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MASSACHUSETTS COURT RULES

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PROBATE AND FAMILY COURT RULES
D. PROBATE COURT RULES

*ALM Probate Ct. Rule 16* (2007)

Review Court Orders which may amend this rule.

Rule 16. Will Contests

(a) If any person who has filed an appearance pursuant to General Probate Rule 2 on a petition for the probate of a will fails to file a written affidavit of objections to the petition, stating the specific facts and grounds upon which the objection is based, within thirty (30) days after the return day (or such other time as the court, on motion with notice to the petitioner, may allow), the court may, upon its own motion or on motion of the petitioner, the guardian ad litem (if any), or any person whose appearance is on file (with notice to any person whose appearance is on file and, if applicable, the guardian and petitioner), order the appearance struck.

(b) If an affidavit of objections fails to comply with the requirements of the foregoing section (a), such affidavit of objections and the appearance of the party filing such affidavit of objections may be struck on motion with notice in the manner provided in the foregoing section (a) at any time after the filing of such affidavit of objections.

(c) Upon the filing of an affidavit of objections, the court or any party may request a pretrial conference to be held within thirty (30) days. The court at such pretrial conference may consider any of the matters enumerated in Rule 16 of the M.R. Civ. P. and may enter a pretrial order with respect to any one or more of such matters.

(d) No postponement or continuance of the trial date set by the court at such pretrial conference shall be granted except for good cause shown upon motion with notice allowed by the court after hearing.

**HISTORY:** Amended Dec 15, 1986, effective Jan 2, 1987

**NOTES:**

EDITORIAL NOTE-
The 1986 court order transferred the provisions of former section 2A of the Probate Court Rules to this rule, and added subsections (b)-(d). Former Rule 16 dealt with jury issues.

TEXTS--

Riley, Estate Administration in Massachusetts: A Handbook with Forms, Second Edition (Michie) § 4.06.

CASE NOTES

ALM Probate Ct. R. Rule 16 (as amended effective Jan. 2, 1987) affords will contestant who states by affidavit facts constituting lack of testamentary capacity adequate due process, in that it allows for filing of affidavit and judicial hearing. *Wimberly v Jones (1988) 26 Mass App 944, 526 NE2d 1070,* review den *403 Mass 1103, 529 NE2d 1346.*

Judge correctly struck appearance of contestants to will, where affidavit of attorney stating contestant's grounds of objections to will did not satisfy requirements of ALM Probate Ct. R. Rule 16, since attorney had no direct knowledge of matters asserted in his affidavit. *Howland v Cape Cod Bank & Trust Co. (1988) 26 Mass App 948, 526 NE2d 1073.*

Affidavit implies statement under oath by person having direct knowledge of facts which he verifies, except as otherwise clearly stated in affidavit itself. *Howland v Cape Cod Bank & Trust Co. (1988) 26 Mass App 948, 526 NE2d 1073.*

Probate judge abused discretion in not allowing will contestants to amend objections so as to contain specific allegations and to be sworn by contestant with personal knowledge, where proponents waited for more than one year to move to strike objections and parties had engaged in extensive discovery. *Hobbs v Carroll (1993) 34 Mass App 951, 614 NE2d 695,* summary op at (Mass App) 21 MLW 2938.

Probate Court rule requiring objections to will to be specific is intended to help screen out frivolous attacks on wills. *Hobbs v Carroll (1993) 34 Mass App 951, 614 NE2d 695,* summary op at (Mass App) 21 MLW 2938.

Where pretrial order stated that only contested issues concerned disposition of items of personal property between husband and wife, judge's deviation from terms of pretrial order by ordering husband to pay $10,000 to wife was abuse of discretion. *Slade v Slade (1997) 43 Mass App 376, 682 NE2d 1385.*

Probate judge erred in dismissing objection to allowance of will rather than allowing full evidentiary hearing on merits of objection, where affidavits in support of objection indicated that two nurses in charge of care of decedent who was 95 when he died and 90 when he executed will and trust may have exerted undue influence over decedent. *Gilmore v Harte (1997) 43 Mass App 916, 683 NE2d 729.*

Affidavit filed by testator's son objecting to allowance of will on grounds of undue influence by testator's aunt satisfied standard of "specific facts and grounds" set forth in Rule 16 of Probate Court Rules, where affidavit alleged that nearly illiterate testator who was dependent on aunt left only 5000 to son who lived with him and remainder of estate, including house, to aunt's two nieces who rarely saw testator, and that aunt had numerous opportunities to exercise undue influence over testator and did so. *Baxter v Grasso (2001) 50 Mass App 692, 740 NE2d 1048.*

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PROBATE AND FAMILY COURT RULES
D. PROBATE COURT RULES

*ALM Probate Ct. Rule 27A* (2007)

Review Court Orders which may amend this rule.

Rule 27A. Depositions and Discovery

Depositions and discovery shall be governed by Rules 26 through *37 of the Mass.R.Civ.P.*

**HISTORY:** Added, effective January 1, 2000

**NOTES:**

REPORTER'S NOTES
[2000]The adoption of rule 27A works a major change in probate discovery practice. Formerly, the discovery rules of the Massachusetts Rules of Civil Procedure were only applicable to probate accounts. Other contested probate proceedings required prior court approval for obtaining discovery which is clearly inconsistent with modem civil discovery rules. Now depositions and discovery in all probate matters shall be governed by the Massachusetts Rules of Civil Procedure.

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MASSACHUSETTS COURT RULES

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PROBATE AND FAMILY COURT RULES
D. PROBATE COURT RULES

*ALM Probate Ct. Rule 27B* (2007)

Review Court Orders which may amend this rule.

Rule 27B. Summary Judgment

Summary judgment may be granted in accordance with the provisions of *Rule 56 of the Mass.R.Civ.P.*

**HISTORY:** Added, effective January 1, 2000

**NOTES:**

REPORTER'S NOTES
[2000]Rule 27B makes summary judgment under *Rule 56 of the Massachusetts Rules of Civil Procedure* available in probate proceedings.

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MASSACHUSETTS COURT RULES

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MASSACHUSETTS RULES OF CIVIL PROCEDURE
III. PLEADINGS AND MOTIONS

*ALM R. Civ. P. Rule 16* (2007)

Review Court Orders which may amend this rule.

Rule 16. Pre-Trial Procedure: Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master;

(6) The possibility of settlement;

(7) Agreement as to damages; and

(8) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

**NOTES:**

REPORTERS' NOTES-

[1973] Although in recent years, the Superior Court has been unable to make consistent systematized use of pre-trial conferences, the device is well-worth preserving, regulating, and encouraging. Coupled with the liberal discovery provisions in the Rules, pre-trial procedure can simplify and expedite every type of litigation. The basic principle of Rule 16, including the trial judge's power to

modify the pre-trial order "to prevent manifest injustice," are quite familiar. *Gurman v Stowe-Woodward, Inc., 302 Mass 442, 444-445, 19 NE2d 717, 718 (1939)* and cases cited; *Mitchell v Walton Lunch Co., 305 Mass 76, 80, 25 NE2d 151, 154 (1940).*

The word "master" as used in Rule 16(5) includes an auditor. See Rule 53(a). The changes in Rule 16(5) from Federal Rule 16(5) are designed to reflect Massachusetts practice. Because an auditor's findings are by their very nature evidence utilizable before a jury (see, e. g., *Roth v Rubin Bros., 344 Mass 604, 607, 183 NE2d 856, 858-859 (1962)),* it has not been considered necessary to say so. Rule 16(6) and Rule 16(7), taken from *Superior Court Rule 58*, are designed to emphasize that agreements about money, in either partial or full resolution of the dispute, are the most valuable by-products of a pre-trial system.

CROSS REFERENCES--

Pretrial conferences in criminal proceedings, ALM Crim R 11.

Joinder of orders under Rules 23 and 16, Rule 23(d).

Partial summary judgment order, Rule 56.

FEDERAL ASPECTS--

Pretrial Conference, Scheduling, Management, *USCS Rules of Civil Procedure 16.*

28 Fed Proc, L Ed, Pretrial Procedure §§ 64:1 et seq.

1 Fed Proc Forms L Ed, Actions in District Court, §§ 1:265 to 1:268, 1:1284 to 1:1287, 1:1295 to 1:1298.

1 Fed Proc Forms, Actions in District Court §§ 1:1251-1:1298.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES--

*62A Am Jur 2d, Pretrial Conference and Procedure §§ 1* et seq.

11A Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure §§ 1421-1443.

ANNOTATIONS--

Power of court to adopt general rule requiring pretrial conference as distinguished from exercising its discretion in each case separately. 2 ALR2d 1061.

Binding effect of court's order entered after pretrial conference. 22 ALR2d 599.

Appealability of order entered in connection with pretrial conference. 95 ALR2d 1361.

Formal sufficiency of response to request for admissions under state discovery rules. 8 ALR4th 728.

Consideration or submission at trial, under *Rule 16 of Federal Rules of Civil Procedure*, of issues not fixed for trial in pre-trial order. 11 ALR Fed 786.

Authority of District Court, under *Rule 16 of the Federal Rules of Civil Procedure*, to compel parties to agree on pretrial stipulation of facts. 40 ALR Fed 859.

Consideration at trail, under *Rule 16 of Federal Rules of Civil Procedure*, of issues not fixed for trial in pretrial order. 117 ALR Fed 515.

TEXTS--

Swartz and Swartz, Massachusetts Pleading and Practice -- Forms and Commentary (Matthew Bender) §§ 16.1-16.34, 20.

Swartz, Trial Handbook for Massachusetts Lawyers 2d Ed §§ 2:28, 10:2.

CASE NOTES



I. In General

1. In general

"Litigation control conference" called by Superior Court judge was authorized by *Massachusetts Rules of Civil Procedure, Rule 16* and *Superior Court Rule 27. Norton v Vaughan (1982) 13 Mass App 1075, 435 NE2d 634.*

Judge had discretion to refuse to allow defendant to introduce certain deeds in evidence because they were not on list of exhibits, inasmuch as this was proper sanction for noncompliance with his pretrial order. *Cole v Anciporch (1988) 25 Mass App 975, 520 NE2d 499,* review den *402 Mass 1102, 523 NE2d 267.*

Nothing in the record indicated the existence of a stipulation, written or otherwise, or that the case was not tried in accordance with the written pretrial reports of the respective parties; thus, the injured party could not assert there was a stipulation in the pretrial conference in regard to medical bills associated with pain and suffering. *DeMarco v Martin (2003) 2003 Mass App Div 95, 2003 Mass App Div LEXIS 36.*

In a summary proceeding initiated by landlords to obtain possession of leased premises, once judgment was entered in favor of the landlords and the tenants they were suing abandoned their appeal of that judgment, there was no authority for granting the tenants' motion to appoint a real estate master, as the post-trial and post-judgment appointment of a master was not authorized. *Caplis v Richard (2003, Super Ct) 16 Mass L Rep 793, 2003 Mass Super LEXIS 282.*

2. Evidentiary matters

Manufacturer's request for sanctions based on spoliation of the evidence was denied because the doctrine of spoliation was inapplicable; the testing company that destroyed the allegedly faulty refrigerator was not a party to the litigation, and the parties in the case did not impose a duty on the company by serving it with a subpoena duces tecum pursuant to *Mass. R. Civ. P. 45(b)* or by entering into a contract with it. *Quincy Mut. Ins. Co. v W.C. Wood Co. (2007, Super Ct) 22 Mass L Rep 541, 2007 Mass Super LEXIS 177.*

3-10. [Reserved for future use.]

II. Case Notes under *Federal Civil Rule 16* [For comparison of Massachusetts Rule with Federal Rule, see Reporters' Notes, supra]

11. In general

Where, in action for divorce, the ownership of a house, the proceeds from its occupancy, and the disposition of the furniture were in issue, and the defendant averred that she was not the wife of the plaintiff, if she wished pre-trial procedure and a jury trial upon the property issues she should have demanded it. *Scholl v Scholl (1945, App DC) 80 US App DC 292, 152 F2d 672* (superseded by statute as stated in *Webster v Hope (In re Hope) (BC DC Dist Col) 231 BR 403, 11* Fourth Cir & Dist Col Bankr Ct Rep 290).

Trial judge erred at pre-trial conference in entering judgment in favor of defendant, over objection of plaintiff, even though case had become one of law for damages, plaintiff having right to trial in open court. *Clay v Callaway (1949, CA5 Ga) 177 F2d 741, 25 BNA LRRM 2066, 17 CCH LC P 65441,* reh den (CA5 Ga) *178 F2d 758, 25 BNA LRRM 2188, 17 CCH LC P 65509.*

A rule of the district court requiring party to provide the other party with a list of witnesses to be called at trial is proper even as applied to the secretary of labor in a wage and hour case. *Wirtz v Hooper-Holmes Bureau, Inc. (1964, CA5 Ga) 327 F2d 939, 48 CCH LC P 31527, 8 FR Serv 2d 16.*268, Case 1.

It was error for trial court not to have permitted amendment of pretrial order to allow presentation of new theory of recovery where the judge ruled admissible most of the evidence upon which plaintiff's new theory was based. *Laguna v American Export Isbrandtsen Lines (1971, CA2 NY) 439 F2d 97, 14 FR Serv 2d 1210.*

Rule 16 should be read in light of Rule 15(b). *Mains v United States (1975, CA6 Ohio) 508 F2d 1251, 75-1 USTC P 9167, 35 AFTR 2d 541,* on remand (SD Ohio) *76-2 USTC P 9520, 38 AFTR 2d 5336,* affd (CA6) *78-1 USTC P 9414, 42 AFTR 2d 6026* and cert den *439 US 981, 58 L Ed 2d 652, 99 S Ct 569.*

Rule 16 does not furnish District Court authority on own initiative to issue notice to potential plaintiffs of pendency of action at least absent stipulation by parties. *Pan American World Airways, Inc. v United States Dist. Court for Cent. Dist. (1975, CA9 Cal) 523 F2d 1073, 20 FR Serv 2d 1.*

A party may not require his adversary to resort to pre-trial procedure or the taking of depositions to supply deficiencies in the former's pleading. *Sweeney v Buffalo Courier Express, Inc. (1940, DC NY) 35 F Supp 446.*

Plaintiff cannot subvert the clear intent of the pretrial rules by withholding his theory of liability under the cloister of privilege. Defendant's motion to compel plaintiff to make a more definite statement of his counsel's contentions as to defendant's liability in breach of warranty and negligence action was granted. *Harvey v Eimco Corp. (1963, ED Pa) 33 FRD 360, 7 FR Serv 2d 298.*

Corporate defendants in criminal antitrust suit were entitled only, as a matter of right, to pre-trial disclosure of the grand jury testimony of corporate officers who were officers at the time they testified and of individuals who testified before the grand jury in response to subpoenas duces tecum directed to the corporation; however, if during the progress of the suit matters developed which presented more compelling reason than had been presented the court would entertain new motions based upon those subsequent developments and would determine them upon the then existing circumstances. *United States v Aeroquip Corp. (1966, ED Mich) 41 FRD 441, 1967 CCH Trade Cases P 71972.*

While under this rule, literally read, it is the court which is vested with the discretion to call the case up for pre-trial, such action may be instigated by a suggestion from counsel in the form of a motion. *Fisher v Donbar Development Corp. (1967, ED NY) 42 FRD 655, 11 FR Serv 2d 1091.*

In an action in which the issues are substantially the same if not identical to those involved in a Coast Guard official hearing in connection with the sinking of a ship, the testimony given at such hearing by witnesses who are unavailable at the trial or without the jurisdiction of the court is admissible subject to objections including relevancy and hearsay. The witnesses were under oath, plaintiff was represented throughout the proceedings by its present attorney, who was given the right to cross-examine and object. These procedures protected plaintiff's rights and minimized the dangers. *In re Panoceanic Tankers Corp. (1971, DC NY) 54 FRD 283.*

12. Purpose generally

The purpose of the pre-trial conference is to simplify the issues, amend the pleadings where necessary, and to avoid unnecessary proof of facts at the trial. *McDonald v Bowles (1945, CA9 Cal) 152 F2d 741.*

Pre-trial proceedings are designed to determine what the issues are, not to invade the trial function of resolving those issues. *Reynolds Metals Co. v Metals Disintegrating Co. (1949, CA3 NJ) 176 F2d 90, 82 USPQ 84.*

The purpose of this rule is to formulate the issues for trial, and when the issues are formulated at a pre-trial hearing, the court is required to enter an order reciting such action. When entered, such

pre-trial order controls the subsequent course of the action. *Owen v Schwartz (1949, App DC) 85 US App DC 302, 177 F2d 641,* 14 ALR2d 1337.

