

# *When Estate Planners and Real Estate Lawyers Don't Speak the Same Language*



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Theresa Santoro is Of Counsel in the Real Estate Department at Sherin and Lodgen, LLP. Prior to that, she was an attorney at Cushing & Dolan, PC's Real Estate Department. Theresa is analytical and detail-oriented, with broad and deep experience in complex business and real estate matters, including entity formation, real estate and business acquisitions, dispositions, and financing, as well as transactional commercial and residential real estate, condominium developments and conversions, due diligence, permitting, complex contract

and lease negotiations, and risk assessment involving a variety of multifaceted legal and title problems.

Theresa drafts and negotiates a significant workload of matters, including leases, contracts, business acquisitions, institutional and private equity and trust financing, and purchase and sale agreements for residential properties and commercial projects, including businesses, hotels, restaurants, retail spaces, multifamily buildings, office and industrial buildings, warehouses, business parks, and raw land for development projects. She also coordinates IRS 1031 tax deferred like-kind exchanges, advises on zoning and land use matters, and files petitions throughout Land Court and various Probate Courts.

A recipient of the CALI Excellence for the Future Award, Theresa is the Co-chair of REBA's Estate Planning Section. She is also a member of the MBA, Federal Bar Association and Rhode Island Bar Association, and served as Secretary of the Bristol County Bar Association and President of the Warren Barrington Rotary Club.

Theresa earned a J.D. from Roger Williams University School of Law. She was the third successful graduate in the advanced collaborative program with Roger Williams University undergraduate study, resulting in her achievement of a dual major Bachelor of Science, *summa cum laude*, and a Juris Doctor in six years.



## **Lisa V. Still, Esq.**

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Lisa Vesperman Still is the New England Regional Counsel and Massachusetts State Counsel for WFG National Title Insurance Company. Lisa has over 25 years of experience in real estate and title, both as a transactional attorney in private practice for more than 17 years, concentrating in all-things-real estate, and as underwriting counsel. As underwriting counsel, Lisa unravels complex title puzzles and oversees the underwriting in all New England states. Lisa heads up WFG's Basically Title series,

and leads the New England Back to School sessions and CE classes for WFG's Real Estate School.

In addition to being a member of the REBA Standards & Forms Committee, Lisa serves on the Education, Membership and Best Practices Committees of the American Land Title Association, is president of the New England Land Title Association, and a member of the Barnstable Bar Association. She is also involved in her local Cape Cod community, serving in volunteer roles and leadership capacities on the Lower Cape. Lisa served as grievance officer for the Orleans and Brewster Housing Authorities and was a board member of the Community Development Partnership, and currently serves as secretary of the Brewster Sportsman's and Civic Club and as president of the Nauset Warriors Booster Club.

Lisa received her J.D. from Loyola University New Orleans College of Law and her B.A. in Political Science from The College of New Rochelle. She lives in Brewster with her partner Steve and daughter Savannah, while keeping tabs on her son Ethan, who serves in the Army. When she's not tackling title puzzles, Lisa loves walking and hiking the little-known paths, trails and dunes of Cape Cod.

# *When Estate Planners and Real Estate Lawyers Don't Speak the Same Language*

## **Powers of Attorney**

Massachusetts General Laws, Chapter 190B, §§5-501 to 5-507

### **REBA Title Standard No. 34 Powers of Attorney**

An instrument executed by an attorney in fact under a recorded power of attorney, durable or otherwise, is not on that account defective provided:

- (1) the power of attorney had not, at the time of such execution, terminated pursuant to its own terms;
- (2) the power of attorney contains sufficient powers for the execution of the instrument, the transaction for which the instrument is being used, or both;
- (3) at the time of the recording of such instrument:
  - (a) no revocation of the power of attorney had been recorded with the registry of deeds for the county or district in which the real estate affected lies; and
  - (b) no evidence of the death of the principal had been recorded with either the registry of deeds or registry of probate for the county or district in which the real estate affected lies; and
  - (c) in the case of a non-durable power of attorney, no evidence of incapacity or legal disability of the principal had been recorded with either the registry of deeds or registry of probate for the county or district in which the real estate affected lies; and
- (4) only if required by the express terms of the power of attorney, there has been recorded an affidavit signed by the attorney in fact under the penalties of perjury stating that the attorney in fact did not have at the time of such execution pursuant to the power of attorney, actual knowledge of the revocation or of the termination of the power of attorney by death, or, in the case of a non-durable power of attorney, by mental illness or other disability or incapacity.

