massachusetts Land Court ("Land Court") under General Laws chapter 240, section 14A that, given the protected status of solar energy systems afforded by Chapter 40A, Waltham could not prohibit its proposed construction of the access road. Agreeing with the plaintiff, the Land Court declared Waltham's prohibition of the access road invalid[16] and ordered the building inspector to allow construction. The city appealed, and, on direct appellate review, the SJC affirmed.[17]

As a preliminary matter, the court had little difficulty finding the access road to be a part of the solar energy system. Section 3, para. 9 protects solar energy systems and "structures that facilitate the collection of solar energy."[18] The court pointed to religious and educational use cases under Section 3 in which ancillary structures, such as church steeples, were considered part of the protected use.[19] For example, in *Martin v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*,[20] the court agreed that a steeple that exceeded the zoning height limit was permissible as part of a religious building. The court declared that the inquiry focused on the use of land or structure, not the use of an element or part of a structure.[21] To be sure, roads are not structures; however, as the court also noted, case law has long recognized that an "access road in one zoning district leading to another zoning district 'is considered to be in the same use as the parcel to which the access leads.'"[22] Moreover, the court emphasized the importance of the road to the solar energy system. Not only was it necessary for construction and maintenance, but it would serve as the route for connection to the electric grid.[23] Given this, it appears hard to argue that the access road was not part of the solar energy system.

The court then turned to the principal issue in the case: whether the Waltham zoning code ran afoul of Section 3, para. 9. The parties disagreed as to the extent to which the zoning code regulated solar energy systems.[24] Tracer Lane asserted that, since the Waltham zoning code did not specifically list solar energy systems in its use table,[25] it prohibited these facilities throughout the city.[26] In contrast, Waltham maintained that solar uses were allowed in industrial zones, which made up approximately 2% of the city's land area, as "establishments for the generation of power for public or private consumption purposes that are further regulated by Massachusetts General Laws."[27] Furthermore, the city argued that accessory solar energy systems were allowed in residential and commercial districts. For purposes of its opinion,

11. The same "unreasonably regulate" language also appears in the first paragraph of Section 3, in connection with the protection afforded to agricultural uses. Mass. Gen. Laws ch. 40A, § 3 (West, Westlaw through 2022 2nd Annual Session).

12. *See infra* text at n. 57-61.

13. Tracer Lane II Realty, LLC v. City of Waltham, 489 Mass. 775, 776-77 (2022).

14. Tracer Lane II Realty, LLC v. City of Waltham, No. 19 MISC 00289 (HPS), 2021 WL 861157, at *2 (Mass. Land Ct. March 5, 2021), *aff'd,* 489 Mass. 775 (2022).

15. As a general rule, land in one district ("first district") cannot be used as a road to access a use in another district ("second district") where the use being accessed in the second district is not allowed in the first district. *See* Bruni v. Planning Board, 73 Mass. App. Ct. 663, 672 (2009) (citing Beale v. Planning Board, 423 Mass. 690, 694 (1996)); Dupont v. Town of Dracut, 41 Mass. App. Ct. 293, 295-96 (1996).

16. *Tracer Lane*, 489 Mass. at 777.

17. *See Tracer Lane*, 2021 WL 861157, at *8.

18. Mass. Gen. Laws ch. 40A, § 3 para. 9 (West, Westlaw through 2022 2nd Annual Session).

19. *See Tracer Lane*, 489 Mass. at 779-80.

20. 434 Mass. 141 (2001).

21. *Id.* at 149.

22. *Tracer Lane*, 489 Mass. at 780 (quoting Beale v. Planning Board, 423 Mass. 690, 694 (1996)). *See also* Lapenas v. Zoning Board of Appeals, 352 Mass. 530, 533 (1967); Town of Brookline v. Co-Ray Realty Co., 326 Mass. 206, 211-13 (1950); Dupont v. Town of Dracut, 41 Mass. App. Ct. 293, 295-96 (1996).

23. *Tracer Lane*, 489 Mass. at 780. *See also* Town of Tisbury v. Martha's Vineyard Comm'n, 27 Mass. App. Ct. 1204 (1989) (holding that a fuel oil tank was an essential component of greenhouse operations; accordingly, prohibition of tank was invalid as a practical prohibition of a protected agricultural use).

24. *See Tracer Lane*, 489 Mass. at 777-78.

25. Waltham, Mass., Zoning Code § 3.4 (1988, as amended through Aug. 3, 2021), *available at* ecode360.com 13128319.

26. *See* Building Inspector v. Belleville, 342 Mass. 216, 217-18 (1961); Leominster Materials Corp. v. Board of Appeals, 42 Mass. App. Ct. 458, 461 (1997). *But see* Town of Warren v. Hazardous Waste Facility Site Safety Council, 392 Mass. 107, 121-22 (1984).

27. Waltham, Mass., Zoning Code § 3.245 (1988, as amended through Aug. 3, 2021), *available at* ecode360.com 13128319.

the SJC assumed that Waltham's view of its zoning code was correct.

Focusing on the limited amount of land that Waltham made available for utility-scale solar facilities, the court struck down the zoning prohibition as violative of Section 3. While acknowledging that the ninth paragraph imposes fewer restrictions on municipalities than several other Section 3 limitations, the court nevertheless adopted a balancing of interests approach borrowed from case law concerning those other Section 3 provisions.[28] Thus, the interest the ordinance advances must be weighed against the impact on the protected use. The court assumed Waltham's interest to be preservation of the character of its zoning districts, which it found to be a legitimate matter of municipal concern.[29] However, Waltham's interest was offset by the purpose behind the statutory protection for solar energy systems. Paragraph 9 advances a significant state policy of promoting solar energy in order to reduce greenhouse gas emissions. In weighing the two interests, the court easily concluded that limiting solar facilities to 1 or 2% of the municipal land area was impermissible. Noting the importance of large solar installations to the commonwealth's decarbonization goals, the court determined that Waltham's allowance of accessory rooftop solar in residential and commercial districts likewise was insufficient.[30] Although Waltham had "discretion to reasonably restrict the magnitude and placement of solar [large-scale] energy systems," the city could not completely ban them in the vast majority of its land area, at least in the absence of a reasonable basis "grounded in public health, safety, or welfare."[31] The court saw no evidence that Waltham's restriction was *necessary* to protect public health, safety or welfare.[32] This result makes practical sense of the strained statutory language. Paragraph 9 does not forbid all regulation. Nor is it as restrictive as Section 3 protections for child care or religious and educational uses. Rather, para. 9 bans "unreasonable" regulation as well as outright prohibition unless *necessary* to protect public health, safety or welfare.

