

# Drafting & Administering Trusts that Hold Real Estate in Massachusetts

REBA

May 28, 2026

# True Trusts vs. Nominee Trusts

## True Trusts

- ▶ Fiduciary relationship with respect to property
- ▶ Trustee holds legal title to property subject to equitable duties to the beneficiaries

## Nominee Trusts

- ▶ Agency relationship with respect to property
- ▶ Trustee holds legal title to property subject to the direction of the beneficiaries

# True Trusts vs. Nominee Trusts

## Why Use True Trusts

- ▶ Asset protection (certain trusts)
- ▶ Incapacity/continuity planning
- ▶ Estate tax planning

## Why Use Nominee Trusts

- ▶ Privacy
- ▶ Ability to adjust beneficial ownership without recording new deed
- ▶ Minimal probate avoidance

# Nominee Trust Pitfalls

- ▶ Termination Provisions
- ▶ Lost Schedule of Beneficiaries
- ▶ Successor Trustee Appointment
- ▶ Lender Issues

# Asset Protection

- ▶ Only available in limited circumstances
- ▶ Generally requires trust to be irrevocable
- ▶ Be aware of the Fraudulent Transfers Act
  - ▶ Actual fraud
  - ▶ Constructive fraud
  - ▶ Constructive fraud for future creditors
- ▶ Medicaid/MassHealth asset protection
  - ▶ 5-year lookback
  - ▶ No access to principal

# Drafting Considerations

- ▶ Summed up in one word: CLARITY
  - ▶ Do not rely on statutory default provisions
  - ▶ Favor explicit grants of authority/power
- ▶ Key provisions to include:
  - ▶ Power to sell, lease, and/or mortgage
  - ▶ Third-party reliance

# Title & Conveyancing Issues

- ▶ Registered land generally has stricter requirements compared to recorded land
- ▶ Lenders may be reluctant to finance transactions involving trust-owned real estate
  - ▶ For revocable trusts, may need to transfer out of the trust and then back into the trust
- ▶ Trust beneficiaries are eligible for homestead protection
  - ▶ Always record a new homestead declaration when property is transferred to a trust

# Trustee Certificates

- ▶ Name of the trust must match name in the original trust instrument
- ▶ Always specify the date of the original trust and any amendments thereto
- ▶ Identify successor Trustees
- ▶ Must include a jurat, not merely an acknowledgement

# Use & Occupancy Rights

- ▶ Clearly state the scope of the rights, the duration of the rights, the obligations of the beneficiaries, and how the rights can be terminated
- ▶ Consider:
  - ▶ Beneficiary-occupant disappears
  - ▶ Beneficiary-occupant ceases to fulfill their obligations
  - ▶ Beneficiary-occupant moves to assisted living or skilled nursing facility
  - ▶ Trust has insufficient assets to maintain property

# Responsibility for Expenses

- ▶ Clearly define who is obligated to pay which expenses
- ▶ Common scenario: Beneficiary pays “carrying costs;” Trust pays capital expenses
  - ▶ Define what constitutes carrying costs vs. capital expenses
- ▶ If the Trust is responsible for some/all expenses, ensure it has sufficient reserve funds
  - ▶ Include provisions for scenario where reserve funds are exhausted

# Managing Beneficiary Conflicts

- ▶ If property is intended to be used by multiple beneficiaries (e.g., family vacation home) be clear about how to manage:
  - ▶ Who gets to use the property when
  - ▶ Carrying costs and capital expenses
    - ▶ **Strongly** recommend a reserve fund to handle expenses
  - ▶ What happens if a beneficiary wants out
- ▶ More beneficiaries means increased likelihood that conflicts will arise
- ▶ Nominee trusts require **all** beneficiaries to agree when directing the Trustee

# Insurance Considerations

- ▶ Ensure there is adequate liability and casualty coverage for the Trust
- ▶ Ensure the proper listing of both the named insured and any additional insureds
- ▶ Beneficiaries may need their own coverage

# Key Takeaways

- ▶ Draft carefully and clearly
- ▶ Assume that disputes/conflicts will arise and plan for them now
- ▶ Do not dabble in this as a side gig

# Contact Us

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