#### *Comments*

*See M.G.L. c. 190B, §§5-501 to 5-507.*

*Under M.G.L. c. 190B, § 5-504 (as amended effective July 8, 2012), an affidavit of the type described in clause (4) of this Title Standard is no longer required as to either durable or nondurable powers of attorney to establish good faith reliance by third parties unless the power of attorney itself expressly requires the recording of such affidavit. However, this legislative change does not affect the advisability of obtaining such an affidavit from the attorney in fact as a matter of practice in new transactions in order to gain the benefit of the statutory conclusive reliance provision of M.G.L. c. 190B, § 5-505.*

Adopted November 6, 1978

Amended May 21, 1984 (Added first paragraph)

Amended May 7, 2012 (to conform Standard to passage of M.G.L. c.190B, effective March 31, 2012)

Amended May 6, 2013 (to conform Standard to passage of M.G.L. c. 190B, §5-504(c) effective July 8, 2012)

**REBA Form No. 1  
Affidavit Regarding Power of Attorney**

I, \_\_\_\_\_  
of \_\_\_\_\_, \_\_\_\_\_ County,  
Massachusetts, do under oath depose and say that I am the attorney in fact or agent named in a  
Power of Attorney dated \_\_\_\_\_ executed by my principal  
of \_\_\_\_\_ County, Massachusetts, and filed or recorded with  
\_\_\_\_\_ Registry \_\_\_\_\_.

\_\_\_\_\_ as Document \_\_\_\_\_ and noted on Certificate of Title \_\_\_\_\_  
\_\_\_\_\_ in Book \_\_\_\_\_, Page \_\_\_\_\_.  
\_\_\_\_\_ herewith

and that at the time of the execution, pursuant to said Power of Attorney, of an instrument dated  
\_\_\_\_\_ and filed or recorded with said Registry.

\_\_\_\_\_ as Document \_\_\_\_\_ and noted on Certificate of Title \_\_\_\_\_  
\_\_\_\_\_ in Book \_\_\_\_\_, Page \_\_\_\_\_.  
\_\_\_\_\_ herewith

I did not have actual knowledge of any revocation or of any termination of said Power of  
Attorney by death, mental illness or other disability.

Executed under the penalties of perjury this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_

*See REBA Title Standard No. 34*

*[Attach appropriate acknowledgement certificate here]*

Adopted May 21, 1984

**Commonwealth of Massachusetts Land Court  
Guidelines on Registered Land dated February 27, 2009**

**15. Deeds: Execution and Acknowledgment of Deed under Power of Attorney**

(May 1, 2000)

Although, as indicated below, there is some leeway in the way a deed in such an instance can be signed, there is little flexibility as to how the granting clause should be drafted.

When a sealed instrument is executed by an agent or attorney, for the principal, the strict technical rule of the Common Law, which has never been relaxed in England or in this Commonwealth, requires that it be executed in the name of the principal in order to make it his deed" *Abbey v. Chase*, 6 Cush. 54. As stated in Crocker's Notes on Common Forms, Little Brown & Company (Seventh Edition, 1955), § 351, where A.B. is the principal, a deed beginning "I, C.D.," or "I, C.D. as attorney for A.B." is an improper form as to the granting clause, and will be ineffective as the deed of the principal. The deed should be drafted by reciting in the granting clause the principal's name only, as though there was no power of attorney.

As far as the execution of the instrument, the signature should be as noted below. We'll assume that Mary Doe is the principal and that John Doe is her attorney in fact under a power of attorney:

/s/ Mary Doe  
by John Doe her Attorney in Fact  
under Power of Attorney, recorded with (Registry of Deeds) Book---, Page---

In this instance John will actually sign Mary's name. Although the above form is the preferred one, the signature "John Doe for Mary Doe" would seem to be satisfactory. See *Mussey v. Scott*, 7 Cush. 215.

The acknowledgment, like the deed, should be that of the principal (albeit through the act of the agent), as follows:

Then personally appeared the aforementioned John Doe and acknowledged the foregoing instrument to be the free act and deed of Mary Doe.

**Registered land memos from the Chief Title Examiner**

Memorandum: Form of Acknowledgements and powers of attorney dated 02/04/2021 - <https://www.mass.gov/memorandum/form-of-acknowledgments-and-powers-of-attorney>

## Life Estates

### Massachusetts General Laws, Chapter 184

Section 5: Conveyance vesting life estate and remainder to heirs

Section 5. If land is granted or devised to a person and after his death to his heirs in fee, however the grant or devise is expressed, an estate for life only shall vest in such first taker, and a remainder in fee simple in his heirs.

Source: <https://malegislature.gov/Laws/GeneralLaws/PartII/TitleI/Chapter184/Section5> (9/30/2022)

### 26 United States Code Annotated/Title 26. Internal Revenue Code

§ 2036. Transfers with retained life estate

(a) General rule.--The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death--

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

§ 7520. Valuation tables

(a) General rule.--For purposes of this title, the value of any annuity, any interest for life or a term of years, or any remainder or reversionary interest shall be determined--

(1) under tables prescribed by the Secretary, and

(2) by using an interest rate (rounded to the nearest 2/10 ths of 1 percent) equal to 120 percent of the Federal midterm rate in effect under section 1274(d)(1) for the month in which the valuation date falls.

If an income, estate, or gift tax charitable contribution is allowable for any part of the property transferred, the taxpayer may elect to use such Federal midterm rate for either of the 2 months preceding the month in which the valuation date falls for purposes of paragraph (2). In the case of transfers of more than 1 interest in the same property with respect to which the taxpayer may use the same rate under paragraph (2), the taxpayer shall use the same rate with respect to each such interest.

(b) Section not to apply for certain purposes. -- This section shall not apply for purposes of part I of subchapter D of chapter 1 or any other provision specified in regulations.