III. Implications

The decision leaves several questions unanswered. In particular, the manner and extent to which municipalities may prohibit or regulate solar energy systems remains open. Since the court found Waltham's limitation clearly invalid, it did not consider what might be a more reasonable regulation. Accordingly, it avoided deciding whether a categorical ban throughout a zoning district may be permissible[33] if a higher percentage of land in the municipality is available for solar facility projects (and if so, what that higher percentage may be). The court did not indicate how the balancing of interests should be done or identify potential municipal interests other than the preservation of the character of zoning districts. The court did not provide a meaningful sense of when a regulation aimed at large-scale solar facilities may be deemed "necessary" to advance the public health, safety or welfare. And, the court did not address whether a municipality may require special permits or site plan approval for solar facilities. Nevertheless, the opinion's language indicates municipalities might have a fair bit of leeway in setting parameters for siting solar facilities.

The language of the several Section 3 protections varies. For religious, educational and child care uses, municipalities may only impose reasonable regulations relating to dimensional, density and parking requirements; they may not prohibit such uses.[34] However, municipalities have more flexibility under the solar provision, as they are merely prohibited from "unreasonably regulat[ing]" solar facilities, "except where necessary to protect the public health, safety or welfare."[35] Arguably, the Section 3 protection most analogous to the solar facility protection is the last paragraph, which concerns antenna structures for amateur radio operators. No zoning ordinance or bylaw may prohibit construction or use of such an antenna by a federally licensed amateur radio operator, but "may reasonably regulate the location and height of antenna structures for the purposes of health, safety or aesthetics," provided the regulation "reasonably allow[s] for sufficient height . . . so as to effectively accommodate amateur radio communications" and "constitute[s] the minimum practical regulation necessary to accomplish" the municipality's legitimate purposes.[36] There is, however, no appellate case law under this provision. The agricultural exemption is also similar, and is the only other Section 3 provision that uses the term "unreasonably regulate"; however, it does not include an exception for regulations intended to promote public health,

28. *Tracer Lane*, 489 Mass. at 781 (citing Rogers v. Town of Norfolk, 432 Mass. 374, 379 (2000)).

29. *Id.* (citing *Rogers*, 432 Mass at 380).

30. *See id*.

31. *Id.* at 782.

32. *Tracer Lane*, 489 Mass. at 781.

33. In a request for amicus briefs, the court asked whether allowing solar energy facilities in certain areas of a municipality but prohibiting them in other areas is permissible, or instead constitutes unreasonable regulation in contravention of the statute. Given its resolution of the case, the court managed to sidestep the question posed to the amici. Land Court decisions have split on the question of a categorical districtwide ban. *Compare, e.g.*, Briggs v. Zoning Board of Appeals, No. 13 MISC 477257 (AHS), 2014 WL 471951 (Mass. Land Ct. Feb. 6, 2014), *and* DuSeau v. Szawlowski Realty, Inc., No. 12 MISC 470612 (JCC), 2015 WL 59500 (Mass. Land Ct. Jan. 2, 2015) *with* PLH, LLC v. Town of East Longmeadow, 18 MISC 000640 (Mass. Land Ct. May 3, 2021) (notice of docket entry re: decision on motion for summary judgment), *and* Northbridge McQuade, LLC v. Northbridge Zoning Board of Appeals, 18 MISC 000519 (Mass. Land Ct. June 17, 2019) (docket entry: decision on summary judgment).

34. A municipality may not "prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic . . . or by a nonprofit educational corporation[] . . . " but may impose "reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Mass. Gen. Laws c. 40A, § 3 para. 2 (West, Westlaw through 2022 2nd Annual Session). Child care uses may not be subject to a special permit, but are subject to "reasonable" dimensional regulations. *Id.* para. 3.

35. Mass. Gen. Laws c. 40A, § 3 para. 9 (West, Westlaw through 2022 2nd Annual Session).

36. Mass. Gen. Laws c. 40A, §3 para. 10 (West, Westlaw through 2022 2nd Annual Session).

safety or welfare.[37] Thus, municipalities may not use zoning to prohibit, unreasonably regulate, or require a special permit for agricultural uses except that all such activities may be limited to parcels of five acres or more (or two acres or more in certain circumstances) in areas not zoned for agriculture. In other words, provided they meet the minimum acreage requirement, agricultural uses cannot be prohibited anywhere regardless of zoning district. The *Tracer Lane* opinion leaves open the issue of whether matters of public health, safety or welfare can in some circumstances justify a categorical ban of solar facilities from specific districts.[38]

In Section 3 cases involving the imposition of dimensional regulations on land or structures used for religious or educational purposes,[39] courts have balanced competing interests by looking at whether the challenged zoning provision "would substantially diminish or detract from the usefulness of a proposed structure, . . . without appreciably advancing the municipality's legitimate concerns."[40] Significant regulatory compliance costs also weigh in favor of protecting the proposed structure from dimensional regulations that do not significantly mitigate municipal concerns.[41] A similar approach governs child care cases.[42] In effect, a zoning regulation that fails the balancing test is unreasonable.[43] The cases teach that this balancing process is a fact-specific undertaking.[44] In applying a balancing approach used in other Section 3 cases to para. 9 as well, the *Tracer Lane* court emphasized that protection for solar energy facilities plays a key role in advancing the commonwealth's interest in addressing climate change. This statutory interest must be weighed against municipal interests.[45] However, the court did not provide guidance for how to conduct the balancing and what weight to assign different factors, leaving the decision to a case-by-case analysis.

The one municipal interest specifically recognized in *Tracer Lane* is preservation of the character of the community's zoning districts. It is well established that "[t]he primary purpose of zoning is the preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods."[46] This interest has also been highlighted in other Section 3 cases.[47] Zoning advances many other interests as well. Section 2A of chapter 808 of the Acts of 1975, which enacted the current Chapter 40A, sets forth a non-exclusive list[48] of purposes and objectives for zoning. Several of these statutory purposes may be relevant to large solar facilities.[49] In particular, depending on the area in question, environmental issues can raise legitimate concerns because utility-scale solar facilities have the potential to cause significant environmental impacts.[50] These systems require large areas of land and therefore can result in loss of habitat and alter drainage, increase erosion, and cause soil compaction, thereby affecting local vegetation. There have also been reports of concentrated sunlight beams and solar towers killing birds and insects. Solar thermal facilities, as opposed to solar photovoltaic facilities, use large quantities of water for cleaning and cooling.[51]

Accordingly, in appropriate circumstances, protecting sensitive natural areas and avoiding other environmental damage could be considered legitimate municipal interests supporting prohibition of or restrictions on solar energy systems in specific

37. Special rules apply to agriculture uses involving "facilities for the sale of produce, wine and dairy products." *See* Mass. Gen. Laws c. 40A, § 3 para. 1 (West, Westlaw through 2022 2nd Annual Session).

38. Unlike the provisions governing educational and religious uses, child care uses and agricultural uses, which all bar the prohibition of the use of land for the protected activity, para. 9 bars zoning from prohibiting or unreasonably regulating solar energy systems. Mass. Gen. Laws c. 40A, § 3 para. 1 (West, Westlaw through 2022 2nd Annual Session). This distinction in the statutory language could suggest that where a municipality allows solar energy systems in part of the community, a prohibition may be imposed on land in other parts of the community. However, the *Tracer Lane* decision indicates that this distinction is not significant, at least if the amount of land available for solar is so small that it amounts to unreasonable regulation.