This rule does not countenance an attorney agreeing to the dismissal of his client's cause of action. *Viking Theatre Corp. v Paramount Film Distributing Corp. (1966, CA3 Pa) 362 F2d 980, 1966 CCH Trade Cases P 71828.*

Provisions for pre-trial procedure, depositions, and discovery, and summary judgment proceedings are designed to supplement pleadings and thereby afford more expeditious methods for narrowing litigation to the genuine issues which are material to the case to the end that the just, speedy, and inexpensive determination of every action may be secured. *Perry v Creech Coal Co. (1944, DC Ky) 55 F Supp 998, 8 CCH LC P 62280.*

The purpose is to weed out extraneous issues, leaving those that are material, and, where necessary, to amend the pleadings to clarify issues or to state issues that are to be tried but had not theretofore been brought up. *Trantham v Canal Ins. Co. (1953, DC Tenn) 117 F Supp 241,* affd (CA6 Tenn) *220 F2d 752.*

13. Failure to appear for pre-trial conference

Federal district court did not abuse its discretion in dismissing plaintiff's action because of his attorney's failure to appear at pre-trial conference, of which he had been given notice pursuant to local rule of the district court. *Link v Wabash R. Co. (1961, CA7 Ind) 291 F2d 542, 4 FR Serv 2d 295.*

Plaintiff's failure to appear at a pre-trial conference ordered by the court, advance notice of which was given to the attorneys for both parties, constitutes a failure to prosecute and failure to comply with the rules, and defendant's motion to dismiss the action on the merits should be granted. *Wisdom v Texas Co. (1939, DC Ala) 27 F Supp 992.*

No exception is made for an action in which the United States is a party; the United States Attorney must appear and his failure to do so would subject the government to the same sanctions which may be imposed upon a private litigant. *Walling v Richmond Screw Anchor Co. (1943, DC NY) 4 FRD 265.; Daitz Flying Corp. v United States (1945, DC NY) 4 FRD 372.*

14. Matters for consideration at pre-trial conference

Pre-trial conference does not take the place of regular trial. The spirit of a pre-trial conference is not only to call the parties together and ask them to stipulate as to all matters concerning which there can be no dispute, but to compel them to stipulate and agree as to all facts concerning which there can be no real issue. The purpose is to simplify issues, amend the pleadings where necessary, and to avoid unnecessary proof of facts at the trial. *Berger v Brannan (1949, CA10 Colo) 172 F2d 241,* cert den *337 US 941, 93 L Ed 1746, 69 S Ct 1519.*

District judge had the power to compel full discovery as a prerequisite to having an effective pre-trial conference despite the availability of other potential avenues of discovery. *Buffington v Wood (1965, CA3) 351 F2d 292, 9 FR Serv 2d 35B.22,* Case 2 (criticized by *Identiseal Corp. of Wisconsin v Positive Identification Systems, Inc. (CA7 Wis) 560 F2d 298, 23 FR Serv 2d 1466).*

At a pre-trial hearing, the court considered motion for jury trial, matters relating to subpoena duces tecum and questions propounded at taking of deposition. *Ulrich v Ethyl Gasoline Corp. (1942, DC Ky) 2 FRD 357.*

15. Simplification of issues

One of purposes which pretrial conference serves is to expedite disposition of cases by simplifying issues and eliminating surprise. *Mains v United States (1975, CA6 Ohio) 508 F2d 1251, 75-1 USTC P 9167, 35 AFTR 2d 541,* on remand (SD Ohio) *76-2 USTC P 9520, 38 AFTR 2d 5336,* affd (CA6) *78-1 USTC P 9414, 42 AFTR 2d 6026* and cert den *439 US 981, 58 L Ed 2d 652, 99 S Ct 569.*

Pre-trial procedure may be used as a substitute for a bill of particulars, after answers are filed and interrogatories answered, for the simplification of the issues and determination of question of necessary amendments. *Deltox Rug Co. v Colonial Coverlet Co. (1939, DC Tenn) 29 F Supp 122, 42 USPQ 602.*

Pre-trial conference should be held where parties cannot substantially agree as to the simplification of the issues. *Wilson v Kennedy (1948, DC Pa) 75 F Supp 592.*

Pre-trial order may pass judgment upon the legal sufficiency of a defense. *American Machine & Metals, Inc. v De Bothezat Impeller Co. (1949, DC NY) 82 F Supp 556, 80 USPQ 416,* app dismd (CA2 NY) *173 F2d 890, 81 USPQ 504,* appeal after remand (CA2 NY) *180 F2d 342, 84 USPQ 155,* cert den *339 US 979, 94 L Ed 1383, 70 S Ct 1025, 85 USPQ 526.*

A pre-trial order limiting the issues for trial must be based on admissions or agreements of counsel for both parties and not on "concessions and undertakings" by counsel for only one of the parties. *United States v Hartford-Empire Co. (1940, DC Ohio) 1 FRD 424.*

The making of an order for a simplification of the issues under this rule is lodged in the court's discretion. *Yale Transport Corp. v Yellow Truck & Coach Mfg. Co. (1944, DC NY) 3 FRD 440.*

The task of limiting the issues and pruning the surplusage should be accomplished by pre-trial proceedings and not by motions and addressed to the complaint. *Colton v Wonder Drug Corp. (1957, DC NY) 21 FRD 235.*

Court has power and authority under this rule to define the issues in a protracted case where counsel have failed to agree as to what are the triable issues. *Life Music, Inc. v Broadcast Music, Inc. (1962, SD NY) 31 FRD 3, 6 FR Serv 2d 286.*

In protracted antitrust action parties could not, after numerous pre-trial conferences, attempt to broaden, rather than define the issues. *Life Music, Inc. v Broadcast Music, Inc. (1962, SD NY) 31 FRD 3, 6 FR Serv 2d 286.*

16. Necessity or desirability of amendments

Contract was made an issue as a result of an order entered pursuant to a pre-trial conference, even though party failed to amend its pleadings to make the contract an issue. *Low v Davidson Mfg. Co. (1940, CA7 Ill) 113 F2d 364.*

At pre-trial conference, action was dismissed and discontinued, without prejudice, for want of jurisdiction, as to all defendants except one, as to which defendant plaintiff was granted leave to

amend his complaint to allege a separable controversy. *Kapp v Frank W. Kerr & Co. (1942, DC Mich) 2 FRD 509.*

17. Admissions of fact and documents

In action by price administrator to enjoin defendants from selling various meats and meat products at prices in excess of those established by price regulation and for treble damages, the pre-trial order directed the price administrator to deliver to defendant a transcript prepared by investigators of the office of price administration from invoices and records of defendant; this exhibit not only set forth the facts of each sale as appeared on each invoice, but also the ceiling price and the amount of overcharge; the pre-trial order directed the defendant to make objections to the exhibit so that the objections as well as the exhibit would compromise the statement of the facts in dispute; the defendant made no objections and the cause was submitted to the jury; it was held that the jury's finding of the facts to be as submitted in the exhibit were conclusive on appeal to the court of appeals. *McDonald v Bowles (1945, CA9 Cal) 152 F2d 741.*

Where stipulation following pre-trial conference provided that pictures of highway secured by defendant could be admitted into evidence without further identification, and defendant introduced into evidence seven photographs of defendant's automobile, court would have been justified in excluding latter evidence due to surprise, but did not abuse his discretion in admitting same. *Cherney v Holmes (1950, CA7 Wis) 185 F2d 718.*

In action by assureds and against insurors for wind loss allegedly payable under extended coverage endorsement on fire policy, testimony that it was agent's idea that assureds purchase the policy, as endorsed, was irrelevant and immaterial, but admission of such testimony was not prejudicial. *Queen Ins. Co. v Larson (1955, CA9 Hawaii) 225 F2d 46.*

The acceptance, by a trial judge, of testimony offered by a witness whose name was not included on an original pretrial order witness list, but whose name was submitted on an amended list the day following submission of the original list and providing opposing counsel eight days' notice of an intention to call the witness, was not error, but was within the discretion of the court. *Davis v Duplantis (1971, CA5 La) 448 F2d 918, 15 FR Serv 2d 544.*

Discretion granted trial court under Rule 16 is not unlimited: language of rule does not confer upon court power to compel litigants to obtain admissions of fact and of documents even if it is clear that such admissions would simplify trial of case; instead, rule requires parties to appear and consider possibility of admissions which would lessen their task at trial. *Identiseal Corp. of Wisconsin v Positive Identification Systems, Inc. (1977, CA7 Wis) 560 F2d 298, 23 FR Serv 2d 1466.*

After counsel for one party has incurred expenses in preparing evidence and subpoenaing witnesses to prove certain facts which could have and should have been admitted at the pre-trial conference, opposing counsel should not be permitted, over the objection of the former, to admit such facts at the trial thereby eliminating proof on the questions involved. *Byers v Clark & Wilson Lumber Co. (1939, DC Or) 27 F Supp 302.*

In view of the provisions for pre-trial procedure, the court may, in advance of a second trial by an action, make rulings as to the use of testimony given by a witness at the first trial. *Penn v Automobile Ins. Co. (1939, DC Or) 27 F Supp 337.*

If the parties cannot substantially agree to the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, a pre-trial conference should be held. *Wilson v Kennedy (1948, DC Pa) 75 F Supp 592.*

Requested admissions made of opposing counsel at pre-trial conference and rejected due to lack of information will not be made part of the report of pre-trial conference, since such matters should normally be obtained through requests for admission under Rule 36. *Tobin v Chambers Constr. Co. (1952, DC Neb) 106 F Supp 473, 22 CCH LC P 67093.*

A pretrial memorandum cannot be used as an admission against interest where it was not made on the record during the course of a trial, where it was not included in a "pleading", and where it was not made during the course of a pretrial procedure as contemplated under this section. *Taylor v Allis-Chalmers Mfg. Co. (1969, DC Pa) 320 F Supp 1381,* affd (CA3 Pa) *436 F2d 416.*

18. Other matters aiding in disposition of action

Trial court did not abuse its discretion by limiting pre-trial examination by defendant of diaries seized by government to personal entries made by defendant. *United States v Schiller (1951, CA2 NY) 187 F2d 572.*

In products liability action in order to minimize confusion engendered by conceptual disparities between strict liability and negligence theories, trial judge, at final stages of pre-trial conference should encourage parties: (1) To elect theory of recovery on which case will proceed to trial, or (2) if case is to be tried on alternative theories, to classify and organize evidence which will be presented under each theory. *Murray v Fairbanks Morse (1979, CA3 VI) 610 F2d 149, CCH Prod Liab Rep P 8599.*

Motion for leave to bring in third party was made and determined in connection with pre-trial hearing. *Connelly v Bender (1941, DC Mich) 36 F Supp 368.*

District courts have discretion to make advisory rulings. *Jiffy Foods Corp. v Hartford Acci. & Indem. (1971, WD Pa) 331 F Supp 159.*

At a pre-trial hearing in an action for a deficiency judgment, the court passed upon a form of judgment to be entered, ruled that the statute of limitations was no defense to the action, and although timely demand had not been made, ordered a trial by jury limited to the issue of the value of the property. *Schram v Kolowich (1942, DC Mich) 2 FRD 343.*

In a protracted case the sequence in which the issues will be tried should be established in advance of trial. *Life Music, Inc. v Broadcast Music, Inc. (1962, SD NY) 31 FRD 3, 6 FR Serv 2d 286.*

In action to enjoin violations of the Fair Labor Standards Act *[29 USCS §§ 201* et seq.], secretary of labor was required to produce a list of witnesses, though such list would, in effect, reveal the identity of certain informers. *Goldberg v Hooper-Holmes Bureau, Inc. (1962, ND Ga) 33 FRD 519, 7 FR Serv 2d 631.*

The following elements ought to be present for court to exercise discretion to add witnesses to witness list: (1) some form of surprise development occurs; (2) some showing that proffered new evidence or testimony will fill some significant gap in proof; (3) undue prejudice will not result. *United States v International Business Machines Corp. (1980, SD NY) 87 FRD 411.*

19. Disclosure of issues

A new trial was granted on the court's initiative in an action for personal injuries alleged to have resulted from muriatic acid burns, in which defendant was permitted at the trial to interpose the defense, which was not disclosed at pre-trial proceedings, that the acid which caused plaintiff's injury was sulphuric and not muriatic acid and was allowed to make a physical demonstration to show the nondeleterious effect of muriatic acid. *Burton v Weyerhaeuser Timber Co. (1941, DC Or) 1 FRD 571.*

To obviate the element of surprise, parties are expected to disclose at pre-trial conference all issues of law and fact which they intend to raise at trial except such as may involve privileged or impeaching matter. these exceptions, disclosure may be made to the presiding judge without disclosure to opposing counsel and a ruling obtained on the exception claimed. *Burton v Weyerhaeuser Timber Co. (1941, DC Or) 1 FRD 571.*

20. Disclosure of information

This rule does not give defendant right to require government to furnish copies of statements or confessions made by him to police. *United States v Pete (1953, DC Dist Col) 111 F Supp 292.*

The stipulating of actuarial testimony as part of the case even though no actuary's name or address had been specified by the other party is a waiver of the right to have such witness named. *McSparran v Pennsylvania R. Co. (1966, ED Pa) 258 F Supp 130.*

Party accused of violations of revenue laws relating to illicit whiskey was entitled to examine reports of scientific experiments in relation to his case. *United States v Turner (1967, ED Tenn) 274 F Supp 412.*

Defendant railroad who denied plaintiff access to information relating to braking power of trains by denying the existence of such information could not claim they were prejudiced by the court's refusal to admit such evidence at trial. *Cage v New York C. R. Co. (1967, WD Pa) 276 F Supp 778, 12 FR Serv 2d 817,* affd (CA3 Pa) *386 F2d 998.*

The voluntary production of documents at a pre-trial hearing is appropriate for the purpose of simplifying issues and proofs. At such hearing, admissibility of documents may be determined, as well as scope of depositions to be subsequently taken. *Fairwater Transp. Co. v Chris-Craft Corp. (1940, DC NY) 1 FRD 509.*

At a pre-trial hearing, the court made an order for the taking of a deposition and production of documents. *Monarch Liquor Corp. v Schenley Distillers Corp. (1941, DC NY) 2 FRD 51.*

In an action under the Fair Labor Standards Act *[29 USCS §§ 201* et seq.], information as to employees involved, their occupations and alleged inadequacy of records may be obtained by pretrial procedure or discovery. *Walling v Bay State Dredging & Contracting Co. (1942, DC Mass) 3 FRD 241, 7 CCH LC P 61696.*

In action to enjoin violations of the Fair Labor Standards Act *[29 USCS §§ 201* et seq.], disclosure of wage and hour administrator's statements by or reports concerning said employees would not be required; but records of names of defendant's employees whom plaintiff claims defendant underpaid would be ordered disclosed. *Walling v Richmond Screw Anchor Co. (1943, DC NY) 4 FRD 265.*

The court will not refuse an examination of records and reports of investigators of the wage and hour administrator merely because they will be regarded as hearsay. *Walling v Richmond Screw Anchor Co. (1943, DC NY) 4 FRD 265.*

Where it was not clear that complete relief could be had by plaintiff against two defendants without a joinder of two other defendants or whether plaintiff was entitled to a discovery against such other defendants, motions of such other defendants to dismiss should be refused without prejudice to them from raising the same questions in their motions at the trial of the action. *Overly v Overly (1945, DC Pa) 4 FRD 312.*

Pre-trial order can require each party to furnish to the other party a list of trial witnesses that each party will call or will have available at the trial and the names of witnesses each party may call, and such order is not objectionable because it would require a party to disclose the identity of an informer. *Goldberg v Ann-Vien, Inc. (1961, ND Ga) 29 FRD 6, 5 FR Serv 2d 224.*

21. Dismissal of action at pre-trial conference

At a pre-trial conference, the court may take evidence on the question of jurisdiction, and, if it is found that jurisdiction is lacking, the action may be dismissed with prejudice. *Fink v United States (1939, DC Wash) 28 F Supp 556.*

At a pre-trial hearing, plaintiff was granted a dismissal without prejudice but with costs. *Ryerson & Haynes, Inc. v American Forging & Socket Co. (1942, DC Mich) 2 FRD 343, 53 USPQ 672.*

In a pre-trial conference in an action against joint tortfeasors in which it appeared that the court had jurisdiction of only one defendant, the action should be dismissed without prejudice as to the others and leave granted to amend complaint so as to allege a separable controversy. *Kapp v Frank W. Kerr & Co. (1942, DC Mich) 2 FRD 509.*

22. Preparation of pre-trial order

Absent a pre-trial order, the exchange of witness lists does not limit the number of witnesses or act as a bar to the testimony of a witness not named thereon. If a pre-trial proceeding is to be used for such a purpose there must be a pre-trial order. *Jones v Union Auto. Indem. Asso. (1961, CA10 Kan) 287 F2d 27, 4 FR Serv 2d 303.*