(c) Tables. --

(1) In general. -- The tables prescribed by the Secretary for purposes of subsection (a) shall contain valuation factors for a series of interest rate categories.

(2) Revision for recent mortality charges. -- The Secretary shall revise the initial tables prescribed for purposes of subsection (a) to take into account the most recent mortality experience available as of the time of such revision. Such tables shall be revised not less frequently than once each 10 years to take into account the most recent mortality experience available as of the time of the revision.

[(3) Redesignated (2)]

(d) Valuation date. -- For purposes of this section, the term "valuation date" means the date as of which the valuation is made.

(e) Tables to include formulas. -- For purposes of this section, the term "tables" includes formulas.

**Internal Revenue Service Actuarial Tables**  
<https://www.irs.gov/retirement-plans/actuarial-tables>

**Massachusetts General Laws, Chapter 65C**

Section 5: Valuation; gross estate

Section 5. (b) The value of an annuity, a life estate or an interest in property less than an absolute interest shall be determined in accordance with the actuarial tables in effect as of the decedent's death under section two thousand and thirty-one of the [Internal Revenue Code of the United States] in effect on January first, nineteen hundred and eighty-five at such time and regulations issued thereunder.

Source: <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIX/Chapter65C/Section5> (9/30/2022)

**Commonwealth of Massachusetts Land Court**  
**Guidelines on Registered Land dated February 27, 2009**  
**28. Life Estate Deeds**  
(May 1, 2000)

An example of a life estate deed is where one or more grantors convey real estate to one or more grantees (the "remaindermen") reserving (a) the right to use and occupy the real estate and (b) sometimes other rights such as the right to sell or mortgage, during the lives of the grantors (the "life tenants").

The certificate of title should issue in the names of the grantees/remaindermen in whatever relationship is stated in the life estate deed, e.g., joint tenants or tenants-in-common, immediately followed by a recitation of the rights reserved by the grantors/life tenants exactly as it appears in the life estate deed, e.g., subject to the rights of \_\_\_\_\_ and \_\_\_\_\_ to use and occupy the premises for and during their lives as reserved in Document No. \_\_\_\_\_.

If the grantors/life tenants reserve additional powers with or without notice to the grantees/remaindermen, these should be recited in the certificate of title, e.g., "Subject to the rights, powers and interests reserved to and in Document No. \_\_\_\_\_, any of which may be exercised without notice to, or assent from, the above-named owners or their assigns."

If the grantors/life tenants holding the retained rights exercise them, no notice to or assent from the grantees/remaindermen or their assigns need be given or obtained unless, of course, called for by the deed reserving such rights.

A typical "no notice" provision in a deed would be "No notice to, or assent by, the grantees herein or their assigns shall be necessary in connection with any exercise of the rights retained by the grantors herein."

## **Trusts**

### **Real Estate Bar Association (REBA) Title Standards**

- TS 9 - Massachusetts Business Trusts and the Rule Against Perpetuities
- TS 23 - Self Dealing by Trustees
- TS 33 - Transfers by Trustees
- TS 38 - Attachments of Trust Property
- TS 45 - Transfers to Trusts
- TS 53 - Indefinite References - Trusts
- TS 68 -Trustee's Certificates Under MGL c. 184, § 35

### **Real Estate Bar Association (REBA) Forms**

- Form 20: Declaration of Trust: Establishing Nominee Trust
- Form 20A: Schedule of Beneficiaries Nominee Trust
- Form 20B: Receipt of Schedule of Beneficiaries
- Form 20C: Nominee Trust Resignation
- Form 20D: Nominee Trust Appointment of Successor Trustee
- Form 20E: Certificate of Acceptance by Trustee
- Form 20F: Nominee Trustee Certificate of Appointment of Successor Trustee and Acceptance
- Form 20G: Trustee Certificate
- Form 20H: Certificate and Direction of Beneficiary

### **Commonwealth of Massachusetts Land Court Guidelines on Registered Land dated February 27, 2009**

- LC Guideline 51 - Trusts: Conveyances to Trustees
- LC Guideline 52 - Trusts: Conveyances by Trustees
- LC Guideline 53 - Trusts: Trustee's Deeds for Nominal Consideration
- LC Guideline 55 - [Instruments requiring] Approval by Chief Title Examiner (Section 6 Successor Trustees/Removal of Trustees)
- LC Guideline 59 – Indefinite References
- LC Guideline 62 – Trusts: Expired

## **Trustee's Certificates**

### **Massachusetts General Laws Chapter 184**

Section 35: Trustee's certificate; requirements; effect

Section 35. Notwithstanding section 25 to the contrary, a certificate sworn to or stated to be executed under the penalties of perjury, and in either case signed by a person who from the records of the registry of deeds or of the registry district of the land court, for the county or district in which real estate owned by a nontestamentary trust lies, appears to be a trustee thereunder and which certifies as to: (a) the identity of the trustees or the beneficiaries thereunder; (b) the authority of the trustees to act with respect to real estate owned by the trust; or (c) the existence or nonexistence of a fact which constitutes a condition precedent to acts by the trustees or which are in any other manner germane to affairs of the trust, shall be binding on all trustees and the trust estate in favor of a purchaser or other person relying in good faith on the certificate. The certificate most recently recorded in the registry of deeds for the county or district in which the real estate lies shall control.