39. These are so-called "Dover Amendment" cases.

40. Trustees of Tufts College v. City of Medford, 415 Mass. 753, 759 (1993).

41. *See id.* at 759-60 (Dover Amendment is intended to encourage a degree of accommodation between the protected use in matters of critical municipal concern); Trustees of Boston College v. Board of Aldermen, 58 Mass. App. Ct. 794, 798, 800 (2003), *rev. denied,* 440 Mass. 1108 (2003).

42. Rogers v. Town of Norfolk, 432 Mass. 374, 378 (2000).

43. *See* Summit Farm Solar, LLC v. Planning Board, No. 18 MISC 000367, 2022 WL 522438, at *9 (Mass. Land Ct. Feb. 18, 2022).

44. *See, e.g., Rogers*, 432 Mass. at 383; *Trustees of Tufts College*, 415 Mass. at 759; *Trustees of Boston College*, 58 Mass. App. Ct. at 800.

45. In essence, the court balanced the local public welfare interest of preserving the integrity of the zoning districts against the statewide public welfare interest of advancing solar energy. Tracer Lane II Realty, LLC v. City of Waltham, 489 Mass. 775, 781 (2022).

46. Kaplan v. City of Boston, 330 Mass. 381, 384 (1953).

47. *Rogers*, 432 Mass. at 380; *Trustees of Tufts College*, 415 Mass. at 758.

48. These include: reducing "congestion in the streets"; conservation of health; providing "safety from fire, flood, panic and other dangers"; providing adequate air and light; preventing overcrowding; avoiding "undue concentration of population"; "encourag[ing] housing for persons of all income levels"; facilitating "adequate provision of transportation, water, water supply, drainage, sewerage, schools, parks, open space and other public requirements"; conserving "value of land and buildings, including the conservation of natural resources" and preventing environmental pollution; encouragement of "the most appropriate use of land throughout the [municipality], including recommendations of any master plan"; and preserving and increasing amenities to fulfill such objectives. 1975 Mass. Acts 1114.

49. Although traffic congestion and parking requirements often come up in other § 3 cases, those concerns are unlikely to play a role in solar energy systems, which, once built, require few visits to the site.

50. *See, e.g.,* Gabriel Popkin, "Are There Better Places to Put Large Solar Farms Than These Forests?," N.Y. Times (Sept. 21, 2022), https://www.nytimes.com/2022/09/21/opinion/environment/solar-panels-virginia-climate-change.html.

51. Olivia Smith Wilson, "The Dark Side of the Sun: Avoiding Conflict over Solar Energy's Land and Water Demands," New Security Beat (Oct. 2, 2018), https://www.newsecuritybeat.org/2018/10/dark-side-sun-avoiding-conflict-solar-energys-land-water-demands/.

areas.[52] Large solar facilities also can take up valuable agricultural land,[53] preservation of which is a legitimate purpose of zoning.[54] However, environmental and agricultural concerns are less persuasive if the municipality otherwise allows uses that could harm habitat or sensitive features at the locations proposed for solar.[55] Prevention of nuisances due to glare from solar facilities may also be a legitimate municipal concern, but can be addressed by reasonable screening, landscaping requirements, and setbacks rather than outright prohibition.

Highlighting these issues, a Land Court case decided shortly after the SJC opinion in *Tracer Lane* distinguished municipal purposes and public welfare. In *Kearsarge Walpole, LLC v. Lee*, the Land Court acknowledged that preservation of agriculture and open space in an area zoned as a rural residential district was an important municipal purpose but did not view it as implicating public health, safety or welfare.[56] The SJC in *Tracer Lane* did not make this distinction. And, although the SJC did not specifically discuss the meaning of public welfare, language of the opinion implies that there is no such difference as suggested in *Kearsarge*.

Indeed, the concept of public welfare has a broad reach. In *Opinions of the Justices*, the court noted that "public welfare has never been and cannot be precisely defined. Sometimes it has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts, but not to include 'mere expediency.'"[57] Under this formulation, preservation of land for agricultural use should be considered a matter of public welfare. Public welfare even extends to aesthetics, at least in some circumstances. *Opinions of the Justices* considered the constitutionality of a proposed act to create a regulatory scheme for a newly established Nantucket historic district. In opining that the act would be constitutional, the SJC indicated that aesthetic concerns were a matter of public welfare, although there was also an economic component to its analysis since Nantucket would benefit from enhanced tourism as a result of the proposed law.[58] The ability to regulate based on aesthetics was expanded in *John Donnelly & Sons, Inc. v. Outdoor Advertising Board,*[59] which upheld a zoning bylaw prohibiting billboards based on the general welfare. Moreover, in a child care case under Section 3 of Chapter 40A, the SJC recognized aesthetics as a valid municipal interest but did not label it "public welfare."[60] The U.S. Supreme Court has also deemed aesthetic concerns to be matters of public welfare.[61]

Thus, the statement in *Kearsarge* that preserving open space and agricultural land in residential districts is "outside the umbrella of public health, safety and welfare"[62] appears to be inconsistent with the prevailing case law, at least insofar as it pertains to aesthetic-type impacts outside the context of Section 3, para. 9. However, the holding of *Kearsarge* — i.e., that a zoning regulation that bars large solar facilities on all but approximately 2% of the municipality's land is not necessary to protect the public health, safety or welfare, at least absent specific proof — is entirely consistent with, and compelled by, the holding of *Tracer Lane*.

Although municipal concerns may be advanced by regulation, if regulation is not *needed* to protect public welfare (or health or safety), then it may be outweighed by the purpose of advancing solar energy. Accordingly, aesthetic concerns, like glare, could be addressed by reasonable setbacks and screening requirements but would not support a blanket prohibition throughout a particular zoning district.

Since Waltham had no regulatory structure for solar energy systems, the court in *Tracer Lane* did not have occasion to discuss whether para. 9 allows municipalities to require special permits or site plan approvals for such facilities. Special permits

52. The Land Court recently relied on environmental concerns to uphold a denial by the Petersham Zoning Board of Appeals of a special permit for a large ground-mounted solar energy system on a vacant parcel of wooded land. Sun-Pin Energy Services, LLC v. O'Neill, No. 21 MISC 000626 (JSDR), 2023 WL 5094112 (Mass. Land Ct. Aug. 8, 2023). The board's denial was based on the project's adverse impact on natural and working lands and the need to cut a significant number of trees, contrary to the commonwealth's energy policy goals, which strongly discouraged tree removal. The denial noted adverse impacts to water management, cooling and other climate benefits provided by trees as well as on wildlife habitat, recreational opportunities and a sense of place for people. The Land Court's decision was appealed on Sept. 1, 2023. *See also* Mass. Dep't. of Energy Resources, Et Al., Mass. Clean Energy Results: Questions and Answers, Ground-Mounted Solar Voltaic Systems (June 2015) at 4 & 20 (clear cutting of trees for installation of ground-mounted solar systems strongly discouraged due to water management, cooling and climate benefits provided by trees).