Where trial court found that the parties to antitrust suit were in fact in accord it could properly make a tentative order defining the issues despite plaintiff's lack of formal assent. *Life Music, Inc. v Edelstein (1962, CA2 NY) 309 F2d 242, 6 FR Serv 2d 294.*

In the district of Oregon, the practice requires that pre-trial orders should be agreed upon by counsel and presented to the court for signature and filing at a reasonable time before trial, but if counsel are unable to agree, pretrial orders representing the views of both sides should be submitted. *Burton v Weyerhaeuser Timber Co. (1941, DC Or) 1 FRD 571.*

A pre-trial order based on an agreement of the parties which did not clearly set forth their contentions was set aside and another pretrial conference ordered, with the direction that, upon the formulation of a pre-trial order, the trial should immediately follow. *Calvin v West Coast Power Co. (1941, DC Or) 2 FRD 248.*

The court is not limited to one pre-trial order in a case. *Glaspell v Davis (1942, DC Or) 2 FRD 301.*

23. Effect of pre-trial -- Enforcement

The court should give no instruction to the jury which would nullify the effect of a pretrial order or be inconsistent with the issues as framed in such order. *Bryant v Phoenix Bridge Co. (1942, DC Me) 43 F Supp 162.*

A counterclaim which was not called to the court's attention at the pretrial hearing, and upon which no pretrial order was formulated, will not be considered upon appeal where it is permissive as distinguished from compulsory. *Berryhill v Gibson (1971, MD Ala) 331 F Supp 122, 15 FR Serv 2d 1033,* vacated on other grounds *411 US 564, 36 L Ed 2d 488, 93 S Ct 1689.*

The United States is bound by any agreements or admissions its counsel may make at a pretrial conference to the same extent as a private litigant is bound by the statements made by its attorney. *Daitz Flying Corp. v United States (1945, DC NY) 4 FRD 372.*

When a pre-trial order is entered it controls the subsequent course of the action unless modified at the trial. *Washington v General Motors Acceptance Corp. (1956, DC Fla) 19 FRD 370.*

24. Evidence

Although pretrial statements are to be liberally construed to cover any of legal or factual theories that might be embraced by their language, District Court did not abuse discretion in action brought by plaintiff who was injured when plastic injection heel molding machine designed and manufactured by defendant closed on his hand, when court excluded evidence of plaintiff that wiring diagram showed molding machine was designed with momentary contact emergency stop button which was less safe than maintain contact switch, where pretrial statement of plaintiff -- "the 'emergency stop' button was not designed so that when it was depressed it was visibly in an 'off' position" -- did not fairly apprise defendant of momentary contact claim. *Rodrigues v Ripley Industries, Inc. (1974, CA1 NH) 507 F2d 782, 19 FR Serv 2d 641.*

25. Simplification of issues

Limitation of issues at pre-trial conference bars consideration of other questions on appeal. *Frank v Giesy (1941, CA9 Or) 117 F2d 122.*

Where plaintiffs did not object at pre-trial conference to order limiting issues, no reservation of point was made and no request was made for amendment or modification in course of the trial, they could not object to such order on appeal. *Fowler v Crown-Zellerbach Corp. (1947, CA9 Or) 163 F2d 773.*

Upon a proper showing that there is no genuine issue to be tried, a judge may grant a motion for summary judgment wholly irrespective of the terms of a pre-trial order specifying a number of issues which remained after the discussion at the pre-trial conference had eliminated others. *Irving Trust Co. v United States (1955, CA2 NY) 221 F2d 303, 55-1 USTC P 11522, 47 AFTR 444,* cert den *350 US 828, 100 L Ed 740, 76 S Ct 59.*

A party does not waive or admit an issue as to which his opponent has the burden of proof by failing to include the issue in his pre-trial stipulated list of remaining issues. *Pacific Indem. Co. v Broward County (1972, CA5 Fla) 465 F2d 99, 16 FR Serv 2d 977.*

The pre-trial proceeding is the latest summary of the state of the case before trial and is controlling on the issue sought to be raised by defendant concerning the scope of the pleadings. *United States v Wood (1945, DC Mass) 61 F Supp 175.*

26. In particular cases

In action against railroad for services rendered by plaintiff to defendant, contention that defendant's right to set off overpayments was foreclosed because not pleaded was rejected since the issue of overpayment had been expressly raised in the pre-trial order and was so properly before the court. *Rogers v Union P. R. Co. (1944, CA9 Or) 145 F2d 119.*

Wrongful death action was based on the premise that decedent was an employee of defendant and jurisdiction was conditioned on the federal Employers' Liability Act *[45 USCS §§ 51* et seq.], when the case was at issue a pre-trial conference was held; subsequently an agreed statement of facts was filed, and briefs were filed on the question of whether decedent was an employee of defendant at the time of the injury resulting in his death; it was held that this was not enough to show submission of the question in the absence of an order to that effect, but the question was one to be determined at the trial, and it was reversible error to dismiss prior to trial for want of a cause of action. *Miles v Pennsylvania R. Co. (1946, CA7 Ill) 158 F2d 336.*

Court properly refused to instruct on issue of compromise and settlement which had not been raised at pre-trial conference, where parties had stipulated as to how much defendant owed plaintiff should the jury find that a partnership existed. *Case v Abrams (1965, CA10 Okla) 352 F2d 193, 9 FR Serv 2d 16.*32, Case 3.

Refusal to consider alleged violation of state statute in diversity negligence action was justified, despite retainer of new counsel, where plaintiff's first counsel made pretrial waiver of said issue. *Moore v Sylvania Elec. Prods. (1972, CA3 Pa) 454 F2d 81, 15 FR Serv 2d 943.*

Where issue not included in pretrial order is actually tried by parties, policy served by Rule 16 would not be served by trial court's refusal to consider issue since Rule 16 should be read in light of Rule 15(b); final pretrial order did not preclude reliance by taxpayers upon provision of Internal Revenue Code, where opening statements by both taxpayers and government counsel indicated that each intended to make such provision issue in case, and where no evidence pertaining to provision was excluded by trial court. *Mains v United States (1975, CA6 Ohio) 508 F2d 1251, 75-1 USTC P 9167, 35 AFTR 2d 541,* on remand (SD Ohio) *76-2 USTC P 9520, 38 AFTR 2d 5336,* affd (CA6) *78-1 USTC P 9414, 42 AFTR 2d 6026* and cert den *439 US 981, 58 L Ed 2d 652, 99 S Ct 569.*

Issue of whether an anchoring vessel should have used its radar to check on an approaching vessel could not be brought up at trial, since it was not included in the pre-trial order. *Sun Oil Co. v The S.S. Georgel (1965, SD NY) 245 F Supp 537,* affd (CA2 NY) *369 F2d 406.*

In an action by administratrix for death of plaintiff's decedent, where only negligence charged was based upon defective handbrake in violation of Safety Appliance Act *[45 USCS §§ 1* et seq.] and at a pre-trial conference it was agreed that only issue was defectiveness of brake, plaintiff had no right to a new trial based upon the failure of the court to instruct the jury concerning negligence on any other basis. *Barry v Reading Co. (1943, DC NJ) 3 FRD 305,* affd (CA3 NJ) *147 F2d 129,* cert den *324 US 867, 89 L Ed 1422, 65 S Ct 912,* reh den *324 US 891, 89 L Ed 1438, 65 S Ct 1022.*

27. Witnesses

Court properly refused to permit expert witness to testify where appellant's pretrial memorandum did specify that an expert witness would be named later, however, a subsequent pretrial order stated that there would be no changes in the positions taken by counsel in their memoranda and that there would be no amendments and appellant did file a supplemental memorandum listing the name of the witness, but it did not indicate that he would testify as an expert and was filed without permission of the court. *Ely v Reading Co. (1970, CA3 Pa) 424 F2d 758, 13 FR Serv 2d 252.*

The acceptance, by a trial judge, of testimony offered by a witness whose name was not included on an original pretrial order witness list, but whose name was submitted on an amended list the day following submission of the original list and providing opposing counsel eight days' notice of an intention to call the witness, was not error, but was within the discretion of the court. *Davis v Duplantis (1971, CA5 La) 448 F2d 918, 15 FR Serv 2d 544.*

In products liability action involving alleged defective design of defendant manufacturer's truck, District Court properly exercised its discretion in excluding evidence of experiment made by defendant's employee and expert witness on Friday before Monday commencement of trial, where pretrial order included no reference to any experiment or to any photos made by defendant to be used as evidence in case, and where exclusion of evidence on grounds, at least in part, of failure to comply with pretrial order could not be said to have resulted in manifest injustice. *Weaver v Ford Motor Co. (1974, ED Pa) 382 F Supp 1068,* affd without op (CA3 Pa) *515 F2d 506* and affd without op (CA3 Pa) *515 F2d 507.*

28. Withdrawal from pre-trial agreements

Courts must impose adequate protective conditions on withdrawal of pre-trial agreements and stipulations and must then hold to such conditions. Allowance of withdrawal from pre-trial stipulation changed entire tenor and climate of case which started as complicated mechanical inquiry into effect of substitution of bolt in airplane engine into a detective mystery with questionable moral overtones, so much to plaintiff's unjustified detriment that new trial must be had. *Laird v Air Carrier Engine Service, Inc. (1959, CA5 Fla) 263 F2d 948, 1 FR Serv 2d 267.*

Considerations of fairness to taxpayers required that they be relieved of factual stipulation prepared in light of Treasury regulation, when such regulation was amended with retroactive affect after the stipulation, and the case should be decided upon the basis of a factual record made in light of the amended regulation. *Brennan v O'Donnell (1970, CA5 Ala) 426 F2d 218, 70-1 USTC P 9397, 14 FR Serv 2d 43, 25 AFTR 2d 1250,* on remand (ND Ala) *322 F Supp 1069, 71-1 USTC P 9399, 27 AFTR 2d 1560.*

Pretrial stipulation entered into pursuant to Rule 16 may be modified only to prevent manifest injustice and where no such showing of injustice has been offered or made, withdrawal of stipulation will not be permitted where it would prejudice opposite party. *Cooperative Services, Inc. v U.S. Dep't of Housing & Urban Development (1977, App DC) 183 US App DC 344, 562 F2d 1292.*

An amended complaint which does not introduce any basically new material, but merely realigns the old elements will be allowed, even though it brings in the issue of price discrimination, whereas the pre-trial stipulation limits the issues to those arising under the Sherman Act *[15 USCS §§ 1-7,* 15 note], together with a claim under § 7 of the Clayton Act *[15 USCS § 18].* Stipulations are not absolutely binding in a protracted case. *Castlegate, Inc. v National Tea Co. (1963, DC Colo) 34 FRD 221, 7 FR Serv 2d 236.*

Party may not present live witness where, at pretrial proceedings, he agreed to present taped deposition of witness. *Keil v Eli Lilly & Co. (1980, ED Mich) 88 FRD 296, 7 Fed Rules Evid Serv 164, 30 FR Serv 2d 679.*

29. Costs

The expense of producing models and charts was not taxable as costs where no prior approval was obtained from the court by the prevailing party to produce them. *Johns-Manville Corp. v Cement Asbestos Products Co. (1970, CA5 Ala) 428 F2d 1381, 166 USPQ 359, 14 FR Serv 2d 396* (questioned in *United States EEOC v W & O Inc. (CA11 Fla) 213 F3d 600, 83 BNA FEP Cas 117, 78 CCH EPD P 40108, 46 FR Serv 3d 1138, 13 FLW Fed C 697,* reh, en banc, den (CA11 Fla) *233 F3d 580).*

Costs may not be taxed for fees of a witness whose testimony is outside of the scope of the pretrial order. *Federal Deposit Ins. Corp. v Fruit Growers Service Co. (1941, DC Wash) 2 FRD 131.*

Costs may be taxed for the expenses of a deposition, the use of which became unnecessary as the result of a pre-trial hearing, unforeseeable at the time the deposition was taken. *Federal Deposit Ins. Corp. v Fruit Growers Service Co. (1941, DC Wash) 2 FRD 131.*

LEXSTAT ALM GL CH. 201, § 34



*** CURRENT THROUGH ACT 62 OF THE 2008 LEGISLATIVE SESSION ***

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
TITLE II DESCENT AND DISTRIBUTION, WILLS, ESTATES OF DECEASED PERSONS AND ABSENTEES, GUARDIANSHIP, CONSERVATORSHIP AND TRUSTS
Chapter 201 Guardians and Conservators
GUARDIAN AD LITEM AND NEXT FRIEND

**GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY**

*ALM GL ch. 201, § 34* (2008)

**§ 34. Appointment of Guardian Ad Litem or Next Friend; Effect.**

If, under the terms of a written instrument or otherwise, a minor, a mentally retarded person, an autistic person, or person under disability, or a person not ascertained or not in being, may be or may become interested in any property real or personal, or in the enforcement or defense of any legal rights, the court in which any action, petition or proceeding of any kind relative to or affecting any such estate or legal rights is pending may, upon the representation of any party thereto, or of any person interested, appoint a suitable person to appear and act therein as guardian ad litem or next friend of such minor, mentally retarded person, autistic person, or person under disability or not ascertained or not in being; and a judgement, order or decree in such proceedings, made after such appointment, should be conclusive upon all persons for whom such guardian ad litem or next friend was appointed.

**HISTORY:** 1896, 456, § 1; RL 1902, 145, § 23; 1906, 452, § 2; 1976, 548; 1985, 315.

**NOTES:**

**Editorial Note**

**The 1976 amendment** rewrote the section to provide representation for mentally retarded persons, and to expand the duties of guardians and next friends to include enforcement or defense of legal rights of persons under the disabilities described.

**The 1985 amendment** provided for representation for autistic persons.

**Cross References**

Guardian for insane defendant, ALM GL *c 208, § 15*.

**Jurisprudence**

*39 Am Jur 2d, Guardian & Ward §§ 157, 160.*

41 Am Jur 2d, Incompetent Persons, §§ 115-121.

*42 Am Jur 2d, Infants §§ 173-177.*

14 Am Jur Pl & Pr Forms (Rev), Incompetent Persons, Forms 101 et seq., 201 et seq.

**Annotations**

Judgment in guardian's final accounting proceedings as res judicata in ward's subsequent action against guardian. 34 ALR4th 1121.