Source: <https://malegislature.gov/Laws/GeneralLaws/PartII/TitleI/Chapter184/Section35> (9/30/2022)

**REBA Form No. 35**  
**Trustee's Certificate Pursuant to M.G.L. c. 184, § 35**

Name of Trust: \_\_\_\_\_

Dated: \_\_\_\_\_

I, \_\_\_\_\_ [Name of Trustee], Trustee of  
\_\_\_\_\_ [name of trust] under  
\_\_\_\_\_ [indenture] \_\_\_\_\_ [agreement declaration] of Trust  
dated \_\_\_\_\_ [date], [as amended] (the "Trust") between  
\_\_\_\_\_ [name of settler/donor] as  
\_\_\_\_\_ [settler/donor] and  
\_\_\_\_\_ [name of original trustees] as  
the original [and current] trustees, certify as follows:

(a). \_\_\_\_\_ Name of Trustee(s) is/are the current trustee(s) of the Trust. If either one of us shall fail or cease to serve, \_\_\_\_\_ Successor Trustee shall serve as successor Trustee;

(b). The trustees of the Trust have authority to act with respect to real estate owned by the Trust, and have full and absolute power under said Trust to convey any interest in real estate and improvements thereon held in said Trust and no purchaser or third party shall be bound to inquire whether the trustee has said power or is properly exercising said power or to see to the application of any trust asset paid to the trustee for a conveyance thereof; and,

(c). There are no facts which constitute conditions precedent to acts by the trustees or which are in any other manner germane to affairs of the Trust.

Executed as a sealed instrument under the pains and penalties of perjury on \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
NAME OF TRUSTEE  
Trustee

*See REBA Title Standard No. 68*

*Note*

*The Trustees Certificate may need to be amended in certain circumstances, for example, where there are conditions precedent to the acts by the trustees.*

*[Attach appropriate acknowledgement or jurat certificate form]*

*Comment*

*As to registered land, see also Land Court Guideline 52.*

Adopted November 3, 2003

Amended November 14, 2011 (Amended to make reference to jurat certificate form in the Note and to add the Comment)



## Massachusetts General Laws, Chapter 203E [Massachusetts Uniform Trust Code]

### Section 1013: Certification of trust

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

- (1) that the trust exists and the date the trust instrument was executed;
- (2) the identity of the settlor;
- (3) the identity and address of the currently acting trustee;
- (4) the powers of the trustee;
- (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
- (7) the trust's taxpayer identification number; and
- (8) the manner of taking title to trust property.

(b) A certification of trust may be signed or otherwise authenticated by any trustee.

(c) A certification of trust shall state that the trust has not been revoked, modified or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect shall not be liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument, in addition to a certification of trust or excerpts, shall be liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section shall not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

Source: <https://malegislature.gov/Laws/GeneralLaws/PartII/TitleII/Chapter203E/Section1013> (9/30/2022)

**Commonwealth of Massachusetts Land Court  
Guidelines on Registered Land dated February 27, 2009**

**52. Trusts: Conveyances by Trustees**

(May 1, 2000, Revised February 27, 2009)

**A. Nominee Trust Conveyances - Trust in Same Registry District**

Conveyances by Trustees of a nominee trust are acceptable if

- (1) the instrument of conveyance is authorized by the terms of the registered or recorded (previously or simultaneously) trust instrument or certificate given pursuant to G.L. c. 184 §35, and (a) a Trustee's Certificate in substantially the form appended hereto as Exhibit A or Exhibit B is submitted, or (b) the instrument of conveyance itself contains all such matters required to be set forth in a Trustee's Certificate;

or

- (2) Land Court approval has been obtained.

**B. Nominee Trust Conveyances - Trust in Different Registry District or recorded in Registry of Deeds**

Conveyances by Trustees of a nominees trust are acceptable if

- (1) the instrument of conveyance is authorized by the terms of the registered or recorded (previously or simultaneously) trust instrument and (a) attested copies of the trust declaration, or of a certificate pursuant to G.L. c. 184 §35, and all amendments thereto and all trustee resignations and appointments are submitted (as established by a certificate by an attorney, or given under oath by the trustee, certifying that the instrument or certificate of which the attested copy is provided is current, in force, and not the subject of any recorded amendment), and (b)(i) a Trustee's Certificate in substantially the form attached hereto as Exhibit A or Exhibit B is submitted, or (ii) the instrument of conveyance itself contains all such matters required to be set forth in a Trustee's Certificate, and with respect to a Trust for which only a Certificate pursuant to G.L. c. 184 §35 has been recorded, it is subscribed and sworn to under the pains and penalties of perjury

or

- (2) Land Court approval has been obtained (this requires the fully executed instrument and a Land Court Examiners Report on the contents and status of the trust).