53. *See* Didem Tali, "Negative Effects of Solar Energy," Sciencing, https://sciencing.com/negative-effects-solar-energy-6325659.html (July 26, 2019). On the other hand, installation of solar facilities on agricultural land can be beneficial for farmers. *See, e.g.,* U.S. Dep't of Energy, Off. of Energy Efficiency and Renewable Energy Solar Energy Tech. Off., Farmer's Guide to Going Solar, *available at* energy.gov/eere/solar/farmers-guide-going-solar (discussing the benefits of co-locating solar facilities and crop production).

54. Town of Burlington v. Dunn, 318 Mass. 216 (1945), *cert. denied,* 326 U.S. 739 (1945). *See also* Mass. Gen. Laws ch. 40A, § 3, para. 1 (West, Westlaw through 2022 2nd Annual Session) (limiting use of zoning to regulate agriculture).

55. Section 3 applies only to zoning regulation. *See* Mass. Gen. Laws ch. 40A, § 3 (West, Westlaw through 2022 2nd Annual Session). Solar facilities are subject to wetlands and other environmental requirements.

56. Kearsarge Walpole, LLC v. Lee, No. 21 MISC 000449 (KTS), 2022 WL 4938498, at *6 (Mass. Land Ct. Oct. 4, 2022) (holding that a zoning bylaw may not prevent the development of a solar facility in a rural residential district in the absence of ample other land available in the municipality for solar).

57. *Opinions of the Justices*, 333 Mass. 773, 778 (1955).

58. *Id*. at 778, 781 ("In a general sense the proposed act would be an act for the promotion of the public welfare.").

59. 361 Mass. 746 (1972).

60. Rogers v. Town of Norfolk, 432 Mass. 374, 382 (2000). *See also* 1975 Mass. Acts 1114 (stating zoning regulations may address "development of natural, scenic, and aesthetic qualities of the community.").

61. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 94 (1974); Berman v. Parker, 348 U.S. 26, 32 (1954) (noting that public welfare includes aesthetic concerns).

62. Kearsarge Walpole, LLC v. Lee, No. 21 MISC 000449 (KTS), 2022 WL 4938498, at *7 (Mass. Land Ct. Oct. 4, 2022).

are authorized by Chapter 40A[63] for uses that the municipality determines require specific approval, given their potential to cause adverse impacts on neighboring properties or the community. The process provides a means to review impacts on a project-specific basis. Unless drafted or applied unreasonably, a zoning regulation requiring a special permit for a solar facility would presumably be able to avoid "prohibit[ing] or unreasonably regulat[ing] the installation of solar energy systems or the building of structures that facilitate the collection of solar energy."[64] This special permit process could avoid disputes over the categorical exclusion of solar from certain districts and accommodate both municipal concerns and the statutory goal of advancing solar energy.

PLH, LLC v. Town of Ware could provide a blueprint.[65] In *PLH*, the Appeals Court affirmed a Land Court decision granting summary judgment in favor of the town of Ware on the plaintiff's challenge to a zoning bylaw that required a special permit and site plan approval[66] for ground-mounted solar energy facilities in two of the town's residential zoning districts. The zoning bylaw also allowed ground-mounted solar energy facilities with only site plan approval in all commercial and industrial districts, while prohibiting them in the town's four most densely developed districts.[67] The Appeals Court observed that the solar facility protection in para. 9 affords more flexibility to municipalities than do the provisions protecting agricultural uses and child care uses. In contrast to para. 9, those provisions specifically prohibit special permit requirements.[68] The court stated that "[i]f the Legislature intended to prohibit special permits for solar installations, it would have indicated as much in the ninth paragraph."[69] The court rejected the plaintiffs' argument that the special permit failed to serve a legitimate municipal interest beyond that advanced by site plan review, reasoning that preservation of a zoning district's character and environment is a legitimate municipal purpose.[70] Moreover, it noted that a special permit was required only for large installations and only in two of the town's zoning districts.[71] The court also stated that the special permit requirement properly provided the town the opportunity to evaluate matters such as erosion, grading and drainage, and thereby "ensure that large solar installations are appropriate for their location."[72]

Given that the zoning bylaw allowed large solar installations on 72% of the town's land area, either with a special permit or after site plan review, the court readily determined that the special permit requirement did not "unreasonably burden or restrict solar installations."[73] Further, the town's bylaw exempted small building-mounted solar installations used for agriculture or for one- and two-family dwellings. The court found no evidence that the town used the special permit requirement to prohibit solar installations or as "a pretext for mere preferences regarding land use."[74] Nor was the court persuaded that the special permit added unreasonable expense or delay beyond that due to site plan review. While acknowledging that a requirement that imposed excessive cost could unduly restrict large solar facilities, the court noted that the site plan approval and special permit processes occurred simultaneously, the site plan approval process "already involve[d] the submission of extensive planning documents and the participation of several municipal departments," and, "[i]n this context, the additional burden of the special permit application is reasonable considering the municipal interests it serves."[75] *PLH*

63. *See* Mass. Gen. Laws ch. 40A, § 9 (West, Westlaw through 2022 2nd Annual Session).

64. Mass. Gen. Laws ch. 40A, § 3 para. 9 (West, Westlaw through 2022 2nd Annual Session). Several attorney general decisions under Gen. Laws ch. 40, § 32 have disapproved town bylaws that prohibited battery energy storage systems, finding that they qualified as structures that "facilitate the collection of solar energy" and therefore benefited from protection under para. 9 as interpreted by *Tracer Lane*. Letter from Margaret J. Hurley, Assistant Attorney General, Director, Municipal Law Unit, to Sandra Fritze, Spencer Town Clerk, Case No. 10804 (May 30, 2023); *see also* Letter from Margaret J. Hurley, Assistant Attorney General, Director, Municipal Law Unit, to Stefany Ohannesian, Medway Town Clerk, Case No. 10779 (May 17, 2023); Letter from Margaret J. Hurley, Assistant Attorney General, Director, Municipal Law Unit, to Anna Wetherby, Wendell Town Clerk, Case No. 10721 (Mar. 1, 2023); *available at* https://massago.hylandcloud.com/203ngpublicaccess/cq-search/cq-index.html?CustomQueryID=103&selSearchYear=2023&OBKey__152_1=01-01-2023&OBKey__152_2=10-02-2023&txtSearch=&OBKey__151_1=&OBKey__154_1=&OBKey__153_1=&OBtn_Yes=Search. *See also* NextSun Energy LLC v. Fernandes, Nos. 19 MISC 000230 & 19 MISC 000564, 2023 WL 317259 at *14 (Mass. Land Ct. May 9, 2023) (battery energy storage system ancillary to proposed solar energy facility was integral part of the facility for zoning purposes).