**Treatise References**

Cross, Fleischner, Elder, *Guardianship and Conservatorship in Massachusetts, 2d Ed. (Michie) §§ 3.09, 6.06, 8.06, 9.04.*

Riley, *Estate Administration in Massachusetts: A Handbook with Forms, 2d Ed. (Michie) § 2.06.*

**Law Reviews**

Black, *"Infants, next friends, actions, settlements and attorneys' fees". 34 Mass LQ 19.*

**CASE NOTES**

1. In general 2. Appointment of guardian ad litem

**1. In general**

A judgment against a minor, without a probate guardian or a guardian ad litem to represent him, is voidable upon a writ of error. *McIsaac v. Adams (1906) 190 Mass 117, 76 NE 654, 1906 Mass LEXIS 1029.*

This section is declaratory of the inherent powers of the courts necessary for the administration of their jurisdiction; it is not mandatory. *Chase v. Chase (1914) 216 Mass 394, 103 NE 857, 1914 Mass LEXIS 1098.; Hibbard v. Aetna Casualty & Surety Co. (1938) 301 Mass 442, 16 NE2d 241, 1938 Mass LEXIS 996.; Ryan v. Cashman (1951) 327 Mass 677, 100 NE2d 838, 1951 Mass LEXIS 666.*

The allowance for the guardian's services is a necessary general expense of administration as distinguished from ordinary current expense, and having been incurred for the protection and benefit of the entire property is to be borne by capital. *Loring v. Old Colony Trust Co. (1917) 227 Mass 392, 116 NE 730, 1917 Mass LEXIS 1125.*

Where, in an earlier suit in which it was held that a power of appointment vested in a son by his father's will was extinguished, a guardian ad litem had been appointed to represent all persons not then ascertained or in being, the persons subsequently seeking to be recognized as appointees in a second action were bound by the former decree. *Turner v. Forbes (1943) 314 Mass 120, 49 NE2d 608, 1943 Mass LEXIS 795.*

The findings of a guardian ad litem in his report to the probate court, which is printed with the record, are not binding upon any person not represented by him, for he is not a trier of fact like a

master, whose findings, after confirmation by the court, become the factual basis of the decree, and his findings have no authoritative standing as establishing the facts in the case. *Young v. Tudor (1948) 323 Mass 508, 83 NE2d 1, 1948 Mass LEXIS 643.*

The making of impartial authoritative findings would be inconsistent with the duty of a guardian ad litem to represent the parties whose interests he is appointed to protect. *Young v. Tudor (1948) 323 Mass 508, 83 NE2d 1, 1948 Mass LEXIS 643.*

Probate Court is tribunal to which jurisdiction to appoint guardians and conservators has been given. *Strange v. Powers (1970) 358 Mass 126, 260 NE2d 704, 1970 Mass LEXIS 703.*

Terms "guardian ad litem" and "next friend" are used interchangeably. *Judge Rotenberg Educ. Ctr. v. Commissioner of the Dep't of Mental Retardation (1997) 424 Mass 476, 677 NE2d 156, 1997 Mass LEXIS 65.*

Where judge specifically appointed special advocate for child as guardian ad litem in proceeding to dispense with parental consent to adoption, advocate's report was properly admitted in evidence. *Adoption of Georgia (2000) 433 Mass 62, 739 NE2d 694, 2000 Mass LEXIS 762.*

Probate Court judge who served as guardian ad litem in guardianship proceeding prior to her nomination to bench was not automatically disqualified *Guardianship of Pollard (2002) 54 Mass App 318, 764 NE2d 935, 2002 Mass App LEXIS 379,* review denied *(2002) 437 Mass 1103, 772 NE2d 588, 2002 Mass LEXIS 771.*

**2. Appointment of guardian ad litem**

In a proceeding for the annulment of a marriage on the ground of the wife's insanity at time of marriage, there is no reason why the same person may not rightly be appointed both guardian ad litem for the respondent wife and as investigator to determine her mental condition, and the person so appointed having reported that the wife was insane was under no obligation thereafter to contest the annulment proceeding. *Hillson v. Hillson (1928) 263 Mass 143, 160 NE 448, 1928 Mass LEXIS 1111.*

Where guardian ad litem made an appearance for infant to contest will, such appearance by guardian amounted to acceptance of his appointment as such and was conclusive that infant contested will. *Old Colony Trust Co. v. Wolfman (1942) 311 Mass 614, 42 NE2d 574, 1942 Mass LEXIS 754.*

The statute relative to the appointment of trustees to fill vacancies contains no provision for the appointment of a guardian ad litem or next friend to represent persons under disability, and this section, relative to the appointment of a guardian ad litem or next friend for persons under disability who are interested under the terms of a trust instrument in any proceeding affecting the trust estate, does not make such action by the judge other than permissive. *Waitt v. Harvey (1942) 312 Mass 384, 45 NE2d 1, 1942 Mass LEXIS 848.*

Whether a Probate Court can appoint a guardian ad litem for an ascertained minor who has never been made a litigant before it by being notified in the manner required to bring in other parties, with the same effect as "if the minor had been made a party in the usual way," Quaere. *Young v. Tudor (1948) 323 Mass 508, 83 NE2d 1, 1948 Mass LEXIS 643.*

Guardian ad litem appointed under GL *c 208, §§ 15, 16* may function as next friend *White v. White (1958) 337 Mass 114, 148 NE2d 361, 1958 Mass LEXIS 623.*

Probate court order that proposed ward, who was found competent, pay fee of $2,447 to attorney appointed to act as guardian ad litem reversed, where guardian ad litem acted as investigator for court and did not advance proposed ward's arguments. *Guardianship of Mentally Ill Person (1986) 397 Mass 93, 489 NE2d 1005, 1986 Mass LEXIS 1211.*

Probate judge did not abuse discretion in appointing guardian ad litem and did not err in crediting report of guardian ad litem who testified at length before judge. *Bernier v. DuPont (1999) 47 Mass App 570, 715 NE2d 442, 1999 Mass App LEXIS 849,* review denied *(2000) 430 Mass 1115, 724 NE2d 709, 2000 Mass LEXIS 124.*

In case before Land Court involving issue of whether cancellation of note and discharge of mortgage were done by mistake, judge had authority to appoint guardian ad litem for mortgagor who was, due to mental illness, unable to provide any information on issue before court. *NationsBanc Mortg. Corp. v. Eisenhauer (2000) 49 Mass App 727, 733 NE2d 557, 2000 Mass App LEXIS 609.*

LEXSTAT ALM GL CH. 204, § 15



PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS
TITLE II DESCENT AND DISTRIBUTION, WILLS, ESTATES OF DECEASED PERSONS AND ABSENTEES, GUARDIANSHIP, CONSERVATORSHIP AND TRUSTS
Chapter 204 General Provisions Relative to Sales, Mortgages, Releases, Compromises, Etc., by Executors, Etc
COMPROMISES, ETC.

**GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY**

*ALM GL ch. 204, § 15* (2008)

**§ 15. Compromise of Wills.**

The supreme judicial court or the probate court may authorize the persons named as executors in an instrument purporting to be the last will of a person deceased, or the petitioners for administration with such will annexed, to adjust by arbitration or compromise any controversy between the persons who claim as devisees or legatees under such will and the persons entitled to the estate of the deceased under the laws regulating the descent and distribution of intestate estates, to which arbitration or compromise the persons named as executors, or the petitioners for administration with the will annexed, as the case may be, those claiming as devisees or legatees whose interests will in the opinion of the court be affected by the proposed arbitration or compromise, and those claiming the estate as intestate, shall be parties.

**HISTORY:** 1864, 173, § 1; PS 1882, 142, § 14; 1889, 266; RL 1902, 148, § 15; 1902, 538; 1903, 222; 1918, 257, § 399; 1919, 5; 1920, 2.

**NOTES:**

**Cross References**

A decree allowing compromise of a will conclusive after one year, ALM GL *c 192, § 3.*

**Jurisprudence**

*31 Am Jur 2d, Executors and Administrators §§ 257-259.*

*39 Am Jur 2d, Guardian and Ward § 107.*

9A Am Jur Pl & Pr Forms (Rev), Executors and Administrators, Forms 581-607.

13 Am Jur Pl & Pr Forms (Rev), Guardian and Ward, Forms 316, 317, 324, 330, 333.

9 Am Jur Legal Forms 2d, Guardian and Ward § 133:94.

9 Am Jur Trials 601, Will Contests.

19 Am Jur Trials 1, Actions by or Against a Decedent's Estate.

96 Am Jur Trials 343, Will Contests.

Cause of Action to Invalidate Will on Ground of Undue Influence in its Execution. 6 COA 91.

Cause of Action to Invalidate Will on Ground of Lack of Testamentary Capacity. 9 COA 87.

Cause of Action to Invalidate Will on Ground of its Revocation by Act of Testator. 18 COA 415.

Cause of Action to Probate Will Over Claim of Invalidity for Lack of Due Execution. 2 COA2d 389.

**Annotations**

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so. 42 ALR2d 1319.

Power and responsibility of executor or administrator to compromise claim due estate. 72 ALR2d 191.

Power and responsibility of executor or administrator to compromise claim against estate. 72 ALR2d 243.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death. 72 ALR2d 285.

Effect of doubtful construction of will devising property upon marketability of title. 65 ALR3d 450.

Effect of impossibility of performance of condition precedent to testamentary gift. 40 ALR4th 193.

**Treatise References**

Riley, *Estate Administration in Massachusetts: A Handbook with Forms, 2d Ed. (Michie) § 4.08.*

**Law Reviews**

The effect on interests in real estate of compromise agreements as to wills. 2 Mass Law Quar 645 et seq.

**CASE NOTES**

1. In general 2. Agreement of compromise and decree pursuant thereto 3. --Effect of decree 4. --Parties

**1. In general**

Under earlier law (Pub Sts *c 142, § 14*), probate court lacked jurisdiction in equity to confirm and enforce agreement of compromise under a will, a proceeding unknown to general equity jurisprudence but created by statute, and over which, at the time, supreme judicial court had exclusive jurisdiction. *Abbott v. Gaskins (1902) 181 Mass 501, 63 NE 933, 1902 Mass LEXIS 907.*

Where a decree has been entered in a probate court admitting a will to probate to be executed according to the terms of a compromise under this section, approved by a previous decree of the same court void for want of jurisdiction, and later a new compromise agreement concerning the same controversy has been confirmed by a single justice of the supreme judicial court, it is the duty of the probate court upon exhibition to it of the new compromise and decree, to declare its old decree void and to admit the will to probate to be executed in accordance with the valid compromise agreement. *Bartlett v. Slater (1902) 182 Mass 208, 65 NE 73, 1902 Mass LEXIS 990.*

A decree of a probate court admitting a will to probate to be executed according to the terms of a compromise under this section, approved by a previous decree of the same court void for want of jurisdiction, even if it is technically operative as a decree simply establishing the will until formally revoked, at any rate will be vacated on motion of a contestant, and the controversy to which the attempted compromise related is not affected by the entry of the decree. *Bartlett v. Slater (1902) 182 Mass 208, 65 NE 73, 1902 Mass LEXIS 990.*

Decision briefly discusses history, scope, and purpose of this and the following sections, and the important results which have been attained thereby. *Baxter v. Treasurer (1911) 209 Mass 459, 95 NE 854, 1911 Mass LEXIS 971.*

Whether the authority given by this section, to confirm a compromise agreement adjusting a controversy concerning the allowance of a will, authorizes the confirmation of an agreement which has the effect of extinguishing a devise over after a life estate, was mentioned as a question on which no opinion was expressed. *Neafsey v. Chincholo (1916) 225 Mass 12, 113 NE 651, 1916 Mass LEXIS 1177.*

Legislative authority to courts to compromise wills so as to affect future contingent interests has been held not to be violative of the Constitution on the broad ground that the general interest of the public that property shall not be entangled by the possibility of uncertain contingencies of contests in the future might support such an enactment. *Whiteside v. Merchants' Nat'l Bank (1933) 284 Mass 165, 187 NE 706, 1933 Mass LEXIS 1109.*

If a judge was without jurisdiction to authorize the adjustment of a controversy under this section in accordance with the terms of the agreement, it would follow that the decree allowing the will falls of itself with the compromise. *McDonagh v. Mulligan (1940) 307 Mass 464, 30 NE2d 385, 1940 Mass LEXIS 1064.*

Where all interested parties are legally competent and there are no unrepresented interests, the parties may, before a will is allowed, settle their differences by an agreement of compromise without the aid of the instant section, such an agreement is wholly contractual and in no sense testamentary, and such an agreement may eliminate a trust providing for the postponement of distribution of principal, and provide for immediate distribution thereof. *Budin v. Levy (1962) 343 Mass 644, 180 NE2d 74, 1962 Mass LEXIS 859.*

Executor retains common law right to compromise claims. *Price v. Price (1965) 348 Mass 663, 204 NE2d 902, 1965 Mass LEXIS 867,* cert den *(1965) 382 US 820, 15 L Ed 2d 66, 86 S Ct 47, 1965 US LEXIS 629.*

Parties to dispute over distribution of estate may settle differences either by (1) petitioning court for approval of compromise, or (2) settling claims by mutual agreement. *Richmond v. Wohlberg (1982) 385 Mass 290, 431 NE2d 902, 1982 Mass LEXIS 1294.*

**2. Agreement of compromise and decree pursuant thereto**

Decree ratifying a compromise, by force of the statute, is binding and valid as to all parties claiming either under will or as heirs or next of kin, But it is binding and is intended mainly for the purpose of determining the rights of the parties to particular or proportionate parts of the estate, as against each other, and does not, in the absence of any stipulation to that effect in the agreement, fix the right to immediate payment. It has the character of a judgment so far as regards proportionate parts of the estate, and precedence among the parties, but not as to the absolute right to receive anything. *Lincoln v. Wood (1880) 128 Mass 203, 1880 Mass LEXIS 39.*

It seems, that a bill in equity cannot be maintained to compel one who is named as executor and trustee in an alleged will, the proof of which is pending in the probate court, to administer the property of the estate of the alleged testator in accordance with an agreement of compromise, because unless the will is allowed there can be no compromise concerning it. *In re Parker (1913) 215 Mass 226, 102 NE 427, 1913 Mass LEXIS 1265.*

If before a will is finally proved the parties interested, but who are in controversy over its provisions, enter into an agreement of compromise under this section and § 17, which is approved by the court, the entire will nevertheless is admitted to probate, although the division of the property among the contracting parties depends upon the agreement, and not upon the will. *Renwick v. Macomber (1917) 225 Mass 380, 114 NE 720, 1917 Mass LEXIS 879.; Baxter v. Treasurer (1911) 209 Mass 459, 95 NE 854, 1911 Mass LEXIS 971.; In re Parker (1913) 215 Mass 226, 102 NE 427, 1913 Mass LEXIS 1265.*

If a settlement is effected apart from the statute either before or after proof, the will still stands, while the parties are relegated to their contractual rights which can be enforced either at law for damages or in equity for specific performance. *Renwick v. Macomber (1917) 225 Mass 380, 114 NE 720, 1917 Mass LEXIS 879.*

Compromise of a controversy concerning a will which the court may authorize under this section, is not a modification of the will but merely an agreement of the parties interested who, if they are all in being and ascertained and of age, may make such an agreement and make it binding irrespective of the statute. *In re Ellis (1917) 228 Mass 39, 116 NE 956, 1917 Mass LEXIS 1171.*

A bankrupt, then being solvent and not contemplating bankruptcy nor intending to defraud his creditors, had a right to enter into any agreement with his co-heirs and beneficiaries under a will respecting the bounty bestowed upon him by the testator as seemed wise to him; he could create any trust he desired, even to the extent of placing the principal of a trust of which he retained the income beyond the reach of future creditors, but he could not avoid future creditors through a spendthrift trust for his own benefit. *Forbes v. Snow (1923) 245 Mass 85, 140 NE 418, 1923 Mass LEXIS 1126.*

Even when a compromise of a contest over the admission of a will to probate has been authorized by a court under this section and §§ 16-18, upon the probate of the will the title devolves by force of the will, and then is transferred according to the agreement of compromise. *Brown v. McLoughlin (1934) 287 Mass 15, 190 NE 795, 1934 Mass LEXIS 1080.*

The adjustment of a controversy over the probate of a will is necessarily based upon a dispute, a contest, in the settlement of which those claiming as legatees and devisees whose interests will be affected by the compromise agree that the contestants shall have a sum of money or specific share of the estate or thing of value in consideration of the contestants' promise to withdraw their opposition. *McDonagh v. Mulligan (1940) 307 Mass 464, 30 NE2d 385, 1940 Mass LEXIS 1064.*

Even though an agreement in compromise of a will contest is such that the parties are not required to obtain the approval of the probate court under the instant section, if they seek such approval, the requirements of the instant section must be strictly complied with. *Manganiello v. Caggiano (1959) 338 Mass 542, 156 NE2d 41, 1959 Mass LEXIS 679.*

Where there is nothing to show that any of the parties to an agreement in compromise of a will contest were incapable of contracting in their own interests, or represented interests not in being, or that their shares in the estate were uncertain or contingent, there is no need for the parties to resort to the probate court under the instant section to ratify or approve their agreement of compromise. *Manganiello v. Caggiano (1959) 338 Mass 542, 156 NE2d 41, 1959 Mass LEXIS 679.*

Will compromise agreement including payment of $28,000 legal fee to law firm of special administrator was valid and binding on administratrix with will annexed. *Richmond v. Wohlberg (1982) 385 Mass 290, 431 NE2d 902, 1982 Mass LEXIS 1294.*

In an appeal pursuant to Mass. Dist./Mun. Cts. R. App. Div. App. 8C, it was determined that the trial court erred in entering judgment for an executor in an action to enforce an agreement to divide the estate of the parties' father; a brother and sister provided adequate consideration based on their agreement not to contest the will, based on common law and ALM GL *c 204, § 15. Menzone v. Menzone (2003) 2003 Mass App Div 161, 2003 Mass App Div LEXIS 59.*

Because it was entered into before their father died, an agreement by three siblings that the father's will notwithstanding, they would share his estate equally, could not be considered a will compromise; however, the agreement was an enforceable contract given for good consideration as a sister received a one-third share of the property and $18,000 upon its sale, and in return, she gave up her right to contest the father's will based on incompetence/undue influence. *Houle v. Cannizzaro (2007) 23 Mass L Rep 406, 2007 Mass. Super. LEXIS 557.*

**3. --Effect of decree**

It is not the purpose of this section to enforce an agreement. There is no contest over the agreement when it reaches the court. The sole purpose is to allow it to become operative. *Abbott v. Gaskins (1902) 181 Mass 501, 63 NE 933, 1902 Mass LEXIS 907.*

A compromise agreement never is a modification of a will; it is a compromise of the rights of the parties under the will on the one side, and of those who claim that the will is void in respect to the matters covered by the compromise, on the other side. *Hastings v. Nesmith (1905) 188 Mass 190, 74 NE 323, 1905 Mass LEXIS 1118.*

Compelling recognition of agreement. Where there is no necessity for action under this section, to make a compromise valid (see *Abbott v. Gaskins (1902) 181 Mass 501, 63 NE 933, 1902 Mass*

*LEXIS 907),* if the rights of the contestant under such an agreement of compromise are not recognized by the executor, the contestant can by a bill in equity compel him (the executor) to recognize the rights given him (the contestant) under the agreement of compromise. *Blount v. Dillaway (1908) 199 Mass 330, 85 NE 477, 1908 Mass LEXIS 829.*

The right of a contestant to a standing in the probate proceedings is recognized in decrees establishing an agreement of compromise under this section, and it is the practice to insert a clause in decrees made under the instant section, providing that the executor shall administer the estate in accordance with the agreement of compromise established by the decree. *Blount v. Dillaway (1908) 199 Mass 330, 85 NE 477, 1908 Mass LEXIS 829.*

The rights of the parties to an agreement of compromise which adjusted a controversy concerning a will and was approved by the supreme judicial court under this section, depend upon the agreements and the decree confirming it and are not testamentary rights under the will which was the subject of the controversy. *Brandeis v. Atkins (1910) 204 Mass 471, 90 NE 861, 1910 Mass LEXIS 938.;* see *McDonagh v. Mulligan (1940) 307 Mass 464, 30 NE2d 385, 1940 Mass LEXIS 1064.*

Where an agreement of compromise is confirmed by a decree of a single justice of the supreme judicial court and such decree has not been reversed, it is the law of the case and the rights of the parties are to be determined upon the footing that the terms of the will were changed by the agreement of compromise and not upon a construction of the will as it appeared when offered for probate. *Woodward v. Snow (1919) 233 Mass 267, 124 NE 35, 1919 Mass LEXIS 942,* 5 ALR 1381.