**CAVEAT:** Certificates pursuant to G.L. c 184 § 35, once recorded or registered in connection with, and establishing authority for, a particular transaction, may not be used for subsequent transactions at a later date unless: (a) the earlier certificate establishes that the termination of the trust has not occurred as of the date of the later transaction, or (b) the earlier certificate provides that any party interested in title to the locus may rely on the continuing existence of the trust until the recording of a certificate or document establishing the termination of the trust.

**CAVEAT:** A trustee certificate as contained in attached Exhibit A cannot be used also to demonstrate authority of a trustee to convey, in cases where the trust instrument is not of record and a certificate pursuant to G.L. c. 184, § 35 instead has been recorded or registered, unless the recorded or registered G.L. c. 184, § 35 certificate authorizes any party interested in title to the locus to rely on such a trustee certificate.

**C. Trust Conveyances Other Than Nominee Trusts- Trust in Same Registry District**

Trust conveyances are acceptable if the instrument is authorized by the terms of the trust. In these cases, no separate Trustee’s Certificate is required.

**D. Trust Conveyances Other Than Nominee Trusts- Trust in Different Registry District or recorded in Registry of Deeds**

Trust conveyances are acceptable if

- (1) the instrument of conveyance is authorized by the terms of the trust and (a) attested copies of the trust declaration (or, instead, provided the trust is not a testamentary one, of a recorded or registered certificate pursuant to G.L. c. 184, §35) and all amendments thereto and all trustee resignations and appointments are submitted (as established by a certificate by an attorney, or given under oath by the trustee, certifying that the instrument or certificate of which the attested copy is provided is current, in force, and not the subject of any recorded amendment) and (b)(i) a Trustee’s Certificate in substantially the form attached hereto as Exhibit C is submitted, or (ii) the instrument itself contains all such matters required to be set forth in a Trustee’s Certificate

or

- (2) Land Court approval has been obtained (this requires the fully executed instrument and a Land Court Examiners Report on the contents and status of the trust).

**Commonwealth of Massachusetts Land Court Guidelines on Registered Land dated February 27, 2009**

**53. Trusts: Trustee’s Deed for Nominal Consideration**

(May 1, 2000, Revised February 27, 2009)

A trustee’s deed containing a recitation of nominal consideration may be accepted for registration without prior Land Court approval when accompanied by a trustee’s certificate, if authorized by the trust, or a certificate pursuant to G.L. c. 184 §35, signed by at least one of the trustees, certifying that all the beneficiaries who are natural persons are of full age and are competent and that all of the beneficiaries have assented to the conveyance for nominal consideration (See the attached sample certificate.)

The requirements of this guideline address only the issue of a deed reciting nominal consideration; the requirements of other guidelines relating generally to instruments executed by trustees also must be satisfied.

I, \_\_\_\_\_ Trustee  
of \_\_\_\_\_ under a Declaration of  
Trust dated \_\_\_\_\_ and registered as \_\_\_\_\_ hereby certify that:

- 1. Said Trust is in full force and effect.
- 2. All the beneficiaries of said trust who are natural persons, if any, are of full age.
- 3. All the beneficiaries of said trust who are natural persons, if any, are competent.
- 4. All the beneficiaries of said trust have consented to the transfer of the property to \_\_\_\_\_ for nominal consideration.

Signed under the penalties of perjury.  
Signed: \_\_\_\_\_  
Dated: \_\_\_\_\_

[Add Oath]

## **Self-Dealing**

### **Massachusetts General Laws, Chapter 203E**

#### **Section 802. Duty of loyalty**

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee, as provided in section 1012, a sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests shall be voidable by a beneficiary affected by the transaction unless:

- (1) the transaction was authorized by the terms of the trust;
- (2) the transaction was approved by the court;
- (3) the beneficiary did not commence a judicial proceeding within the time allowed by section 1005;
- (4) the beneficiary consented to the trustee's conduct, ratified the transaction or released the trustee in compliance with section 1009; or
- (5) the transaction involves a contract entered into or claim acquired by the trustee before the person became a trustee.

(c) A sale, encumbrance or other transaction involving the investment or management of trust property shall be presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

- (1) the trustee's spouse;
- (2) the trustee's descendants, siblings, parents or their spouses;
- (3) an agent or attorney of the trustee; or
- (4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(d) A transaction not concerning trust property, in which the trustee engages in the trustee's individual capacity, shall be a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(e) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee shall not be presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of chapter 203C. In addition to compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment management services, the trustee shall at least annually notify the persons entitled under section 813 to receive a copy of the trustee's annual report of the rate and method by which that compensation was determined.

(f) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries.

(g) This section shall not preclude the following transactions, if fair to the beneficiaries:

- (1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
- (2) payment of reasonable compensation to the trustee;
- (3) a transaction between a trust and another trust, decedent's estate or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;
- (4) a deposit of trust money in a regulated financial service institution operated by the trustee; or
- (5) an advance or loan by the trustee of money to the trust for a proper trust purpose.

Source: <https://malegislature.gov/Laws/GeneralLaws/PartII/TitleII/Chapter203E/Article8/Section802>  
(9/30/2022)

## **Massachusetts General Laws, Chapter 203E**

### **Section 1005. Limitation of action against trustee**

(a) Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust shall be barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary, unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Any claim against a trustee for breach of trust shall be barred in any event and notwithstanding lack of full disclosure, against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for examination by the beneficiary after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by the beneficiary personally or if, being a minor or disabled person, it is received by the beneficiary's representative as described in article 3.