65. PLH, LLC v. Town of Ware, No. 22-P-347, 2022 WL 17491278, at *1-3 (Mass. App. Ct. Dec. 8, 2022).

66. The plaintiff did not challenge the site plan requirement. *See id.* at *1. The town's planning board initially approved the site plan and denied the special permit, but, on appeal, the judge remanded the special permit decision to the planning board, which then granted the special permit on remand. *Id.*

67. *See id.* at *2 & n.2.

68. Case law has imposed a similar prohibition against requiring special permits for religious and educational uses. *See* Trustees of Tufts College, 415 Mass. 753, 765 (1993); Bible Speaks v. Board of Appeals, 8 Mass. App. 19, 33 (1979) (holding the legislature did not intend special permit requirements to be imposed on educational and religious uses that had been expressly authorized to exist as of right in any zone under § 3); Commissioner of Code Inspection v. Worcester Dynamy, Inc., 11 Mass. App. Ct. 97, 100 (1980). *But see* Trustees of Boston College v. Board of Aldermen, 58 Mass. App. Ct. 794, 799–800 (2003) (holding that a special permit procedure in itself is not invalid in all circumstances).

69. *PLH, LLC*, 2022 WL 17491278, at *1.

70. *Id.* at *2.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

is consistent with trial-level decisions that have upheld the use of special permits[76] for solar facilities, and with the Department of Energy Resources' model zoning for the regulation of solar energy systems, which recommends the use of special permits in limited circumstances for large systems (although cautioning that their validity in this context is uncertain). In several recent decisions reviewing newly adopted bylaws under section 32 of General Laws chapter 40,[77] the Massachusetts Attorney General's Office felt constrained to approve zoning amendments requiring special permits for certain solar facilities because it could not "conclude that the bylaw amendments present a clear conflict with state law," but it warned the municipalities to apply the amendments consistently with the solar protections set forth in Section 3 of Chapter 40A.[78]

PLH appears to have been correctly decided. A property-specific special permit process focused on protecting public health, safety or welfare should be permissible for solar facilities, at least if it is confined to a subset of the municipality's zoning districts and is not used to prohibit, or impose unreasonable conditions on, solar energy facilities in the vast majority of a city or town. Indeed, a special permit requirement appears ideally suited for the task of balancing interests on a case-by-case basis. Therefore, if a rational basis, grounded in the public health, safety or welfare, cannot be provided for imposing a special permit requirement for all solar projects in the municipality, an alternative is to impose such requirements only in sensitive districts or locations. This approach would provide a means to evaluate the public welfare in situations where heightened scrutiny is called for. For example, a special permit process could protect properties in sensitive natural areas from development or provide setbacks and screening for residential areas. As long as the process was used to evaluate impacts arising from a solar facility in order to mitigate them, and not as a means to reject such facilities (for other than public health, welfare or safety reasons), it should be acceptable.[79]

While the *PLH* court was not presented with a challenge to the bylaw's site plan approval requirement, it would appear that site plan review is another acceptable way for municipalities to regulate solar facilities.[80] The process is referenced only once in Chapter 40A;[81] it is a creature of local zoning and case law

76. *See generally* Haggerty v. Borrego Solar Systems, Inc., 33 Mass. L. Rptr. 663 (Mass. Sup. Ct. 2016); Summit Farm Solar, LLC v. Planning Board, No. 18 MISC 000367 (HPS), 2022 WL 522438 (Mass. Land Ct. Feb. 18, 2022) (holding denial of special permit arbitrary and capricious where scope of special permit limited so as not to prohibit protected use); Nextsun Energy LLC v. Fernandes, No. 19 MISC 000230-RBF, 2021 WL 669059 (Mass. Land Ct. Feb. 22, 2021) (holding review under special permit must be narrowly applied), *aff'd*, No.21-P-806, 2022 WL 2962089 (Mass. App. Ct. July 27, 2022); ASD Three Rivers MA Solar, LLC v. Planning Board, No. 19 MISC 000089 (DRR), 2021 WL 1248004 (Mass. Land Ct. April 5, 2021) (holding the board's denial of special permit for reasons not set forth in solar bylaw to be pretext and unreasonable). *PLH* is also consistent with Prime v. Zoning Board of Appeals, 42 Mass. App. Ct. 796, 802-03 (1997), which held, in applying a prior version of the agricultural exemption that did not include language prohibiting special permit requirements, that a special permit requirement could be imposed. *See also* Cullen v. Building Inspector, 353 Mass. 671, 732 (1968) (upholding, under predecessor of Chapter 40A, a zoning bylaw that required the board of appeals' approval for a significant expansion of agricultural use).

77. *See* Mass. Gen. Laws ch. 40, § 32 (West, Westlaw through 2022 2nd Annual Session). Section 32 provides for review by the attorney general of new and amended town bylaws to determine whether they are consistent with state law and the Massachusetts Constitution.

78. *See* Letter from Nicole B. Caprioli, Assistant Attorney General, Municipal Law Unit, to Katherine M. Chretien, New Marlborough Town Clerk, Case No. 10547 (March 23, 2023); *see also* letter from Margaret J. Hurley, Assistant Attorney General, Director, Municipal Law Unit, to Sandra Fritze, Spencer Town Clerk, Case No. 10804 (May 30, 2023); Letter from Margaret J. Hurley, Assistant Attorney General, Director, Municipal Law Unit, to Stefany Ohannesian, Medway Town Clerk, Case No. 10779 (May 17, 2023). All of the letters are *available at* https://massago.hylandcloud.com/203ngpublicaccess/cq-search/cq-index.html?CustomQueryID=103&selSearchYear=2023&OBKey__152_1=01-01-2023&OBKey__152_2=10-02-2023&txtSearch=&OBKey__151_1=&OBKey__154_1=&OBKey__153_1=&OBtn_Yes=Search.

79. In SunPin Energy Services, LLC v. O'Neil, No. 21 MISC 000626 (JSDR), 2023 WL 5094112 (Mass. Land Ct. Aug. 8, 2023), the Land Court upheld the denial of a special permit for a large ground-mounted solar facility based on adverse impact to public welfare due to, among other things, the cutting of a significant number of trees. Extensive tree removal was noted to be contrary to the commonwealth's energy policy goals, creating adverse effects on water management, cooling, wildlife habitat, recreational opportunities and sense of place for people. *Id.* at *7-8. The plaintiff does not appear to have challenged the requirement for a special permit, and there was no assertion that the town was hostile to solar energy projects. In fact, the zoning bylaw allowed large solar facilities as of right in part of the town and with a special permit in the remaining areas. Numerous solar arrays (building-mounted and ground-mounted) had previously received building permits, but the SunPin matter was the first request for a special permit. The Land Court's decision was appealed on Sept. 1, 2023. *See also* Mass. Dep't. of Energy Resources, Et Al., Mass. Clean Energy Results: Questions and Answers, Ground-Mounted Solar Voltaic Systems (June 2015) at 4 & 20 (clear cutting of trees for installation of ground-mounted solar systems strongly discouraged due to water management, cooling and climate benefits provided by trees).

