A valid Massachusetts testamentary trust may now arise under a will that was not fully executed (signed by the will witnesses) until an unspecified time after the death of the testator-settlor.

Massachusetts has broken new ground in allowing a will to be fully executed (signed by the will witnesses) after the death of the testator, with no time period specified. In the upcoming 2014 edition of *Loring and Rounds: A Trustee's Handbook*, Charles E. Rounds, Jr., specifically in §2.1.2, considers the ramifications of these revolutionary developments. The focus is on wills containing testamentary trust provisions. Here is an excerpt:

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In Massachusetts before it enacted its version of the Uniform Probate Code, a will needed to be attested and subscribed by two witnesses in the conscious presence of the testator.[1] The official UPC's Section 2-502, instead, requires that the will be signed by at least two witnesses, each of whom signs within a reasonable time after they have observed the testator sign his name. Thus, under the official UPC a witness, if the circumstances were right, could actually sign after the testator had died. The Massachusetts version of UPC § 2-502, however, has neither the old "conscious presence requirement" nor the model's "within a reasonable time" limitation, at least when it comes to signings by the witnesses.[2] (There is a conscious presence requirement, but only for one who signs "in the testator's name.") That being the case, it would seem that for some unspecified period of time after the testator has died, the witnesses can effectively complete the will's execution, at least if the new law is read literally and the omissions are taken as purposeful.[3]

Should the will have a testamentary trust provision, one wonders what the status of the legal title to the subject property might be in the hiatus between the death of the testator/settlor and the time when the will is finally executed and begins to speak. Perhaps the legal title passes to the administrator of the intestate estate as of the time of death,

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[1] *See* M.G.L.A. c. 191, § 1 (now repealed).

[2] *See* M.G.L.A. c. 190B, § 2-502.

[3] In the commentary to M.G.L.A. §190B, § 2-502, there is a reference to Healy v. Bartless, 73 N.H. 110, 59 A. 617 (1904), which is a witness-signing conscious-presence case, not a proxy-signing conscious-presence case. The contextually inappropriate reference to Healy suggests that Massachusetts' omission of the conscious-presence requirement when it comes to will-witness signing may have been a statute-drafting error.

subject to divestment in favor of the testamentary trustee should the will ever be executed.

Assume the process of probating a will with a testamentary trust provision for the benefit of X commences in Massachusetts. After the testator's death, the witnesses duly sign a subsequent will with a testamentary trust provision for Y that purports to revoke the prior will. Does the post-death execution of the subsequent will halt the probating of the prior will? Or does the commencing of the probating of the prior will somehow call into question the effectiveness of the will that was executed post-death? If it doesn't, then the Massachusetts will scrivener we may well now have another *in terrorem* arrow in his quiver.

"It is true that in the case of a general power presently exercisable, the holder of the power is treated for some purposes as if he were the present owner of the property over which the power is exercisable." John Chipman Gray, The Rule Against Perpetuities 467 (4th ed. 1942).

"A presently exercisable general power of appointment is an ownership-equivalent power." Restatement (third) of Property (Wills and Other Donative Transfers) § 17.4, cmt. *f*(1).