(b) Where a claim is not barred by subsection (a), a beneficiary may not commence a proceeding against a trustee for breach of trust more than 3 years after the date the beneficiary or a representative of the beneficiary knew or reasonably should have known of the existence of a potential claim for breach of trust.

(c) If subsections (a) and (b) do not apply, a judicial proceeding against a trustee for breach of trust must be commenced within 5 years after the first to occur of:

- (1) the removal, resignation or death of the trustee;
- (2) the termination of the beneficiary's interest in the trust; or
- (3) the termination of the trust.

Source: <https://malegislature.gov/Laws/GeneralLaws/PartII/TitleII/Chapter203E/Article10/Section1005>  
(9/30/2022)

**REBA Title Standard No. 23**  
**Self-Dealing by Trustee**

A title based upon a deed from a trustee of record to themselves, or a party identified in M.G.L. c. 203E, §802(c) (See Comment 5), free of the trust, is not on that account defective if:

(1) The recorded trust, as it may be amended, or a Trustee's Certificate pursuant to M.G.L. c. 184, §35 evidencing the provisions of the trust, expressly authorizes self-dealing on the part of the trustee;

or

(2) A court of competent jurisdiction has rendered a judgment authorizing or ratifying the deed;

or

(3) A period of at least three (3) years has elapsed since the recording of the deed and the record does not disclose any adverse claim arising under M.G.L. c. 203E, §802(b) in connection with the transfer;

or

(4) The trust does not contain spendthrift provisions, and all beneficiaries, in a recorded instrument, consent to or ratify the conveyance by the trustee;

or

(5) Barring an express prohibition against self-dealing, the recorded trust, as it may be amended, or Trustee's Certificate pursuant to M.G.L. c. 184, §35, recites that third parties may conclusively rely upon instruments or documents executed by such trustees as mandated by the trust as being duly authorized.

*Comments*

*(1) Regardless of the fairness of the price paid, if the trustee is the purchaser of the property the beneficiaries may insist upon a reconveyance of the property from the trustee, or from any person who purchased from the trustee with notice or knowledge that the trustee had purchased the property through self-dealing, upon the payment of the purchase price where there has been no actual fraud; or, the beneficiaries may hold the trustee liable for the actual value of the property at the time of sale; or, if the trustee has sold the property for an amount in excess of the price paid by such trustee, the beneficiaries may recover such excess. See Vinal v. Gove, 275 Mass. 235, 175 N.E. 464.*

*(2) Self-dealing is considered a breach of the trustee's duty of loyalty. It is characterized as "a sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests" and is voidable by an affected beneficiary. M.G.L. c. 203E, §802(b).*

*(3) If a beneficiary has not received a final account fully disclosing the self-dealing and terminating the trust relationship between the beneficiary and the trustee, a beneficiary is barred from commencing any proceeding against a trustee for self-dealing “more than 3 years after the date the beneficiary or a representative of the beneficiary knew or reasonably should have known of the existence of a potential claim for breach of trust.” M.G.L. c. 203E, §1005(b). For purposes of this Standard, a beneficiary is presumed to have known or reasonably should have known about the breach of trust when the deed is recorded at the Registry of Deeds in the County in which the property is located.*

*(4) Frequently, the identity of a trust’s beneficiaries is disclosed only in an unrecorded schedule of beneficial interests. As such, third parties may be unable to readily ascertain from the registry records the identity of those persons who may consent to, or ratify, a trustee’s conveyance which might otherwise violate this standard, or release the trustee from liability therefor. In such circumstances, the identity of a trust’s beneficiaries may be conclusively established, in favor of persons relying thereon in good faith, in a trustee’s certificate made by a trustee of record that conforms to Title Standard 68. Under certain fact determinative circumstances, it may also be acceptable to establish the identity of off-record trust beneficiaries by recording either the original unrecorded schedule of beneficial interests along with an affidavit pursuant to M.G.L c. 183, §5B by an attorney with actual knowledge of the affairs of the trust, or a copy of the unrecorded schedule of beneficial interests attached to such affidavit.*

*(5) M.G.L. c. 203E, sec 802(c) states that a transaction entered into by a Trustee with any of the following parties gives rise to a rebuttable presumption of self-dealing:*

- a. the trustee's spouse;*
- b. the trustee's descendants, siblings, parents or their spouses;*
- c. an agent or attorney of the trustee; or*
- d. a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.*

Adopted May 3, 1977

Amended May 11, 1998 (Changes 'fiduciary' to 'trustee' throughout the Standard)

Amended November 1, 2021 (Updated to include reference to Massachusetts Uniform Trust Code section discussing self-dealing and change limitation period in paragraph 3. Additionally, changes include reliance on Certificates under MGL. c. 184 s. 35. Comments 2-5 added.)