In a case where the parties to the agreement of compromise were the executors, the only legatees and devisees whose interests were affected by the agreement of compromise, certain legatees under a prior testamentary disposition and the only heirs at law of the deceased who duly appeared to contest the probate, and where they were all of full age and sui juris, there was no absolute need of resort under this section for confirmation of the agreement. Such an agreement could be enforced in equity both before and after the enactment of the statute. Had not the parties to the compromise agreement here involved resorted to the statute, the agreement could have been enforced in equity, or recovery could have been had thereon at law. *McDonagh v. Mulligan (1940) 307 Mass 464, 30 NE2d 385, 1940 Mass LEXIS 1064.*

A decree of the Probate Court allowing a will and codicils and declaring a compromise agreement entered into between the parties in interest valid and binding gives the permanent effect and vitality of a judgment to the agreement of compromise and to every part and term of that agreement. *Newburyport Soc. for Relief of Aged Women v. President & Fellows of Harvard College (1941) 310 Mass 438, 38 NE2d 669, 1941 Mass LEXIS 917.*

The Probate Court may authorize an administrator or executor to compromise by agreement a claim against an estate and may enter the necessary decree to enforce such an agreement, but parties of legal competence with alleged interests in an estate may settle their differences without the aid of and entirely outside of this section. *MacDonald v. Gough (1951) 327 Mass 739, 101 NE2d 124, 1951 Mass LEXIS 678.*

Decision illustrates effect of finality given to consent to allowance of will. *Boxill v. Maloney (1961) 342 Mass 399, 173 NE2d 283, 1961 Mass LEXIS 752.*

Executor should have been party to will compromise agreement. *Ross v. Friedman (1986) 22 Mass App 513, 495 NE2d 321, 1986 Mass App LEXIS 1726.*

**4. --Parties**

On a bill in equity, under this and the following sections, to establish a compromise of a charitable devise for the benefit of a town, the attorney general alone can represent those beneficially interested; and inhabitants of the town, with no peculiar or immediate interests therein distinct from those of the public, cannot intervene by petition to oppose the compromise, or appeal from a decree settling the terms thereof. *Burbank v. Burbank (1890) 152 Mass 254, 25 NE 427, 1890 Mass LEXIS 51.*

Where an agreement of compromise is approved by the supreme judicial court under this section, the persons entitled to take as heirs at law should be determined by the law of this commonwealth. *Brandeis v. Atkins (1910) 204 Mass 471, 90 NE 861, 1910 Mass LEXIS 938.*

One named as a legatee in a will offered for probate, whose legacy is revoked by the terms of a codicil offered for probate with the will, is a necessary party to a compromise of a controversy concerning the will and codicil under this section, and the probate court has no jurisdiction to authorize such a compromise against the objection of such person. *Sherman v. Warren (1912) 211 Mass 288, 97 NE 892, 1912 Mass LEXIS 774.*

A compromise agreement under this and the following section, adjusting a controversy between the persons who claim as devisees or legatees under a will and the persons entitled to the estate of the deceased under the statutes regulating the descent and distribution of intestate estates, need not be signed by a guardian ad litem appointed to represent future contingent interests. *Neafsey v. Chincholo (1916) 225 Mass 12, 113 NE 651, 1916 Mass LEXIS 1177.*

A decree of the probate court confirming under this and the following section, a compromise agreement adjusting a controversy concerning the allowance of a will, if it affected future contingent interests which would arise under the will if admitted to probate and those interests were not represented in the proceedings by a guardian ad litem appointed under § 16 to represent them, was made without jurisdiction as affecting such interests and cannot operate to deprive the persons who become entitled to such interests of their rights. *Neafsey v. Chincholo (1916) 225 Mass 12, 113 NE 651, 1916 Mass LEXIS 1177.*

Petitioners may prove that the recital in a decree, that a guardian was appointed "for all minors interested and to represent any future contingent interests which would arise under said will," is not true in fact, and that they were not served with process or represented in the proceedings. *Neafsey v. Chincholo (1916) 225 Mass 12, 113 NE 651, 1916 Mass LEXIS 1177.*

It was plainly intimated, if not expressly decided, *In re Parker (1913) 215 Mass 226, 102 NE 427, 1913 Mass LEXIS 1265,* that a trustee who is to be eliminated is a necessary party to a compromise agreement. *In re Ellis (1917) 228 Mass 39, 116 NE 956, 1917 Mass LEXIS 1171.*

The court has no jurisdiction under this section, to authorize an executor to adjust by compromise a controversy concerning a will by an agreement to which trustees to whom property is devised and bequeathed by the will are not parties. *In re Ellis (1917) 228 Mass 39, 116 NE 956, 1917 Mass LEXIS 1171.*

While it is true that, in the recitals of this section descriptive of the character of controversy that may be adjusted in accordance with its provisions, the controversy is denominated as one between

the persons who claim as legatees or devisees under the will and the persons entitled to the estate of the deceased under the laws regulating the descent and distribution of intestate estates, yet, in defining those who are necessary parties to the compromise the section specifically designates "those claiming as devisees or legatees whose interests will in the opinion of the court be affected by the proposed...compromise, and those claiming the estate as intestate." It does not prescribe as necessary parties those who would be entitled to the estate of the deceased had he died intestate, but rather those who claim the estate as intestate. *McDonagh v. Mulligan (1940) 307 Mass 464, 30 NE2d 385, 1940 Mass LEXIS 1064.*

Where an interested party is given seasonable notice to appear in opposition to the allowance of the will and to oppose the allowance of an agreement of compromise, and the party does not appear to contest the proceeding, the party may not, thereafter, seek to set the compromise aside on the ground that all interested parties did not assent thereto. *McDonagh v. Mulligan (1940) 307 Mass 464, 30 NE2d 385, 1940 Mass LEXIS 1064.*

Court has no jurisdiction under the instant section to authorize a compromise without the assent of the necessary parties. *Manganiello v. Caggiano (1959) 338 Mass 542, 156 NE2d 41, 1959 Mass LEXIS 679.*

1 of 1 DOCUMENT

MASSACHUSETTS COURT RULES

*** THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED AS OF DECEMBER 12, 2007 ***

PROBATE AND FAMILY COURT RULES
E. UNIFORM PRACTICES OF PROBATE COURTS

*ALM Probate Ct. Unif. Prac. Rule XXVI* (2007)

Review Court Orders which may amend this rule.

Practice XXVI. Probate of Will -- Incompetent Heir

If it appears in the petition for the probate of a will, letters of administration or letters testamentary, or at any later time, that an heir, devisee or legatee is incompetent by reason of insanity, retardation or minority, or is under conservatorship, notice of the petition shall be given to both the heir, devisee or legatee and the guardian or conservator. If the heir, devisee or legatee is not under guardianship, a guardian ad litem may be appointed. Such guardian ad litem and the heir, devisee or legatee shall be given notice of all proceedings relative to the probate of the will, the granting of letters of administration or letters testamentary.

1 of 1 DOCUMENT

MASSACHUSETTS COURT RULES

*** THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED AS OF DECEMBER 12, 2007 ***

PROBATE AND FAMILY COURT RULES
E. UNIFORM PRACTICES OF PROBATE COURTS

*ALM Probate Ct. Unif. Prac. Rule XXXIV* (2007)

Review Court Orders which may amend this rule.

Practice XXXIV. Charitable Interests.

A. When Notice to the Attorney General is Required

1. In connection with a petition for the allowance of a will and the appointment of an executor or an administrator with the will annexed, notice to the Office of the Attorney General. Division of Public Charities, is required in the following instances:

a. The will contains a devise or bequest to a named charity or for charitable purposes. The initial notice shall be accompanied by a copy of the will.

b. The will (I) contains a devise or bequest to the trustee(s) of an inter vivos trust, which trust instrument provides for one or more charitable gifts; and (ii) either the executor(s) or administrator(s) with the will annexed and the trustee(s) are the same persons or entities or the trustee or one of the trustees has a beneficial interest in the estate or trust. The initial notice shall be accompanied by a copy of the will and either a copy of the trust instrument or a summary of the charitable gifts contained therein certified to be accurate by the trustee or his or her representative.

2. With respect to any estate as to which notice is required under Paragraph 1 above, notice shall also be given to the Office of the Attorney General, Division of Public Charities, of any subsequent filing by the executor(s) or administrator(s) with the will annexed of such estate relating to a matter which will affect the charitable interest, including without limitation the allowance of accounts, the sale of an asset, the compromise of a claim, the removal of a fiduciary. and the appointment of a successor fiduciary. A notice relating to the allowance of an account shall be accompanied by a copy of the account.

3. Notice to the Office of the Attorney General, Division of Public Charities, is required in connection with a petition or complaint filed by (a) the trustee(s) of a trust, created either by written instrument or by will, under which there are present or future charitable interests; (b) a charitable corporation; and (c) any other entity holding property in a fiduciary capacity for the benefit of a charitable entity or purpose. The notice shall be accompanied by a copy of the petition or complaint and a copy of the governing instrument(s) unless provided previously.

B. Attorney General as a Necessary Party to an Action

In matters before the court coming within the descriptions listed below, the Attorney General shall be a necessary party. The plaintiff shall not present to the court any request for affirmative action with respect to the relief being requested unless the Attorney General has been made a party with proper service. The matters to which this section applies are:

1. A complaint by a fiduciary for cy pres relief or for authority to deviate from the terms of a governing instrument which deviation may affect a charitable interest.

2. A complaint by a fiduciary for instructions or a declaratory judgment in which the relief sought may affect a charitable interest.

3. Compromise of a will which compromise may affect a charitable interest.

4. A complaint by a fiduciary for a license to sell an asset in circumstances in which a charitable interest may be affected by the sale.

5. A complaint by a fiduciary for authority to consolidate or terminate a trust pursuant to Gen. Laws ch. 203, § 25, or otherwise, which consolidation or termination may affect a charitable interest.

C. Attorney General as an Interested Party

In matters before the court in which the Attorney General is not a necessary party, as described above in Paragraph B, but is an interested party entitled to notice of the proceedings and an opportunity to be heard, the matter, following the giving of such notice and the expiration of the notice period, may be presented to the court without regard to whether the Attorney General has assented thereto or indicated that he does not wish to be heard.

**HISTORY:** Adopted, effective Dec 1, 1996

**STANDING ORDER 1-06**
**CASE MANAGEMENT AND TIME STANDARDS FOR CASES FILED IN THE PROBATE AND FAMILY COURT DEPARTMENT**

**PREAMBLE**

*The fair and efficient administration of justice requires that all cases and actions before the Probate and Family Court receive timely attention and action from the court. This requires that the judicial system dispose of cases as expeditiously as is consistent with care, fairness and sound decisions. It is the responsibility of the court to manage the process and disposition of the cases before the court. These time standards are intended to provide the Probate and Family Court with recognized goals for the timely disposition of cases.*

*These time standards represent aspirational goals to measure the movement of cases in the Probate and Family Court. Each case is unique and the Judges must, consistent with the rules of court and statutes, exercise sound judgment in such a manner as to provide the parties with a fair opportunity to be heard and to allow the court to achieve a reasoned disposition. Those individuals who appear before our courts have distinct needs that must be addressed on an individual basis, case by case. These time standards preserve discretion for judges to schedule individual cases according to the particular needs of the individuals involved.*

*These time standards recognize that there are many factors that determine the flow of cases in the Probate and Family Court which are not within the control of the court. These standards also recognize that the cases heard in the Probate and Family Court require consideration of the individual needs of the families who come before the court.*

Accordingly:

**1. GENERAL PROVISIONS**

This Standing Order applies to all actions filed in the Probate and Family Court.

This Standing Order applies to all Divisions of the Probate and Family Court.

The timing for the completion of the case, from filing to trial, settlement, or dismissal, shall be calculated from the date of filing the petition or complaint.

At time of filing, all cases shall be assigned to a caseflow track according to the type of case. Most cases shall be assigned to one of the following tracks; 3-6 months to trial, 8 months to trial, or 14 months to trial.

## 2. TRACK ASSIGNMENT AND CASE MANAGEMENT

a. Track Assignment

At filing each case is assigned to a track.

The Plaintiff/Petitioner shall be provided with a Track Assignment Notice except as set forth below. The Plaintiff/Petitioner shall serve the Track Assignment Notice upon the Defendant/Respondent along with the summons or notice (citation). No service of the Track Assignment Notice will be required in cases where service is by publication.

No Track Assignment Notice shall be issued for cases in the 3-6 month track: Probate of Will, Administration, Accounts, Real Estate Sales, and Change of Name. No Track Assignment Notice shall be issued for cases described in sections 10 through 17 of this Standing Order. No Track Assignment Notice shall be issued at the time of filing for any case filed by the Department of Revenue, Child Support Enforcement Division.

The goals for completion of all cases filed in the Probate and Family Court are outlined in the chart in section 7(a) and in sections 10 through 17 of this Standing Order. A Judge, at any time, may change the track designation for a case and issue a new Track Assignment Notice.

b. Next Event Scheduling

At the conclusion of every court event, until a judgment has issued or the complaint has been dismissed, or until a permanent decree has issued or the petition has been dismissed, the Court shall schedule the next court event for the case.

Once a motion hearing, conference, or any other court event has been scheduled and placed on a court list, whether at the request of a party, a party's lawyer, the Register, or the Court, it can be removed from the list or continued only if a next court event is scheduled.

c. Case Management Conferences: Generally

Case Management Conferences will be scheduled by the court for the case types set forth in sections 2(d),(e), and (f) below, when a return of service, answer, objection, or counterclaim is filed and there is no future court event scheduled for the case.

In scheduling a case management conference, the Register shall issue a Case Management Conference Notice and Order in the format specified by the Chief Justice of the Probate and Family Court.

The purpose of the Case Management Conference is to establish the Court's control of the progress of the case, to provide early intervention by the Court, to offer Alternative Dispute Resolution processes, to establish discovery limitations and deadlines, to discuss settlement progress and opportunities for settlement, and to assign a date for the pre-trial conference, if needed.

d. Case Management Conference: Equity, Petition to Partition, and Domestic Relations, including Paternity (except Joint Petitions for Divorce, Joint Petitions for Modification and Complaint for Divorce filed under G. L. c. 208, § 1B).

Upon the filing of the return of service, answer, objection, or counterclaim, the Register shall review the case to determine if a future court event has been scheduled in the case. If no future court event has been scheduled, the Register shall schedule a Case Management Conference on the next available date, but no sooner than thirty (30) days from the filing of the return of service, answer, objection, or counterclaim. The Register shall send the Case Management Conference Notice and Order to all parties.

e. Case Management Conference:1B Divorce, Guardianship and Conservatorship

All G. L. c. 208, § 1B Divorce Cases

The Register shall review the case one hundred twenty (120) days after the case is filed. If no return of service has been filed, and no answer, appearance, motion, or other paper has been filed by a defendant, the Register shall mail to the plaintiff a written notice of dismissal in accordance with section 3 of this Standing Order. If the return of service or an answer, objection, or counterclaim has been filed, but no future court event has been scheduled, a Case Management Conference shall be scheduled on the next available date, but no sooner than thirty (30) days from the filing of the return of service. The Register shall send the Case Management Conference Notice and Order to all parties.