80. In a recent opinion affirming a decision by the Norton Planning Board that approved with conditions the site plan for a proposed large ground-mounted solar facility, the Land Court found that the board had properly mitigated potential harmful impacts from the project. However, the court remanded several conditions of the site plan approval for reconsideration. No party challenged the validity of the site plan approval requirement. NextSun Energy LLC v. Fernandes Nos. 19 MISC 000230 & 19 MISC 000546, 2023 WL 3317259 at *13-15 (Mass. Land Ct. May 9, 2023) as amended by 2023 WL 4156740 (Mass. Land Ct. June 23, 2023).

81. *See* Mass. Gen. Laws ch. 40A, § 17's new bond provision, which applies to an appeal from "a decision to approve a special permit, variance or site plan."

and provides a means to review uses, including as-of-right uses, in order to impose reasonable conditions to address potential adverse impacts.[82] Where a use is allowed as of right, site plan review is less onerous than special permit review, because it cannot be used to deny a project (except in a very unusual case) and may instead be used only to impose reasonable conditions.[83] The Appeals Court has barred the use of site plan review in a Dover Amendment case,[84] but, for the reasons discussed above in connection with special permits, the increased flexibility afforded municipalities by para. 9 should allow its use as a tool for solar projects.

The lesson from *Tracer Lane* is that a municipality must accommodate solar energy systems within its borders but may regulate them to limit adverse impacts. To survive challenge, local zoning should allow all types of solar energy systems, whether roof-top or ground-mounted, small-scale or large. Room must be made for these facilities in at least more than 2% of the municipality (unless the municipality can show that limiting such facilities so dramatically is "necessary to protect the public health, safety or welfare," a standard that appears unlikely to be met),[85] but how much more remains uncertain. Assuming *PLH* is followed, municipalities may exclude solar facilities altogether from some districts and allow them by special permit and site plan review in others, at least where they allow solar facilities by right (or subject only to site plan review) somewhere and do not use either process to unduly restrict solar energy facilities.[86] In any case, municipalities wishing to control the siting of solar facilities must have requirements in place. In the absence of a regulation, they will be allowed anywhere in the community even if not identified in the zoning code as an allowed use.

— Victor N. Baltera

Mr. Baltera thanks his colleague, Michael K. Murray, for his valuable contributions to this comment.

82. *See* Y.D. Dugout v. Board of Appeals, 357 Mass. 25, 31 (1970); *See generally* Prudential Ins. Co. v. Board of Appeals, 23 Mass. App. Ct. 278 (1986); Auburn v. Plan. Bd., 12 Mass. App. Ct. 998 (1981); *Mass. Zoning Manual,* Section 8.14 (MCLE, 7th ed.) (2021); Mark Bobrowski, *Handbook of Massachusetts Land Use and Planning Law,* Section 9.08 (4th ed. 2018).

83. *Prudential Ins. Co.,* 23 Mass. App. Ct. at 283-84 & n. 9.

84. Bible Speaks v. Board of Appeals, 8 Mass. App. Ct. 19, 34 (1979).

85. This was further brought home by Kearsarge Walpole, LLC v. Lee, No. 21 MISC 000449 (KTS), 2022 WL 4938498 (Mass. Land Ct. Oct. 4, 2022), a Land Court case decided shortly after the SJC's opinion in *Tracer Lane*. The court emphasized the need for a finding of significant harm to public health, safety or welfare to support a categorical prohibition of solar facilities in the Walpole Rural Residential zoning district. *Id.* at *6. Walpole had zoning provisions specifically addressing solar facilities but, like Waltham in *Tracer Lane*, it only allowed large installations in approximately 1-2% of the town's land area. *Id.* The Land Court held that, where only a small portion of the town was available for solar, the categorical districtwide ban was invalid without showing that such a ban is necessary to protect public health, safety or welfare. *Id.* at *7.

86. According to the Appeals Court, Ware allowed large solar in 72% of its land areas. PLH, LLC v. Ware, No. 22-P-347, 2022 WL 17491278, at *2 (Mass. App. Ct. Dec. 8, 2022).

Book Review

The Words That Made Us: America's Constitutional Conversation, 1760–1840

By Akil Reed Amar (Basic Books – A Hatchette Imprint) 2021, 832 pages

Akil Reed Amar, the distinguished professor of law and political science at Yale University, begins *The Words That Made Us* with a question: "Do we really need yet another American history book?" His answer, of course, is "yes."[1] We need it, he says, because many of the best American history books are "period pieces." Others tend to focus on a single issue, failing in the process to recognize the connective tissue binding that issue to the wider story of the nation's founding.[2]

Beyond that, he says, the complete story of the nation's founding requires an understanding not only of historical events but also of the legal theories the Colonists used to create the nation's ordered framework.[3] In his view, most historical narratives focus on one subject or the other, failing to recognize and understand the way both are connected.

Thus, this book is designed to tell "the panoramic story of America itself, a story of how various widely scattered New Worlders first became *Americans* and then continued to debate and refine what being American meant, legally, politically, militarily, diplomatically, economically, socially, ideologically, institutionally, and culturally — what being American meant *constitutionally*."[4]

Six hundred and seventy-five pages later, Amar returns to that question, beginning a 27-page postscript with, "Why This Book?" His answer is important. Because of our many differences in race, gender, economic circumstances, philosophical outlook and more, our continued success as a nation requires "a common core. . . . The United States Constitution and its history are what We (with a capital W) have in common, and if We don't like that document as is, We can amend it, as, indeed, previous generations of Americans have made amends and amendments. This terse text and the saga that underlies it are what make us Americans. Without broad agreement on the constitutional basics — not every detail, but on the big picture, the main narrative — we are lost. We are Babel. We are not We. And if so, We may ultimately lose the Republic that Franklin hoped we could keep."[5]

He apparently thinks that Babel is not far off. "On C-Span," he says, "distinguished Civil War historians airily [opine] that the Constitution of 1787-1788 was indeterminate on the secession question. *Nonsense*. On MSNBC, radical-chic intellectuals [proclaim], with barely suppressed smirks, that the Americans revolted in 1776 mainly to protect slavery, which the British government was seeking to abolish. *Ridiculous*. On Fox News, pundits [tell] viewers that the founders loathed 'democracy' as a word and as a concept, and embraced only 'republics,' which were always and everywhere sharply contradistinguished from 'democracies.' *Baloney*."[6]

The theme running through the 675 intervening pages deals not so much with specific historical incidents as it does with conversations between and among the Colonies and the Colonists as the movement toward nationhood proceeded. Those conversations were facilitated by the advent of printing presses. Those presses, Amar suggests, facilitated political-legal conversations between and among ordinary community members, not just the "towering geniuses" who had theretofore dominated political conversation.[7] And those conversations, in Amar's view, shaped the form the new American nation eventually took.[8]