## **Intestate Estates and Informal Probate**

### **Real Estate Bar Association (REBA) Title Standards**

- TS 14 – Missing Probates
- TS 41 – List of Heirs

**Memorandum Re: Land Court Guideline 14. Death: The Effect of Death upon Registered Land Titles (revised 10-2019)** - <https://www.mass.gov/doc/land-court-chief-title-examiner-memorandum-re-land-court-guideline-14-death-the-effect-of-death/download>

## **Deeds of Distribution**

### **Massachusetts General Laws, Chapter 3-906**

#### **Section 3-906: Distribution in kind; valuation; method**

(a) Except as restricted or otherwise provided for by will or order of the court, a personal representative may distribute assets of the estate in kind or partly in cash and partly in kind and pro rata or not pro rata at then current values as between distributees.

(b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within 30 days after mailing or delivery of the proposal.

#### **Section 3-907: Distribution in Kind; Evidence**

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

#### **Section 3-908: Distribution; right or title of distributee**

Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

Source: <https://malegislature.gov/Laws/GeneralLaws/PartII/TitleII/Chapter190B/ArticleIII> (9/30/2022)



**REBA Form No. 58**  
**Deed of Distribution, M.G.L. c. 190B, §3-907**

WHEREAS, \_\_\_\_\_, of \_\_\_\_\_, Massachusetts (“the Decedent”) died on \_\_\_\_\_ having an interest in real estate at \_\_\_\_\_, Massachusetts; and

WHEREAS, the undersigned \_\_\_\_\_, of \_\_\_\_\_, Massachusetts is the duly appointed and qualified Personal Representative of the Estate of the Decedent in the \_\_\_\_\_ Probate and Family Court, Docket No. \_\_\_\_\_;

WHEREAS, the Distributee[s] herein is/are:

- (a)  the Devisee[s] under the Last Will and Testament of the Decedent;
- (b)  the Heir[s] of the Decedent;

NOW, THEREFORE, the undersigned, in distribution of the estate, for no consideration, hereby distributes to:

\_\_\_\_\_, of \_\_\_\_\_, Massachusetts,  
[Distributee 1]  
\_\_\_\_\_, of \_\_\_\_\_, Massachusetts,  
[Distributee 2]  
\_\_\_\_\_, of \_\_\_\_\_, Massachusetts,  
[Distributee 3]

as \_\_\_\_\_  
[specify tenancy]

such interest in the land in

Being the same premises described in a deed of \_\_\_\_\_ to the Decedent dated \_\_\_\_\_ and  
 recorded with \_\_\_\_\_ County Registry of Deeds in Book \_\_\_\_\_, Page \_\_\_\_\_.  
 filed in \_\_\_\_\_ Registry District of the Land Court as Document No. \_\_\_\_\_ and noted on  
Certificate of Title No. \_\_\_\_\_.

Address of Premises: \_\_\_\_\_.

WITNESS my hand and seal on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Personal Representative

**COMMONWEALTH OF MASSACHUSETTS**

\_\_\_\_\_, ss

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me, the undersigned notary public, personally appeared the above \_\_\_\_\_, proved to me through satisfactory identification, being (check whichever applies):  driver’s license or other state or federal governmental document bearing a photographic image,  oath or affirmation of a credible witness known to me who knows the above signatory, or  my own personal knowledge of the identity of the signatory, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that s/he signed it voluntarily for its stated purpose as Personal Representative.

\_\_\_\_\_  
Notary Public  
My Commission Expires:

*Notes and Comments*

*See M.G.L. c. 190B, §§ 3-906, 3-907, 3-908, 3-909, and 3-1006 for limited purpose, requirements, and effect of deeds of distribution.*

# Estate Taxes

## Massachusetts General Laws, Chapter 65C

### Section 14: Lien for unpaid tax liability for delinquent tax, release or discharge of lien

Section 14. (a) Unless the tax imposed by this chapter is sooner paid in full, it shall be a lien for ten years from the date of death upon the Massachusetts gross estate of the decedent, except that such part of the Massachusetts gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by the probate court having jurisdiction thereof, shall be divested of such lien. For dates of death on or after January 1, 1997, an affidavit of the executor, subscribed to under the pains and penalties of perjury, recorded in the appropriate registry of deeds and stating that the gross estate of the decedent does not necessitate a federal estate tax filing, shall release the gross estate of the lien imposed by this section.

Source: <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleIX/Chapter65C/Section14> (9/30/2022)

**REBA Form No. 32**  
**Affidavit**  
**M.G.L. c. 65C, § 14(a)**

RE: \_\_\_\_\_ (“Decedent”) (Name of Decedent) late of \_\_\_\_\_, \_\_\_\_\_, MA (Street address) (City/ Town)

Date of Death: \_\_\_\_\_

I, \_\_\_\_\_, after first being duly sworn, do depose and say that:

1. I am: (Check One:)

\_\_\_\_\_ (a) the duly appointed and qualified Executor under the Will/Administrator of the Estate of the Decedent filed with the \_\_\_\_\_ County Probate Court Docket No. \_\_\_\_\_

or (if there is no executor or administrator of the estate of the Decedent appointed, qualified and acting within the Commonwealth of Massachusetts)

\_\_\_\_\_ (b) a person in actual or constructive possession of property of the Decedent.