Guardianship and Conservatorship Cases

The Register shall review the case one hundred twenty (120) days after the case is filed. If no future court event has been scheduled, the Register shall schedule a Case Management Conference on the next available date. The Register shall send the Case Management Conference Notice and Order to all parties. All temporary guardianships shall include an expiration date and a further hearing date. All

guardianships with approval and authorization of an anti-psychotic medication treatment plan shall include an expiration date and a review date, which may be the same date. All guardianships with authority to approve other extraordinary medical treatment shall include an expiration date for the authority.

f. Case Management Conference for Certain Probate Matters

A Track Assignment Notice shall not be issued at the time of filing for the cases assigned to the 3-6 Month Track: Probate of Will, Administration, Accounts, Real Estate Sales, and Change of Name. If a timely appearance in opposition or objection is filed in a case initially assigned to the 3-6 Month Track, the Register shall reassign the case to the 8 Month Track and issue to all parties a Track Assignment Notice. The Register shall also issue a Pre-Trial Notice and Order in the form specified by the Chief Justice of the Probate and Family Court with an established date for a Pre-Trial Conference unless another future court event has been scheduled. The date for the Pre-Trial Conference shall be after the return date, but no more than forty-five (45) days after the return date.

g. Case Management Conference conducted at Motion Hearing

If a motion, or other hearing, is scheduled and held prior to the date of the Case Management Conference, the Judge may conduct a Case Management Conference in connection with the motion hearing, even if there has been no notice of a Case Management Conference for that day, and may cancel any previously scheduled Case Management Conference, making sure to schedule a next event in the order on the motion or the order after Case Management Conference.

Motions shall not be heard at a scheduled Case Management Conference without prior approval of the Court. As a general rule, the discovery schedule and deadline and a Pre-Trial Conference date should be assigned the first time the case is before a Judge with both parties or counsel present.

h. Joint Stipulation on Case Management Conference

Counsel and pro se parties may, at any time after a complaint is filed, file a Joint Stipulation signed by counsel for each represented party and by each pro se party which, at a minimum, requests a pre-trial conference date and agrees to a specific date to be the discovery deadline for that case. The discovery deadline date shall be not more than 180 days after the date of filing of the complaint.

Counsel and pro se parties may, after receiving notice that a Case Management Conference has been scheduled, file, on or before the date of the Case Management Conference, a Joint Stipulation signed by counsel for each represented party and by each pro se party which, at a minimum, requests a

pre-trial conference date and agrees to a specific date to be the discovery deadline for that case. The discovery deadline date shall be not more than 120 days after the date of filing of the Joint Stipulation. If the Joint Stipulation is filed prior to the time scheduled for the Case Management Conference, no one need appear for the Case Management Conference.

Upon the filing of such a Joint Stipulation, the Register shall schedule a pre-trial conference for the next available date not sooner than 14 days after the discovery deadline and issue a Pre-Trial Notice and Order in the form specified by the Chief Justice of the Probate and Family Court. The scheduled pre-trial conference is a "future court event" so that a Case Management Conference will not be automatically scheduled upon the 120 day review or upon the filing of a return of service, answer, objection or counterclaim.

i. Joint Requests to Continue Case Management Conference

Parties engaged in alternative dispute resolution may request an extension of a scheduled Case Management Conference date by filing a joint or assented to motion which attests that the parties are engaged in alternative dispute resolution and includes:

- the name of the alternative dispute resolution provider;
- the dates and number of sessions held and;
- the dates and number of future sessions scheduled.

All other joint requests to continue shall be by written motion stating detailed and specific reasons for the request. All motions shall include proposed dates for the rescheduling of the Case Management Conference. Joint or assented to motions shall be considered without an in person hearing, unless otherwise ordered by the Court. If the motion is allowed, the court shall reschedule the Case Management Conference and send notice to all parties.

j. Citations in Probate, Guardianship, Child Welfare, and Adoption Petitions

Unless all required assents are filed with a probate petition, including guardianship petitions, custody petitions under G. L. c.119, and adoption petitions, the Register shall issue a citation no later than three (3) court days after the date of filing.

k. General Provisions

Nothing in this Standing Order precludes the marking of an earlier hearing date for a motion or other case event when appropriate.

The Court may schedule conferences, including Case Management, Pre-Trial and Status Conferences, as well as Trials, in its discretion.

Any party to any matter filed in the Probate and Family Court may request a Case Management Conference or Pre-Trial Conference after service of the complaint or petition, with notice to the other side of such request.

When a Case Management Conference is held, the conference will include discussion of all actions pending between the named parties. Other pending actions shall be scheduled for a future court event or shall be dismissed.

## 3. DISMISSAL FOR LACK OF SERVICE

The Register shall review all Domestic Relations and Equity cases 120 days after filing of the complaint to determine whether a return of service has been filed. If a return of service has not been filed, and no future court event has been scheduled, the Register shall issue a notice in a format specified by the Chief Justice of the Probate and Family Court. The notice shall inform the plaintiff that, because no return of service has been filed to show that service was made within 90 days of filing as required by Mass. R. Civ. P./Mass. R. Dom. Rel. P. 4 (j), the case will be dismissed 21 days after the date of the notice unless the plaintiff files the return of service showing that service was made within ninety (90) days after the filing of the complaint or unless within those twenty-one (21)days, the plaintiff files and has scheduled a motion for extension of time which shows good cause why service was not made within ninety (90) days after the filing of the complaint.

## 4. CONDUCT OF CASE MANAGEMENT CONFERENCE

a. Counsel and/or Parties Encouraged to Confer.

Prior to the Case Management Conference, counsel and/or parties are encouraged to confer for the purpose of agreeing on a proposed schedule of deadlines and dates through trial.

If a domestic violence restraining order (G. L. c. 209A) or a domestic violence protective order (G. L. c. 208) has been issued for one party against the other, then the parties are not expected to confer. The Case Management Conference shall still be held.

b. At a Case Management Conference the Court may:

(1) explore the possibility of settlement including but not limited to exploring the use of Alternate Dispute Resolution (ADR) processes;

(2) identify or formulate (or order attorneys or parties to formulate) the principal issues and disputes;

(3) prepare (or order attorneys or parties to prepare) a discovery schedule including discovery parameters and deadlines;

(4) establish deadlines for filing motions, including but not limited to motions for summary judgment and a time frame for their disposition;

(5) explore any other matters that the court determines appropriate for the fair and efficient management of the litigation;

(6) hear the case on an uncontested basis if settlement has been achieved, or if no appearance or answer is filed after service and return of service and there is no opposition; or

(7) dismiss the case if no parties are present for the Case Management Conference or if the plaintiff or petitioner is not present.

c. Next Event Scheduling

At the Case Management Conference, the next court date shall be assigned unless a judgment or permanent decree is issued or the case is dismissed.

d. Requirement to Appear

Counsel and parties, or parties alone if not represented by counsel, shall be required to appear at the Case Management Conference, except as provided in section 2(h) above. The Court, in its discretion, may waive the requirement for the appearance of the parties if they are represented by counsel. The Court may conduct Case Management Conferences by telephone, in its discretion.

e. Sanctions for Failure to Appear.

The court may impose sanctions for failure to attend the Case Management Conference without good cause, including dismissal, or may hear the case as if it were uncontested.

## 5. ALTERNATE DISPUTE RESOLUTION SERVICES

When appropriate, cases may be referred to:

a. Probation Officers for dispute intervention services in contested matters at any court event; or

b. Other approved providers of court connected dispute resolution services as defined in S.J.C. Rule 1:18, Uniform Rules on Dispute Resolution.

## 6. CHANGES TO TRACK ASSIGNMENT AND RESCHEDULING OF SCHEDULED EVENTS

a. A party may file and serve a motion requesting a change in track assignment or rescheduling of scheduled events. Changes in track assignment or rescheduling of scheduled events shall be allowed only at the discretion of the Judge. A Probation Officer, in connection with an investigation, may file and serve on all parties a motion requesting a change in track assignment or rescheduling of scheduled events.

b. Motions to continue a trial may be allowed, only for good cause shown, with notice and hearing, in accordance with Mass. R. Dom. Rel. P. 40 (b) and Mass.R. Civ. P. 40 (b).

c. All requests for rescheduling shall include proposed future dates. No action shall be "continued generally." Any rescheduling shall be to a date and event certain.

d. In cases involving allegations or a history of domestic violence, or a prior or current abuse prevention order, the Judge shall take into account the safety of alleged victims and victims and the reduction of conflict when considering any requests for changes in track assignment or rescheduling of scheduled events.

## 7. ASSIGNMENT TO TRACKS:

a. At filing, all Probate, Equity, Domestic Relations (including Paternity) cases (except Joint Petitions for Divorce, Joint Petitions for Modification of Child Support, and Complaints for Contempt, which shall be heard as outlined in sections 10 through 12) shall be assigned to a track according to the chart below:

| | 3-6 Month Track[1] | 8 Month Track | 14 Month Track |
|---|---|---|---|
| | **Probate of Wills and Administration of Estates** | **Complaint to Establish Paternity** | **Complaint for Divorce** |
| | **Accounts** | **Complaint for Custody, Visitation, and Support (Paternity)** | **Complaints in Equity** |
| | **All Other "Probate" except Guardianships and Conservatorships** | **Complaint for Modification (except Joint Petition for Modification of Child Support)** | **Petitions to Partition** |
| | **Real Estate Sales** | **Probate-Guardianships Conservatorships** | **Other "Divorce" Case Types (except Joint Petition for Divorce)** |
| | **Change of Name** | **Complaint for Separate Support** | |
| | | **Other Paternity Case Types** | |

b. G. L. c. 209A Complaints and G.L. c.19A Petitions for Protection from Abuse, cases concerning the custody of children under G. L. c.119, § 23A, G. L. c.119, § 23C, and G. L.c .210, § 3, and Adoptions shall be heard as outlined below in sections 13 through 17.

c. Assignment to a track indicates the maximum amount of time in which a case should be tried, settled, or dismissed. Most cases should be tried, settled, or dismissed before the maximum time period of the track.

d. There may be extraordinary cases which cannot be disposed of within the time frames set forth in their track designations.

[1]As described in section 2(f) above, if a case assigned to this track becomes contested due to the filing of an appearance and, if required, objections, the Register shall change the track designation to an 8 month track.

e. The Register shall issue a Track Assignment Notice for each case in the 8 month and 14 month tracks, except as outlined in section 2 (a) of this Standing Order, in a format specified by the Chief Justice of the Probate and Family Court. The Track Assignment Notice shall reflect the time requirements for each track.

## 8. CONDUCT OF PRE-TRIAL CONFERENCES

a. The Pre-Trial Conference shall be conducted in accordance with Rule 16 of the Massachusetts Rules of Domestic Relations Procedure or the Massachusetts Rules of Civil Procedure.

b. In scheduling a Pre-Trial Conference the court shall issue a Pre-Trial Notice and Order in a format specified by the Chief Justice of the Probate and Family Court.

c. If a case is not resolved at the Pre-Trial Conference, an Order After Pre-Trial Conference shall be issued which shall include provisions specified by the Chief Justice of the Probate and Family Court, and may also include additional provisions at the discretion of the Judge conducting the Pre-Trial Conference.

## 9. SEQUENTIAL TRIAL DAYS

When trial dates are originally assigned, they shall be scheduled on days as close to sequential trial days as the calendar of the trial Judge permits. When trials are not completed in the number of days originally scheduled, the Court shall schedule the remaining trial days as soon as possible using the earliest available trial days, with the goal of minimizing intervals between trial days.

## 10. TRACK FOR COMPLAINTS FOR CONTEMPT

At time of filing, a summons shall issue with the date for the contempt hearing. The hearing date shall be set for no later than twenty-eight (28) days from the date of filing.

## 11. JOINT PETITIONS FOR DIVORCE UNDER G. L. C. 208, § 1A

All Joint Petitions for Divorce shall be scheduled for hearing within thirty (30) days of filing of all required documents.[2]

## 12. JOINT PETITION FOR MODIFICATION OF CHILD SUPPORT

Pursuant to Probate and Family Court Supplemental Rule 412 and Protocol, these cases shall be decided on the pleadings without hearing, within fourteen (14) days of filing, unless otherwise ordered by the Court. If a hearing is ordered by the Court, the Court shall set the time and date for the hearing and shall notify the parties within fourteen (14) days of the filing of the joint petition.

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[2]If a case is ready for hearing at time of filing, a hearing shall be scheduled within 30 days. If a case is uncontested at time of filing, but incomplete, the case shall be scheduled for hearing within thirty (30) days of the date of filing all required documents.

## 13. G. L. c. 209A COMPLAINT FOR PROTECTION FROM ABUSE

All proceedings pursuant to G. L. c. 209A shall be processed in accordance with the existing statutory time requirements and each order shall specifically state the next hearing date and expiration date of the order, unless the order is permanent. If the order is permanent, it shall so specify.

## 14. COMPLAINTS FOR PROTECTION FROM ELDER AND DISABLED ABUSE, G. L. c. 19A, § 20, G. L. c. 19C, § 7

An initial hearing shall be held within fourteen (14) days of the filing of a petition. Emergency hearings may be held with at least twenty-four (24) hours notice to the elderly or disabled person. The court may dispense with notice upon finding that immediate and foreseeable physical harm to the individual or others will result from the twenty-four (24) hour delay and that reasonable attempts have been made to give notice.

## 15. TRACK FOR PETITIONS FILED PURSUANT TO G. L. c. 210, § 3 AND PETITIONS FILED PURSUANT TO G. L. c. 119, § 23C

a. If the Petition is uncontested, due to the assent of all parties or completion of proper notice, with no appearance in opposition filed, the Register shall, within fourteen (14) days of the return date, notify the petitioners that the case is uncontested, and schedule an uncontested hearing within 30 days of the return date. For cases filed under G. L. c. 210, § 3, an adoption plan shall be filed, in accordance with Uniform Probate Court Practice X prior to the hearing date.

b. If, by virtue of an appearance the case is contested, the Register shall issue a Track Assignment and Scheduling Notice for a Case Management Conference to be held not more than thirty (30) days after the return date.

c. At the Case Management Conference, referral to Permanency Mediation shall be considered and a Pre-Trial Conference shall be scheduled for a date within seventy-five (75) days of the Case Management Conference. At the Pre-Trial Conference, a trial date shall be set for no later than one hundred twenty (120) days from the date of the Pre-Trial Conference.

d. If a sua sponte or ex parte custody order under G. L. c. 119, § 23C is issued, the Court shall schedule a hearing within 72 hours of the sua sponte or ex parte custody order, unless a prior evidentiary hearing has been held. Notice shall be given to all parties and counsel.

## 16. TRACK FOR ADOPTION PETITIONS

a. If a Petition is filed as uncontested, due to the filing of necessary surrenders or termination decrees, and notice is not required, a hearing shall be scheduled within thirty (30) days of the filing of the Petition.[3]

[3]If a case is ready for hearing at time of filing, a hearing shall be scheduled within 30 days. If a case is uncontested at time of filing, but incomplete, the case shall be scheduled for hearing within thirty (30) days of the date of filing all required documents.

b. If a timely appearance is filed, a Case Management Conference shall be scheduled for not more than thirty (30) days after the return date.

c. At the Case Management Conference, a Pre-Trial Conference shall be scheduled for a date within seventy-five (75) days of the Case Management Conference. At the Pre-Trial Conference, a trial date shall be set for no later than one hundred twenty (120) days from the date of the Pre-Trial Conference.

## 17. PETITIONS FILED PURSUANT TO G. L. c. 119, § 23(A), VOLUNTARY PLACEMENT WITH DEPARTMENT OF SOCIAL SERVICES

At time of filing, all petitions filed pursuant to G. L. c. 119, § 23(A) shall be scheduled for hearing within thirty (30) days.

## 18. ISSUANCE OF TEMPORARY ORDERS

Temporary orders shall be issued as expeditiously as possible, but in no event more than fourteen (14) days from the conclusion of the hearing, or the receipt by the court of all written submissions. On motions for summary judgment, orders shall be issued within thirty (30) days of the conclusion of the hearing, or the receipt by the court of all written submissions.