Early conversations focused on taxation, largely in response to Parliament's anticipated enactment of laws imposing customs duties

1. Akil Reed Amar, *The Words That Made Us: America's Constitutional Conversation, 1760-1840* (2021).
2. *Id.* at xi.
3. *Id.* at xii-xiii.
4. *Id.* at xiii.
5. *Id.* at 676.
6. *Id.* at 677.
7. *Id.* at 43.
8. *Id.*

on imported molasses.[9] An earlier Parliamentary tax was so onerous that smugglers could evade it easily through a system of bribes to customs officials. Parliament hoped that less onerous import duties would increase Colonial compliance, thereby resulting in greater revenues for the Crown.[10]

Colonists, however, saw the strategy not only for what it was but for what they believed it portended: a virtually endless array of new Parliamentary taxes. In an effort to head off those taxes, various Colonial assemblies met and, via newspapers, pamphlets and other printed documents, circulated resolutions opposing the anticipated revenue measures.[11] Their opposition was based on a well-established component of the unwritten English Constitution that linked the Parliamentary power to tax on Parliamentary representation of and election by those whom Parliament intended to tax. Neither concept applied to the Colonies.[12]

Widespread circulation of the Colonial resolutions, Amar suggests, opened a period during which "Americans from different parts of the continent were . . . beginning to talk constitutionally to each other and were trying to talk to London."[13] But London wasn't listening. Instead, Parliament forged ahead and enacted the wildly unpopular Stamp Act of 1765. With some notable exceptions, the Colonial response was restrained.[14] In October of that year, however, opposition to the tax produced the Stamp Act Congress in which delegates from nine of the Colonies gathered in New York City to discuss a collective response to the Parliamentary action.[15]

In Amar's view, the New York City gathering marked "the first time Americans were beginning to speak formally, juridically, legally about Americans as such. Not about the Province of Massachusetts Bay or the Colony of Connecticut or the Province of New York, but about '*the People of these Colonies*' — all in the same boat."[16] In that sense, the gathering marked "the beginning of a new era of increasingly intense conversation and ever tighter cooperation among the mainland provinces."[17]

Again, however, London failed to listen. Although Parliament repealed the Stamp Act in 1766, less than a year after it was enacted,[18] the following year it enacted the Townshend Acts to raise "money via new duties on a range of imported items, including glass, lead, paint, paper (again, stupidly), and tea."[19] Worse, to ensure adherence to the taxation requirements, Parliament also made provisions for writs of assistance that ultimately would prove to be intolerable to the Colonists.[20]

Ultimately, Parliament repealed most of the duties contained in the Townshend Acts, but it left in place a tax on tea. That led to the Boston Tea Party,[21] an action designed much more to engage public attention than to prevent the tea from reaching the Boston docks where the tax collectors were waiting. The Tea Party was really about theatre, not destruction of tea. As Amar observes, it was nonviolent, proportionate, public-spirited and non-piratic, conversation-starting and attention-grabbing, playful and stylish.[22] But in the process, it dramatically expressed the Colonial objections to a tax imposed by a Parliament the taxpayers had no role in creating and no power to change.

Parliament responded by passing the Coercive Acts, renamed by slogan-savvy Colonials as the Intolerable Acts. Among other things, those measures closed Boston Harbor until someone paid for the jettisoned tea. They also reduced the right of Bostonians to assemble and discuss their common concerns.[23]

As Amar sees it, the Coercive Acts reflected London's failure to listen carefully to what the Americans, not just the Bostonians, were saying. Far from isolating Boston from its other Colonial colleagues, the acts pulled the Colonies closer together and produced overlapping networks among them. Those networks included standing committees of correspondence among the Colonial assemblies, intra-Colonial local committees, local chapters of the Sons of Liberty, merchant groups who organized boycotts, and interlinked local newspapers copying each other's copy and broadly reflecting a national conversation regarding taxation and other issues of common concern.[24] "Rather than joining the widening and deepening conversation," Amar suggests, "London unwisely tried to squelch it and in the process further isolated itself."[25]

9. *Id.* at 45.
10. *Id.*
11. *Id.* at 48-49.
12. *Id.* at 49-50.
13. *Id.* at 50.
14. *Id.* at 53-54.
15. *Id.* at 58.
16. *Id.* at 61.
17. *Id.* at 62.
18. *Id.* at 64.
19. *Id.* at 65.
20. *Id.*
21. *Id.* at 77-80.
22. *Id.* at 79-80.
23. *Id.* at 83-84.
24. *Id.* at 84-86.
25. *Id.* at 87.

London's isolation produced another Colonial conversation, this one about creation of a different and entirely separate form of government.[26] Again, London chose not to participate.[27] Not only that, but, on April 19, 1775, it sent troops to Lexington and Concord, thus giving more energy to the ongoing intra-Colonial conversation and propelling its steadily increasing intensity.[28]

Publication of *Common Sense*, Thomas Paine's early 1776 pamphlet containing a broadside attack on the legitimacy of monarchy as a form of government, provided another source of energy for the ongoing conversation. Paine's attack on the very legitimacy of rule by a monarch raised questions and engaged concepts virtually unheard of at that time. Paine's timing could not have been better. The pamphlet sold thousands of copies within weeks, captivating an America that was ready for captivation by bold new ideas.[29]

Evidence that bold new ideas were necessary soon came with publication of what Amar describes as "a smug and stupid" speech King George delivered to Parliament in which he praised the Coercive Acts and showed no comprehension of the nature or depth of the grievances that were building in the Colonies.[30]

Ultimately, George's unresponsiveness and the tone-deafness with which he and Parliament imposed further sanctions produced the first gathering of representatives of all Colonies to discuss not only an appropriate response but, more significantly, whether and to what extent the Colonists were content with any form of British rule. Concluding that they were not content, on July 2, 1776, they unanimously declared their independence and "that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved."[31]

A more formal Declaration of Independence soon followed. Although Thomas Jefferson is rightly credited with a major role in crafting that Declaration, Amar's view is that, rather than starting from scratch, the document Jefferson produced "powerfully summarized an intense American conversation that had been unfolding for more than a dozen years."[32] In that sense, he suggests, America itself wrote the Declaration. Jefferson was a "stylish notetaker" who had been carefully following the "extraordinarily wide and deep conversation between 1763 and 1776" that had been taking place among the Colonies through newspapers, committees of correspondence, local gatherings and Colonial legislation.[33] King George's failure to listen to that conversation led to a fully independent nation instead of an America that was part of a commonwealth-like arrangement that existed, and still exists, elsewhere in areas of British influence.[34]

The Declaration of Independence immediately produced new conversations about the form of government that should replace the form that had been jettisoned. Initially, the conversations took place separately in each of the Colonies as the Colonists began to think and talk about constitutions for their own self-governance. In those discussions, they had to start from scratch because few advanced societies before 1776 could be characterized as self-governing and written constitutions were virtually unheard of.[35]