2. At the time of his/her death, the Decedent owned an interest in real estate situated at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ County, Massachusetts, as more particularly described in a certain deed from \_\_\_\_\_ to \_\_\_\_\_ dated \_\_\_\_\_ and recorded in the \_\_\_\_\_ County Registry of Deeds at Book \_\_\_\_\_, Page \_\_\_\_\_, or described by \_\_\_\_\_ County Registry of Deeds Land Court Records Certificate of Title No. \_\_\_\_\_.

3. (Check all that apply:)

\_\_\_\_\_ (a) The gross estate of the decedent does not necessitate a Federal estate tax filing.

\_\_\_\_\_ (b) The gross estate of the decedent does not necessitate a Massachusetts estate tax filing.

4. This affidavit is given pursuant to and in accordance with the provisions of Massachusetts General Laws Chapter 65C, Section 14(a).

Executed under the pains and penalties of perjury this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

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*Notes and Comments*

1. *This form replaces REBA Forms 2 and 3*
2. *See IRC Sections 2011 and 2031 and REBA Title Standard No. 3 for Federal estate tax exemption amounts by year of death.*
3. *See M.G.L. c. 65C § 2A and REBA Title Standard No. 24 for Massachusetts estate tax exemption amounts by year of death.*
4. *See M.G.L. c. 65C, § 6(a) for a definition of who may sign this affidavit.*
5. *In the event the Decedent's estate has not been probated and no death certificate has been previously recorded, a death certificate should be recorded with this certificate.*
5. *While not required by the language of the statute, if a person other than an Executor or Administrator signs this affidavit, the affidavit should identify the signatory's relationship to the decedent and how they became in actual or constructive possession of the decedent's property; i.e., spouse, child, caretaker, etc. This may be a The Land Court requirement regarding Registered Land.*

Adopted June 1, 2004

**REBA Form No. 32A**  
**Affidavit Regarding Federal Estate Taxes**

Property Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Book: \_\_\_\_\_

Page: \_\_\_\_\_

RE: \_\_\_\_\_ (“Decedent”) late  
(Name of Decedent)  
of \_\_\_\_\_, \_\_\_\_\_, MA.  
(Street Address) (City/Town)

Date of Death: \_\_\_\_\_

I, \_\_\_\_\_, having personal knowledge of the facts herein stated, under oath depose and say as follows:

1. At the time of his/her death, the Decedent owned an interest in real estate situated at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ County, Massachusetts, as more particularly described in a certain deed from \_\_\_\_\_ to \_\_\_\_\_ dated \_\_\_\_\_ and recorded in the \_\_\_\_\_ County Registry of Deeds at Book \_\_\_\_\_, Page \_\_\_\_\_, or described by \_\_\_\_\_ County Registry of Deeds Land Court Records Certificate of Title No. \_\_\_\_\_.

2. Please select one. (NOTE: If Paragraph 2(b) is selected, you must proceed to Paragraph 3.)

\_\_\_\_\_ (a) The gross estate of the decedent does not necessitate a Federal estate tax filing.

\_\_\_\_\_ (b) The gross estate of the decedent does necessitate a Federal estate tax filing.

3. (NOTE: Please ignore if Paragraph 2(a) was selected. Please select one if Paragraph 2(b) was selected.)

Attached hereto is a copy of (check all that apply), together with supporting proof of payment of the amount shown as due, if any:

\_\_\_\_\_ (a) Federal Estate Tax Closing Letter

\_\_\_\_\_ (b) Account transcript issued by the IRS showing transaction code 421 and the explanation “Closed examination of tax return.”

Signed under the penalties of perjury this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_

COMMONWEALTH OF MASSACHUSETTS

\_\_\_\_\_, ss.

\_\_\_\_\_, 20\_\_

Then personally appeared the above named \_\_\_\_\_, proved to me through satisfactory evidence of identification which was \_\_\_\_\_, to be the person whose name is signed on this document, and acknowledged to me that the contents of the document are truthful and accurate to the best of his/her knowledge and belief, before me.

\_\_\_\_\_  
Notary Public:  
Print Name:  
My Commission Expires:

**Certificate**

I, \_\_\_\_\_, hereby certify that I am an attorney at law with offices at \_\_\_\_\_, \_\_\_\_\_, Massachusetts, and that the facts stated in the foregoing affidavit are relevant to the title to the premises therein described and will be of benefit and assistance in clarifying the chain of title thereto.

\_\_\_\_\_  
Attorney

*Notes and Comments*

1. *If Paragraph 3 is applicable, this Affidavit is not complete unless a copy of the Federal Estate Tax Closing Letter or the IRS Transcript, as applicable, is attached, together with proof of payment of any amounts shown as due.*
2. *The Affidavit may be executed by any person with actual knowledge of the facts stated therein, including, without limitation, the personal representative of the decedent's estate, accountant, or attorney.*
3. *An Attorney may execute the Affidavit as written, or may insert a numbered paragraph stating "the affidavit is relevant to the title to the premises therein described and will be of assistance in clarifying the chain of title thereto" and delete the concluding Certificate. See M.G.L. c. 183, § 5B.*

Adopted November 5, 2018