## 19. ISSUANCE OF JUDGMENT OR DECREE

Except as otherwise indicated in this Standing Order, or with notice to the Chief Justice of the Probate and Family Court, and counsel or parties, the judgment or decree shall be issued as follows:

| Trial Time | Entry of Judgment or Decree |
|---|---|
| One day or less | Within 30 days of the conclusion of the trial |
| Two days | Within 60 days of the conclusion of the trial |
| Three to Seven days | Within 90 days of the conclusion of the trial |
| Exceeds Seven days | Within 120 days of the conclusion of the trial |

Joan M. Dunphy, Chief Justice

Promulgated: March 10, 2006
Effective: April 3, 2006

## THIRD AMENDED STANDING ORDER 1-88
## TIME STANDARDS

### Applicable to all Counties

### A. GENERAL CONSIDERATIONS

Responding to and complying with the directive of the Supreme Judicial Court for ". . . an attack on excessive delay and excessive cost of court proceedings . . ." and in an effort to "secure the just, speedy and inexpensive determination of every action," Mass.R.Civ.P. 1, the Justices of the Superior Court, through our Chief Justice, hereby adopt these time standards as a standing order of the Superior Court ("Standing Order"). The Court recognizes that the litigation process is memory dependent. To the extent that memory dims or becomes unreliable over prolonged periods of time, a just determination may be jeopardized. The concept of early and continuous judicial supervision and control is intended to enhance the quality of litigation and ensure that justice is fairly rendered.

This Standing Order recognizes that there are viable alternative methods of dispute resolution that may avoid delay and reduce the expense inherent in court proceedings, such as mediation, arbitration, summary jury trials, mini-trials, and reference to masters. Such alternate methods of dispute resolution are compatible with the case management objectives of these time standards. Nothing in this Standing Order shall act as a bar to any form of early intervention by the Court to identify cases suitable for alternative dispute resolution.

The Court recognizes and is sensitive to the impact that this Standing Order will have on local legal culture. We have meticulously avoided intrusion into this rich culture except to the extent necessary to preserve to the Court its responsibility to manage the pace of litigation without disturbing the harmony of the trial bar.

Accordingly, it is hereby **ORDERED** that:

(1) All civil actions filed in the Superior Court on or after March 1, 2007 shall be subject to the provisions of this Standing Order. All civil actions filed in the Superior Court on or before February 28, 2007 shall be subject to the Second Amended Standing Order 1-88, dated December 5, 1994.

(2) This Standing Order is applicable to all counties.

(3) The Court will schedule trial dates for both jury and jury-waived cases on its own initiative.

## B. TRACK DESIGNATION

(1) All civil actions shall be designated for purposes of this Standing Order as falling within one of three tracks based upon the nature of the case:

Fast Track ("F")

Average Track ("A")

Accelerated Track ("X")

A listing of case types by track is set forth in Schedules F, A, and X below.

(2) The plaintiff shall indicate the nature of the action and the appropriate track designation on the civil action cover sheet.[1]

(3) For good cause shown, a party may move that a case be designated to a track other than the track selected by the plaintiff on the civil action cover sheet. The motion shall comply with Superior Court Rule 9A, and shall be referred to the attention of the Session Judge.

## C. TRACKING ORDERS

While the clerk shall provide notice to all parties and their counsel of the track designation and corresponding tracking deadlines, the final responsibility for obtaining information from the clerk about the designation of the case and the corresponding tracking order shall rest with each party. Notification shall occur as follows:

(1) The cover sheet will alert parties to the existence of this Standing Order and to the track designation.

(2) Upon the filing of an action and in accordance with the track designated by the plaintiff, the clerk shall issue a tracking order that establishes the tracking deadlines for completion of the stages of litigation. Specific dates for the tracking deadlines shall be included in the tracking order.

(3) After 90 days from the filing of the action, the clerk shall forward a copy of the tracking order to all counsel of record. Counsel who appear in the action after the expiration of 90 days shall be responsible to learn the tracking deadlines for completing the stages of the litigation.

(4) All motions shall be filed within the time prescribed by the tracking order unless the proponent of the motion first moves for and obtains leave of court to file beyond the designated tracking deadline.[2]

(5) All pleadings, appearances, and other papers filed by counsel of record shall be accompanied by counsel's Board of Bar Overseers (BBO) Number.[3] The BBO Number shall appear immediately after counsel's signature, address and telephone number.

## D. AMENDMENTS TO THE TRACKING ORDERS

This Standing Order anticipates that there will be instances when the designation of a case to a particular track is inappropriate or the tracking deadlines cannot reasonably be met. The court recognizes that there are cases which by their very nature require special tracking deadlines, and the system is sufficiently flexible to accommodate these cases as follows:

(1) Amendments to the tracking order of a case may be granted upon motion, filed in accordance with Superior Court Rule 9A, and for good cause shown.

(2) All motions to amend a tracking deadline shall be referred to the attention of the Session Judge for decision. Motions (or oppositions thereto) shall be submitted on the papers, without oral argument.

## E. RULE 16 CONFERENCES

This Standing Order also recognizes that the parties may benefit from a conference under Mass. R. Civ. P. 16 to address various matters that may aid in resolving a case or reducing the time or expense of litigation. Any party may ask the Court for a Rule 16 conference, and such requests will be honored if reasonable. The Court may also schedule a Rule 16 conference on its own initiative. Telephonic conferences may be arranged with the permission of the Court.

## F. TRACKING DEADLINES

The following tracking deadlines shall be mandatory except as modified by order of the Session Judge or Regional Administrative Justice.[4] Documents filed outside the tracking deadlines without leave of court need not be acted upon by the Court, even if filed by agreement between the parties. The tracking deadlines for F and A Track cases will be calculated from the date of filing of the complaint.

(i) After Designation to Fast ("F") Track:

(1) Three months (90 days)

- Service shall be completed on all parties.
- All returns of service shall be filed.

- If service is not made upon a defendant within 90 days after filing of the complaint, the action shall be dismissed as to that defendant without prejudice unless the Court has found good cause to extend the time for service.[5]

(2) Four months (120 days)

- Rule 12, 15,[6] 19 and 20 motions shall be served.

- If no answer or motion to dismiss is filed by a defendant within 120 days of the filing of the complaint, the clerk shall issue a default as to that defendant and notify all parties of the default, unless the Court has found good cause to extend the time to file the answer or motion to dismiss.[7] Nothing in this Standing Order bars the earlier issuance of a default when legally appropriate. When appropriate, cases will be ordered for assessment of damages.

(3) Five months (150 days)

- Rule 12, 15, 19 and 20 motions shall be filed with the Court.

(4) Six months (180 days)

- Rule 12, 15, 19 and 20 motions shall be heard by the Court.

(5) Ten months (300 days)

- All discovery requests shall be served and non-expert depositions completed.[8] Requests for admissions are not included within this deadline but a party may not request of an adverse party the admission of more than thirty factual assertions after this deadline, except with leave of court.

(6) Eleven months (330 days)

- All motions for summary judgment shall be served. Nothing in this Standing Order bars summary judgment motions from being served earlier in the litigation.

(7) Twelve months (360 days)

- All motions for summary judgment shall be filed.

The remaining tracking deadlines assume that a motion for summary judgment has been filed. If no summary judgment motion is filed, earlier tracking deadlines may be set by the Court.

(8) Sixteen months (480 days)

- A pre-trial conference shall be conducted by the Court.[9] The joint pre-trial memorandum shall be filed with the Court no less than three business days prior to the pre-trial conference. A firm trial date shall be set by the pre-trial conference judge.

- The minimum requirements of the joint pre-trial order are attached to and made part of this Standing Order as Appendix A "PRE-TRIAL ORDER."

(9) Twenty-two months (660 days)

- The case shall be resolved and judgment shall issue.

(ii) After Designation to Average ("A") Track:

(1) Three months (90 days)

- Service shall be completed on all parties.

- All returns of service shall be filed.

- If service is not made upon a defendant within 90 days after filing of the complaint, the action shall be dismissed as to that defendant without prejudice, unless the Court has found good cause to extend the time for service.

(2) Four months (120 days)

- Rule 12, 19 and 20 motions shall be served.

- If no answer or motion to dismiss is filed by a defendant within 120 days of the filing of the complaint, the clerk shall issue a default as to that defendant and notify all parties of the default, unless the Court has found good cause to extend the time to file the answer or motion to dismiss. Nothing in this Standing Order bars the earlier issuance of a default when legally appropriate. When appropriate, cases will be ordered for assessment of damages.

(3) Five months (150 days)

- Rule 12, 19 and 20 motions shall be filed with the Court.

(4) Six months (180 days)

- Rule 12, 19 and 20 motions shall be heard by the Court.

(5) Fourteen months (420 days)

- Rule 15 motions shall be served.

(6) Fifteen months (450 days)

- Rule 15 motions shall be filed and resolved, with or without hearing.

(7) Twenty-four months (720 days)

- All discovery requests served and non-expert depositions completed. Requests for admissions are not included within this deadline but a party may not request of an adverse party the admission of more than thirty factual assertions after this deadline, except with leave of court.

(8) Twenty-five months (750 days)

- All motions for summary judgment shall be served.

(9) Twenty-six months (780 days)

- All motions for summary judgment shall be filed.

The remaining Tracking Deadlines assume that a motion for summary judgment will be filed. If no summary judgment motion is filed, earlier tracking dates can be set by the Court.

(10) Thirty months (900 days)

- A pre-trial conference shall be conducted by the Court. The joint pre-trial memorandum shall be filed with the Court no less than three business days prior to the pre-trial conference. A firm trial date shall be set by the pre-trial conference judge.

- The minimum requirements of the joint pre-trial order are attached to and made part of this Standing Order as Appendix A "PRE-TRIAL ORDER."

(11) Thirty-six months (1,080 days)

- The case shall be resolved and judgment shall issue.

(iii) After Designation to Accelerated ("X") Track:

- All X Track cases seeking judicial review of administrative agency proceedings on the administrative record pursuant to the standards set forth in G.L. c. 30A, § 14, G.L. c. 249, § 4, or similar statutes are governed by Standing Order 1-96, and the tracking deadlines set forth in that Order. Those tracking deadlines are as follows:

    - No later than 90 days after service of the complaint, the administrative agency whose decision is at issue shall file a record of the proceeding.

    - No later than 20 days after service of the record, all motions to dismiss or for a more definite statement under Mass. R. Civ. P. 12(b) or (e), all motions for leave to present testimony of alleged irregularities in the procedure before the agency that are not shown in the record under G.L. c. 30A, § 14(5), and all motions for leave to present additional evidence under G.L. c. 30A, § 14(6) shall be served.

    - No later than 30 days after service of the record or the Court's decision on any motion specified above, whichever is later, the plaintiff shall serve a motion for judgment on the pleadings under Mass. R. Civ. P. 12(c).

    - No later than 30 days after service of the motion for judgment on the pleadings, the defendant shall serve an opposition.

- All X Track cases under G.L. c. 123A, § 12 (SDP initial commitment) shall be governed by the deadlines set forth in G.L. c. 123A or otherwise established by law.

- Unless an earlier date is required by law, all disputes in X Track cases shall be resolved and judgment shall issue no later than 12 months (360 days) after the filing of the complaint.

## G. CASES NOT REACHED FOR TRIAL

Any case not reached for trial or otherwise disposed of within the prescribed tracking deadline shall be referred to the attention of the Regional Administrative Justice who shall coordinate with the Session Judge to ensure a speedy disposition within the session or to reassign the case to another session.

A record shall be maintained by the Regional Administrative Justice of all cases not tried or otherwise not disposed of as required under this Standing Order setting forth the reason for the trial delay and the action taken to resolve the matter.

**Barbara J. Rouse**
**Chief Justice of the Superior Court**

**Effective: March 1, 2007**

**Dated:**

## SCHEDULES OF CASE TYPES BY TRACK

### Schedule 'F' (Fast Track)*

**CONTRACT**

A01 Service, labor, and materials
A02 Goods sold and delivered
A03 Commercial paper
A08 Sales or lease of real estate
A99 Other (specify)

**TORT**

B03 Motor vehicle negligence- personal injury/property damage
B04 Other negligence–personal liability/property damage
B20 Personal injury- slip and fall
B21 Environmental
B22 Employment discrimination
B99 Other (specify)

**REAL PROPERTY**

C01 Land taking (eminent domain)
C02 Zoning appeal, G.L. c. 40A
C03 Disputes concerning title
C99 Other (specify)

**EQUITABLE REMEDIES**

D02 Reach and apply
D06 Contribution or indemnification
D12 Dissolution of partnership
D99 Other (specify)

**MISCELLANEOUS**

E95 Forfeiture G.L. c. 94C, § 47
E96 Prisoner cases

* Excluding claims against the Commonwealth or a municipality, which are type E03 cases under Schedule 'A' (Average Track).

**Schedule 'A' (Average Track)**

**CONTRACT**

A12 Construction dispute

**TORT**

B05 Products liability
B06 Malpractice--medical
B07 Malpractice--other (specify)
B08 Wrongful death, G.L. c. 229, § 2A
B15 Defamation (libel/slander)
B19 Asbestos cases

**EQUITABLE REMEDIES**

D01 Specific performance of contract
D07 Imposition of a trust
D08 Minority stockholder's suit
D10 Accounting
D13 Declaratory judgment, G.L. c. 231A

**MISCELLANEOUS**

E03 Claims Against Commonwealth or Municipality
E09 General contractor bond, G.L. c. 149, §§ 29, 29A
E17 Civil Rights Act, G.L. c. 12, § 11H

**Schedule 'X' (Accelerated Track)**

**REAL PROPERTY**

C04 Foreclosure of mortgage
C05 Condominium lien and charges

**MISCELLANEOUS**

E05 Confirmation of arbitration awards, G.L. c. 251
E07 G. L. c. 112, § 12S (Mary Moe)
E08 Appointment of receiver
E11 Workers compensation
E12 G.L. c. 123A, § 12 (SDP initial commitment)
E15 Abuse petition, G.L. c. 209A
E16 Auto surcharge appeal
E18 Foreign discovery proceeding
E19 Sex Offender Registry, G. L. c. 178M, § 6
E97 Prisoner habeas corpus
E99 Other (specify)

**NO SCHEDULE AND NO TRACK**

**MISCELLANEOUS**

E25 Pleural Registry (Asbestos cases)
E14 G.L. c. 123A, § 9 (SDP petition for release)

## ENDNOTES

1. As a result of an amended complaint, crossclaim, counterclaim, or third party action, a case may change from a simple motor vehicle tort ("F" track) to a product liability case ("A" track) and warrant a motion to change the designation to the longer track.

2. This provision places the responsibility of "timely filing" documents on the attorneys and relieves the clerks of the initial responsibility of determining if documents are filed in violation of time standards. The clerk's office does not have the responsibility to return improperly filed papers.

3. This requirement will facilitate the generation of computer assisted notices and trial scheduling. During the past several years, the Trial Court has implemented a number of automated case management systems. The Superior Court civil case management system has been enhanced to support an attorney notice module which requires each attorney of record being assigned a unique code for purposes of computer sorting. The Board of Bar Overseers number provides that unique number and address.

4. Wherever the term Regional Administrative Justice is used in this Standing Order, it shall include his or her designee.

5. The dismissal will be entered automatically by the clerk under the authority of this Standing Order and notices given as required.

6. This provision does not affect the power of the Court to allow amendments to pleadings where "justice appears to require such amendment." The party seeking to amend late must obtain leave from the Session Judge and make a good faith showing of inability to move in timely fashion.

7. The default will be entered automatically by the clerk under the authority of this Standing Order and notices given as required.

8. A party may not have responded to timely filed requests for discovery at this juncture and accordingly motions to compel production of that discovery continue to be appropriate. It is expected that all responses will be filed no later than the date that the joint pre-trial memorandum is filed. Non-expert depositions, however, must be held and completed on or before this date. This Standing Order does not change the duty of a party to supplement under the provisions of Mass.R.Civ.P. 26(e).

9. Some summary judgment motions are sufficiently complex to require additional judicial time to render a decision. The case should nonetheless continue on track and be brought to the attention of the pre-trial conference Justice for his or her consideration and action.

Matters to be reported are those under advisement more than 30 days, with an explanation to be given for those under advisement more than 120 days at the end of the quarter.

A case is considered "under advisement" when all *hearings* have been completed. Cases where findings are required should also appear on this list.

The "Cases In Progress" category is designed to identify the extraordinary cases where trials are not continuing "day-to-day."

The Register of each Division is required to submit independent Quarterly Reports of Matters Under Advisement and Cases In Progress to the Office of the Chief Justice for submission to the Chief Administrative Justice as required by the Supreme Judicial Court.

**VII. Dismissal of Old Divorce Cases**

Pursuant to Supplemental Rule 408 of the Probate and Family Court Department, divorce complaints on the docket for a year without any action shall be marked inactive and notice shall be given to the parties by the Register. If a second year then passes with no action being taken, the matter shall be dismissed.

**VIII. Will Contests and Child Welfare Matters**

Although the Supreme Judicial Court Time Standards do not specifically apply, the Probate and Family Court has established a "fast-track" for cases involving will contests and certain actions affecting children.

Rule 16 of the General Rules of the Probate Court addresses will contests.

Uniform Practices Xa and Xb of the Probate Court provide guidance for actions filed pursuant to GLM 119:23(c), GLM 201:5, or GLM 210:3.