The first generation of constitutions the Colonial conversations produced were designed not just for lawyers and legislators but for all people who read newspapers and who would ultimately be asked to approve their constitutions as an agreed-upon form of self-governance.[36] Ultimately, the various governmental models those constitutions embodied and, more importantly, the discussions among Colonies they produced, provided the basis for the Articles of Confederation.[37] Though those Articles were deeply flawed and ultimately abandoned, the Colonial conversations that produced them were, in Amar's view, "an earnest first draft of an entirely novel and extremely challenging legal project — 'the United States of America.'"[38]

Ultimately, the failed Articles of Confederation were replaced by the Constitution drafted in Philadelphia in 1787. But the Philadelphia drafters, Amar suggests, were editors and compilers of Colonial thought about governance rather than originators of the concepts the draft Constitution contained.[39] The document those editors and compilers produced "was compact, written in plain English, and designed for easy newspaper publication and republication in full."[40]

Publication abounded and the draft sparked a new national

26. *Id.* at 90.
27. *Id.* at 92-93.
28. *Id.* at 94.
29. *Id.* at 95
30. *Id.* at 96.
31. *Id.* at 118-19.
32. *Id.* at 127.
33. *Id.* at 128.
34. *Id.* at 93.
35. *Id.* at 154.
36. *Id.* at 155-56.
37. *Id.* at 162-63.
38. *Id.* at 165.
39. *Id.* at 194.
40. *Id.* at 182.

conversation not only about provisions the draft contained but about fundamental concepts of self-governance. *The Federalist*, containing over 80 essays authored by James Madison, Alexander Hamilton and John Jay, and widely published in newspapers throughout the Colonies, is among the most well-known components of that conversation.[41] Those essays "responded directly, quickly and powerfully to competing newspaper essays by critics of the Constitution" and ultimately led to its adoption.[42] In the end, Amar tells us, adoption of the Constitution was the result of a national constitutional conversation that "was already in full swing in 1776, and the 1787 document must thus be understood as a continuation of a long conversation that Americans had been conducting among themselves."[43]

Amar's focus on the organic nature of what became the Constitution does not overlook or elide the major contributions made by individuals like Hamilton, George Washington, Jefferson, Madison and others. It does, however, reflect his belief that, as participants in the long conversation that led to the Constitution, those contributors were careful and thoughtful listeners as well as originators of new ideas.

Amar also focuses on several of those contributors for the role they played in setting up the new government after the Constitution was formally adopted in 1788. One was Washington, who had been unanimously selected as the nation's first president in 1789. Starting from scratch, he had to think about and plan the new nation's foreign relations, learn how to interact with the newly created legislature, work with his staff, create a military staff, pick Supreme Court justices and, perhaps above all, "maintain the goodwill of Americans who supported the new constitutional order while wooing its skeptics and opponents."[44]

He accomplished all of those things because "Washington could be trusted."[45] That trust existed because when the Revolutionary War ended and Washington "commanded the only effective army on the continent, [he] had not named himself King . . . Rather, . . . [he] dismissed his troops, resigned his military commission, and returned home to resume private life ..."[46] Because of that trust, he was able to persuade people of extraordinary talent to join the new government and begin the task of defining and implementing the words the Constitutional text contained.[47] Perhaps as important, Washington was "'media savvy' . . . both the product of America's emerging newspaper culture and a connoisseur of it."[48] That was an important quality in an era in which vigorous newspaper debates about issues of governance had played and would continue to play an important role in public life.

Hamilton was another contributor on whom Amar focuses. After ratification of the Constitution, questions no longer focused on what the Constitution should say. Instead, they shifted to what the Constitution did say. The words, of course, were there and had been thoroughly debated but, in many places, the text had been written in broad and conceptual terms rather than a series of explicit directives.[49] By interpreting those terms and convincing others to accept his interpretation, Hamilton was able to create a banking system that absorbed the national debt the war had created as well as a system of national currency, both of which were essential to the new nation's financial success.[50] Hamilton also provided advice and vision for creating the new Supreme Court, which he had described in Federalist #78 as "the least dangerous branch" of the new government.[51]

John Adams, our local hero, does not fare so well in Amar's account of the key figures who brought the Constitution to life. To be sure, he credits Adams' "Thoughts on Government" as an outline of

41. *Id.* at 202.
42. *Id.* at 231.
43. *Id.* at 262-63.
44. *Id.* at 276.
45. *Id.* at 288.
46. *Id.*
47. *Id.* at 322.
48. *Id.* at 283.
49. *Id.* at 327-28.
50. *Id.* at 329.
51. *Id.* at 330.

the form of government that ultimately took root.[52] But Congress had sent him on diplomatic missions for the decade from 1778 to 1788, and he therefore missed most of the initial efforts to breathe life into the new Constitution's textual language. Because he was away for that period, he became "a constitutional Rip Van Winkle who had slept through many of the most important events and conversations a sound constitutionalist needed to understand" as implementation of the new framework proceeded.[53] Sadly, in Amar's view, Adams had "skyrocketed from utter obscurity in 1761 to the apex of glory in 1776, only to spend the rest of his life falling back to earth, frustrated and confused."[54]

This is an ambitious book by a distinguished and ambitious author. Indeed, ambition was his goal. In the postscript, he tells that "the book you have just read is nothing if not ambitious. I have aimed to offer you the most penetrating and wide-ranging book about America's Constitution and America's founders now available, a book that seeks to take its place alongside and indeed to synthesize and (dare I say it?) succeed" a list of prominent books by prominent authors on the subject of American history.[55] But this book is not the end of his ambition. His next project is *The Words That Made Us Equal: America's Constitutional Conversation, 1840-1920*.[56] And he hopes to follow that with *The Words That Made Us Modern: America's Constitutional Conversation, 1920-2000*.[57]

In the postscript, Amar also explains in some detail about how components of his narrative differ sharply from the approach to similar historical events taken by other scholars of American history.[58] His explanation reveals that he intended this book and intends those that follow to be components of a continuing conversation with other scholars about how to explain and interpret various aspects of American history. That intention may be the biggest problem this book poses for the average reader. Unaware that he or she is in the middle of an ongoing conversation with absent participants whose voices cannot be heard, the reader may have difficulty following or understanding the reason for the sometimes granular and extensive detail with which Amar frequently discusses events and ideas that seem to involve minor aspects of the American effort to create a new nation. In the end, though, the persevering reader will be rewarded with a thoughtful and well-told tale.

— Hon. James F. McHugh (ret.)

52. *Id.* at 407.

53. *Id.* at 409.

54. *Id.* at 406. Of course, other thoughtful historians hold a very different view. *See, e.g.,* David McCullough, *John Adams* (2001). How interesting it might have been to hear a conversation on the subject between Amar and the late David McCullough.

55. *Id*. at 678.

56. *Id.* at 697.

57. *Id*. at 697-98.

58. *Id.* at 679 et seq.

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