Effective: May 1, 1988

## PROBATE AND FAMILY COURT DEPARTMENT STANDING ORDER NO. 2-88

*(Applicable to All Divisions)*

**PRE-TRIAL CONFERENCES**

1. This Standing Order supersedes Standing Order No. 1-83 which is hereby repealed.

2. All contested cases in all divisions of the Probate and Family Court Department, regardless of anticipated length of trial, shall be pretried prior to the assignment of the trial date by the Court.

3. The pre-trial conference shall be conducted in accordance with Rule 16 of the Massachusetts Rules of Domestic Relations Procedure or the Massachusetts Rules of Civil Procedure and Standing Order 1-88.

Effective: May 1, 1988

## PROBATE AND FAMILY COURT DEPARTMENT STANDING ORDER NO. 1-94

*(Applicable to the Middlesex Division)*

**ASSIGNMENT OF CASES TO THE MIDDLESEX SATELLITE SESSIONS AT CONCORD AND MARLBOROUGH**

**I. Purpose.** The Probate and Family Court Department has established satellite sessions of its Middlesex Division at the Concord and Marlborough District Courts. The satellite sessions have been established primarily to handle long or complex contested matters; to provide the residents of the designated areas with convenient access to the Probate and Family Court; and to provide additional courtrooms for Middlesex sessions.

**II. Assignment Procedures.**

*1. Middlesex Cases.* All requests for assignment of Middlesex Division matters in Concord or Marlborough are to be made through the Trial Department in Cambridge.

*2. Other Division Cases.* The Chief Justice of the Probate and Family Court may, from time to time, assign cases pending in other divisions to these satellite sessions. Requests for such assignments must be made directly to the Office of the Chief Justice.

**III. Non-geographic Assignments.** Regardless of where either party resides, the Trial Department of the Middlesex Division may assign any case pending in the Middlesex Division to the satellite session at either Concord or Marlborough for pre-trial and trial to expedite the flow of cases. A Middlesex case may also be marked up for pre-trial or trial at either Marlborough or Concord if all parties agree to the assignment in writing.

**IV. Geographic Assignments.** A case may be marked up for pre-trial or trial at Concord or Marlborough at the request of either party if at least one party currently resides or one counsel has an office in a town served by that session. The towns served by the sessions are as follows.

*1. Concord:* Acton, Ashby, Ayer, Bedford, Billerica, Boxborough, Burlington, Carlisle, Chelmsford, Concord, Dracut, Dunstable, Groton, Lexington, Lincoln, Littleton, Lowell, North Reading, Pepperell, Reading, Shirley, Tewksbury, Townsend, Tyngsborough, Westford, Wilmington or Woburn.

*2. Marlborough:* Ashland, Framingham, Holliston, Hopkinton, Hudson, Marlborough, Maynard, Natick, Sherborn, Sudbury, Stow, Wayland or Weston.

**V. Motions and Contempts.** Any party who lives in one of the towns served by either the Concord or Marlborough satellite session may request that a motion or a contempt be marked up for hearing at the satellite session which serves that geographic area. A motion or contempt arising from a case already assigned to the Concord or Marlborough satellite session may be marked up for hearing in that session. No other motions or contempts are to be marked up for the Concord or Marlborough satellite sessions.

Effective: August 1, 1994

## PROBATE AND FAMILY COURT DEPARTMENT STANDING ORDER NO. 2-97

*(Applicable to All Divisions)*

**SERVICE**

Service by facsimile or other electronic or telephonic transmittal is not service within the meaning of Mass.R.Dom.Rel.P. 5 unless expressly permitted by a specific rule for a specific purpose, by order of the court for cause shown, or pursuant to a written stipulation of the parties allowing for service by facsimile.

Effective: November 1, 1997

## PROBATE AND FAMILY COURT DEPARTMENT STANDING ORDER NO. 2-98

*(Applicable to All Divisions)*

**TRACKING OF APPOINTMENTS OF GUARDIANS *AD LITEM* AND PROBATION OFFICERS TO CONDUCT INVESTIGATIONS IN DOMESTIC RELATIONS* AND CHILD WELFARE† MATTERS**

It is ordered that the Probation Department of each Division shall track all appointments of Guardians *Ad Litem* and Probation Officers to conduct investigations in Domestic Relations* and Child Welfare† matters.

The following procedure will be followed:

1. When a Judge appoints a Guardian *Ad Litem* (G.A.L.) or a Probation Officer (P.O.) to conduct an investigation in Domestic Relations or Child Welfare matters, the person preparing the appointment form will provide the Probation Department with a copy of the completed form.

2. Upon receipt of the copy of the appointment form the Probation Department will prepare a tracking system which will record, at a minimum, the following:

a. Docket number;
b. Name of the case;
c. Date of appointment;
d. Name of the Judge making the appointment;
e. Whether the appointing judge wants to be notified when the Report is filed;
f. Name(s) of Attorney(s) of record;
g. Name of G.A.L. or P.O.;
h. Due date of the Report;
i. Extension date, if any, granted by the judge;
j. Date Report is received;
k. Date Parties are notified of receipt of Report;
l. Pre-trial date; and
m. Trial date.

3. The G.A.L. will file his/her report with the Probation Department on or before the due date. In situations where the G.A.L. has not filed his/her report in a timely fashion, the Probation Department will contact the G.A.L., either by telephone or in writing, to notify him/her of the need to file the Report and determine if an extension is necessary.

John Smith was married twice and had four children. He had a biological son from his first marriage, as well as an adopted daughter. John Smith had adopted the daughter of his first wife's sister, who was born out of wedlock.

John Smith then divorced his first wife and never developed a relationship with his adopted daughter, who left home at age fifteen.

John Smith married again and had two children with his second wife. His fourth child became his "caretaker", to whom he bequeathed his entire estate and nominated as his executrix. Pursuant to his will, John Smith's third child would receive his estate only in the even that the fourth child predeceased him. John Smith specifically omitted his biological son from his first marriage, without specifying the reason, and failed to reference his adopted daughter in his will. During the planning process, the estate planning attorney asked John Smith whether he had any children but did not specifically ask whether he had any adopted children. John Smith never mentioned to the estate planning attorney that he had an adopted child.

The will included a standard in terrorem clause.

In connection with the fourth child's petition for allowance of John Smith's last will and testament, the biological son, the omitted child, and the third child filed Appearances and Objections based on grounds of incompetency and undue influence.

# CHAPTER FIVE

**IN TERROREM CLAUSE – WILL**

If any beneficiary shall contest the probate or validity of my will or shall contest the validity of the **[TRUST NAME]** or any provisions of it or join in, except as a party defendant, any proceeding to contest the validity of my will or to prevent any provision of it from being carried out in accordance with its terms, regardless of whether or not such proceedings are instituted in good faith and with probable cause, or shall institute or join in, except as a party defendant, any proceeding to contest the validity of the **[TRUST NAME]** or to prevent any provisions of it from being carried out in accordance with its terms, regardless of whether or not such proceedings are instituted in good faith and with probable cause, then all such benefits for the beneficiary and his or her issue shall cease and my will and the trust instrument shall be interpreted as if the beneficiary and his or her issue had predeceased the Donor. For purposes of this clause, the filing of an appearance shall constitute the filing of an objection.

**IN TERROREM CLAUSE - TRUST**

If any beneficiary shall contest the probate or validity of the Donor's will or shall contest the validity of this trust instrument or any provisions of it or join in, except as a party defendant, any proceeding to contest the validity of the Donor's will or to prevent any provision of it from being carried out in accordance with its terms, regardless of whether or not such proceedings are instituted in good faith and with probable cause, or shall institute or join in, except as a party defendant, any proceeding to contest the validity of this trust instrument or to prevent any provisions of it from being carried out in accordance with its terms, regardless of whether or not such proceedings are instituted in good faith and with probable cause, then all such benefits for the beneficiary and his or her issue shall cease and this instrument shall be interpreted as if the beneficiary and his or her issue had predeceased the Donor. For purposes of this clause, the filing of an appearance shall constitute the filing of an objection.

I have been advised that the dispositive provisions of this my Last Will and Testament may be inconsistent with the laws governing the disposition of jointly owned property. At the time of my death I expect that certain assets of mine will be owned jointly with one or more of my children. Such joint ownership shall be deemed to be established for convenience only. This provision shall apply to all jointly owned bank accounts, investment accounts and jointly owned real property interests which I own at the time of my death, but shall not apply to beneficiary designations under life insurance policies, qualified or non-qualified retirement plans or the like. It is my desire that any of my assets which are held in a joint form of ownership shall be considered probate property for purposes of distribution in accordance with the provisions of this my Last Will and Testament. My Executor furthermore, is specifically authorized to recover any funds held in such joint accounts at the time of my death in order to carry out the express provisions of this Article. Any legal fees or other expenses incurred by my Executor in enforcing this provision shall be charged against the person who fails to cooperate with my Executor in carrying out the provisions of this Article.

**Arbitration**

To the extent permitted by applicable law, any controversy or claim arising out of or relating to the provisions or interpretation of this trust, shall be settled by arbitration in accordance with the Code of Commercial Arbitration of the American Arbitration Association (unless the disputing parties agree promptly to another alternative dispute resolution process), and Judgment upon the award tendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The parties understand that this agreement to arbitration does not constitute a waiver of the right to seek a judicial forum where such a waiver would be void under the federal and state laws. Arbitration is final and binding on the parties.

.07 The Trustee shall have the power to defer any payment to any beneficiary hereunder if the Trustee determines that payment is not desirable. In exercising its discretion, the Trustee shall consider the circumstances of the life of such beneficiary, and, if the Trustee, after making inquiry into the beneficiary's affairs, shall conclude that the beneficiary is not yet prepared to manage the distribution otherwise required hereunder, or that the required distribution will fall into the hands of creditors or other persons not beneficiaries of the trust, including, but not limited to, a spouse, then the Trustee may decline to make such distribution at a time when such distribution is otherwise required or may distribute a portion thereof until a later date. The discretion of the Trustee on this matter shall be final and binding upon all persons, subject only to revision by a court of competent jurisdiction, in the case of manifest abuse of the Trustee's power hereunder.

# FACULTY PROFILES

**Jennifer L. Laucirica, Esq.,** manages the Estate Administration Department of Cushing & Dolan PC, and concentrates her practice in the areas of estate taxation, estate settlement, probate law, probate litigation and asset protection planning. Prior to joining Cushing & Dolan, in 2002, Ms. Laucirica specialized in the settlement and taxation of high net worth estates at State Street Global Advisors. She was also a probate paralegal for the Massachusetts Attorney General for six years, where she published "Probate Procedures of the Division of Public Charities" with the Massachusetts Bar Association. Additionally, she presented the publication to the Boston Bar Association as a panelist on behalf of the Attorney General. Ms. Laucirica co-authored various chapters within the MCLE Estate Tax Returns Manual. She has lectured on various estate settlement topics, including "Decoupling the Massachusetts Estate Tax: DOR Audit Perspectives and The Uniform Probate Code". More recently, Ms. Laucirica testified before the Judiciary in support of the adoption of the Uniform Probate Code in Massachusetts. Ms. Laucirica is a member of the Massachusetts Bar Association Probate Law Section Council and of the Boston Estate Planning Council.

**Hon. Edward F. Donnelly, Jr.,** is an associate justice of the Middlesex Division of the Probate and Family Court Department. He was appointed to the bench in 1998 by then-Governor A. Paul Cellucci. Prior to his appointment, Judge Donnelly was a clerk in the Middlesex Probate and Family Court for fifteen years. Prior to coming to work for the court system, Judge Donnelly was an attorney in private practice in Maynard and a staff attorney for the City of Waltham. In 1997, Judge Donnelly received the Public Service Award presented by the Massachusetts Chapter of the American Academy of Matrimonial Lawyers. He is a frequent lecturer at continuing legal education programs. Judge Donnelly is a graduate of the University of Massachusetts and of Boston College Law School.

**Lisa M. Cukier, Esq.,** is a partner at Burns & Levinson LLP, where she practices probate litigation, guardianship and family law. Ms. Cukier litigates will contests, trust disputes, guardianship/conservatorship and family-member disputes. She serves as guardian and conservator for individuals who lack capacity to manage their own affairs and litigates disputes where family members object to other family members serving as fiduciary due to underlying family discord. Ms. Cukier formerly represented the Department of Mental Heath as assistant general counsel and represented the Department of Mental Retardation as regional counsel. Among the varied areas of Ms. Cukier's practice, she is best recognized for her representation of family members of individuals who lack mental competency to make their own financial or personal decisions. Ms. Cukier uses strategic interventions with multi-disciplinary professionals, including psychiatrists, social workers, protective service workers, family members and agency administrators to achieve client goals. Ms. Cukier presently sits on the Board of Editors of Massachusetts Lawyers Weekly and sits on the Council of the Boston Bar Association. She is a past president of the Massachusetts Family and Probate Inn of Court, and is a past co-chair of the Massachusetts Lesbian and Gay Bar Association. In 2006, Ms. Cukier received the MBA Community Service Award. In 2005, she was honored as a Woman of Distinction in Law and Public Service by the Massachusetts Association of

Women Lawyers. Ms. Cukier received the SuperLawyer designation in 2005, 2006 and 2007. She is a graduate of Northeastern University and Suffolk University Law School.

**Maureen E. Curran, Esq.,** graduated from Merrimack College (*summa cum laude*), in 1988, and from Boston College Law School, in 1991. Prior to her graduation, Ms. Curran had been a court reporter for almost twenty years. Since her graduation, she has been a trial attorney, first at Conn, Kavanaugh, Rosenthal, Peisch & Ford, from 1991 through 1996, and then at Hemenway & Barnes, from 1996 to 2005. In February of 2005, Ms. Curran opened her own law practice, the Law Office of Maureen E. Curran LLC, where her practice is concentrated in the area of probate litigation. She handles cases involving will contests, undue influence, competency issues, breach of fiduciary duty related to wills and trusts, contested accounts and guardianships. She also serves as a court appointed guardian ad litem. Ms. Curran has been a member of the Massachusetts Bar Association Probate Law Section Council for the past two years. She also co-chairs the Probate Litigation Practice Group for the Council. For several years, Ms. Curran was an adjunct lecturer, litigation specialist for a pretrial litigation course at Boston College Law School. Ms. Curran also served on the Boston College Law School Alumni Association up until this year. She was the immediate past president.

**Bruce Kaster, MD,** is a geriatric psychiatrist with offices in Newton.

**Rikk I. Larsen,** is a founding partner of Elder Decisions, where he is a mediator, trainer and conflict coach. He has created and presented conflict skills trainings to eldercare professionals from around New England. Mr. Larsen serves on a Subcommittee for the Massachusetts Trial Court's Standing Committee on Dispute Resolution. He co-presented "Using Mediation in Elder Law" at the Massachusetts Chapter of the National Academy of Elder Law Attorneys and presented a workshop "When Families Struggle with Dementia: Facilitating Solutions through Mediation" at the Dartmouth Alzheimer's Conference. He is the co-author, with Crystal Thorpe, of "Elder Mediation: Optimizing Major Family Transitions" for *Marquette Elder's Advisor Law Journal*. Mr. Larsen is a former case coordinator for Family and Probate Court and a case liaison for Small Claims Court for the Harvard Mediation Program. He attended Harvard Law School's Program on Negotiation, studied elder issues with The Center for Social Gerontology and studied the concept of introducing meditation and spirituality into the mediation process at the Harvard Negotiation Program's Insight Initiative. He is a member of the New England Chapter of the Association for Conflict Resolution and the Massachusetts Council on Family Mediation. He received his BA from Williams College and his MBA from Harvard Business School.

# ACKNOWLEDGMENTS

# Acknowledgments

The following full text article, originally appearing in *Massachusetts Lawyers Weekly*, in the April 11, 2005, issue, has been Reprinted with the Permission of its author, Rikk I. Larsen, and of Lawyers Weekly:

WHEN AGING ISSUES LEAD TO FAMILY CONFLICT

The following full text rules and statutes, appearing in this book, have been Reprinted with the Permission of LexisNexis:

MASSACHUSETTS PROBATE COURT RULE 2
MASSACHUSETTS PROBATE COURT RULE 16
MASSACHUSETTS PROBATE COURT RULE 27A
MASSACHUSETTS PROBATE COURT RULE 27B
MASSACHUSETTS RULES OF CIVIL PROCEDURE, RULE 16
MASSACHUSETTS GENERAL LAW CHAPTER 201, SECTION 34
MASSACHUSETTS GENERAL LAW CHAPTER 204, SECTION 15
UNIFORM PRACTICES OF PROBATE COURTS, RULE XXVI
UNIFORM PRACTICES OF PROBATE COURTS, RULE XXXIV