

Chapter 13

ACCOUNTS

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Scope Note

This chapter explains how to prepare accounts. Covered topics include the filing of accounts, their presentation for allowance, the procedure for allowance, contests, and the procedures for the reopening of allowed accounts.

§ 13.1 CONTENTS OF ACCOUNTS

§ 13.1.1 In General

A helpful and detailed discussion of how to prepare probate accounts appears in the authoritative treatise, 2 Thomas H. Belknap, *Newhall's Settlement of Estates and Fiduciary Law in Massachusetts* §§ 29:1–29:9 (West 5th ed. 1997 & Supp. 2005) [hereinafter *Newhall*].

§ 13.1.2 Required Schedules

Accounts of all fiduciaries (executors, administrators, guardians, conservators, and trustees) must contain three separate schedules showing, respectively, receipts, expenditures, and property on hand. G.L. c. 206, § 2. These are customarily designated Schedule A, Schedule B and Schedule C, see **Exhibit 13A**.

In addition, trustees' accounts must include separate schedules of a similar nature with respect to income. G.L. c. 206, § 2. These are customarily designated Schedule D, Schedule E, and Schedule F, see **Exhibit 13B**.

If an account is in proper balance, the total of Schedule A (receipts) minus the total of Schedule B (expenditures) equals the total of Schedule C (property on hand). In a final account, after all the property has been distributed, the totals of

Schedule A and Schedule B will equal each other and the total of Schedule C will be zero.

The items in each schedule of an account should be separately numbered. This makes for ease of reference by the interested parties and the court.

§ 13.1.3 Period of Account

No specific time period for an account is required, as long as the period is “distinctly stated” in the account. G.L. c. 206, § 2. A fiscal year beginning on the anniversary of the fiduciary’s appointment is often used, but a calendar year may be used if more convenient. In the latter case, the first account is for a “short year” running from the date of appointment to December 31.

Accounts are usually prepared on an annual basis, but a single account covering several years is also permissible. This is often done by an executor or administrator who renders a “first and final” account covering several years of estate administration.

§ 13.1.4 Chronological Versus Topical Arrangement of Items

The governing statute, G.L. c. 206, § 2, does not require any set format for probate accounts. The statute is construed flexibly to permit “any reasonable and orderly statement of the account in a manner consistent with the facts . . . with applicable substantive rules of law, and with accounting principles and methods from time to time currently employed by competent and reputable fiduciaries, so long as they fairly and intelligibly reflect the transactions reported.” *Hutchinson v. King*, 339 Mass. 41, 44, 157 N.E.2d 525, 527 (1959). Chronological presentation of items in a probate account is therefore permissible and proper. Although not legally required, topical arrangement of items (e.g., grouping all debts of decedent under one heading, all funeral expenses under another heading, and so forth) is also permissible and may help to make an extensive account more readily intelligible to a person examining it. 2 *Newhall* § 29:2, at 183.

§ 13.1.5 Real Estate

Prior to 1974, fiduciaries were not required to reflect real estate in their accounts. Under G.L. c. 206, §§ 2, 5, and 6, as amended by 1973 Mass. Acts c. 669, real estate must now be shown in the accounts of guardians, conservators, and trustees. This requirement applies to accounts of such fiduciaries with ac-

counting periods ending on or after January 1, 1974. 1973 Mass. Acts c. 669, § 3; Unif. Prob. Ct. Prac. XV(A).

Executors and administrators are not affected by the foregoing change. These two types of fiduciaries need not carry real estate forward from the inventory into the schedules of their accounts.

To illustrate the difference, Schedule A of the first account of an executor or administrator will begin with a figure for “Personal property according to inventory;” whereas Schedule A of the first account of a guardian, conservator, or trustee will begin with a figure for “Real and personal property according to inventory.”

§ 13.1.6 Market Values

Accounts with accounting periods ending after January 2, 1973, are required to reflect market values for all assets that have “readily ascertainable market value.” Such valuation may be as of the end of the accounting period, or at the option of the fiduciary, as of some other date during the last six months of the accounting period. The market values should be shown in Schedule C of the account, either on a separate schedule or in juxtaposition to the book values. For assets without “readily ascertainable market value” (such as real estate, patents, copyrights, oil well interests, closely held stock, or the like), it is sufficient to state the basis of the valuation used: e.g., assessed value, book value, tax value, nominal value, appraisal as of a specified date, etc. Prob. Ct. R. 29A; Unif. Prob. Ct. Prac. XV(B).

In a final account, which reflects no property in Schedule C, there is no occasion to show market values.

(a) *What Is a “Final” Account?*

Any account showing a zero balance in Schedule C may be designated as a “final” account. Unif. Prob. Ct. Prac. XVII(c). This lays to rest some earlier confusion on this point arising from the fact that a fiduciary technically remains in office even after all his or her accounts have been allowed, and might at a later date receive additional assets for which he or she would become accountable. *See 2 Newhall* § 29:16.

§ 13.2 FILING OF ACCOUNTS

§ 13.2.1 Requirement of Filing

A fiduciary appointed by the Probate and Family Court Department is required as a condition of his or her bond to file an account annually. G.L. c. 205, § 1; G.L. c. 206, § 1. However, there is no penalty for failure to file or for failure to file on time. Late filing of an account is permissible and involves at most a “mere technical breach” of the fiduciary’s duty. *Old Colony Trust Co. v. Rodd*, 356 Mass. 584, 588, 254 N.E.2d 886, 889 (1970).

§ 13.2.2 Remedy for Failure to File

If a fiduciary fails to file an account when it is due, a party interested in the estate or trust may bring a petition to compel filing of the account. See **Exhibit 13C** for a sample form. The Probate and Family Court Department will issue an order for service on the fiduciary requiring the account to be filed by a specified date. Such an order is usually obeyed. However, if the fiduciary fails to file the account by the date set forth in the order, enforcement may be effected by means of a contempt petition. See **Exhibit 13D** for a sample form.

§ 13.2.3 Filing Fees

An account will not be accepted for filing unless it is accompanied by the appropriate filing fee. By 2003 Mass. Acts c. 26, § 507, the schedule of filing fees for probate accounts established by G.L. c. 262, § 40 was raised to the following levels:

<i>Gross value of Schedule A</i>	<i>Filing fee per year or major fraction thereof covered by account</i>
\$1,000 or less	NONE
\$1,001 to \$10,000	\$75 (but no more than \$170 regardless of time covered)
\$10,001 to \$100,000	\$100
\$100,001 to \$500,000	\$150
\$500,001 to \$1,000,000	\$200
\$1,000,001 or more	\$400

Practice Note

Before filing, counsel should check for the most current schedule of filing fees.

§ 13.3 PRESENTATION OF ACCOUNTS FOR ALLOWANCE

§ 13.3.1 When Should Accounts Be Presented?

There is no legal requirement, statutory or otherwise, that probate accounts be presented for allowance at any set time. *Dowd v. Morin*, 18 Mass. App. Ct. 786, 791, 471 N.E.2d 120, 124 (1984) (citing text), *review denied*, 393 Mass. 1105, 474 N.E.2d 181 (1985). It is customary for executors and administrators to have their accounts allowed at the conclusion of the administration of the estate. It is customary for guardians, conservators, and trustees to have their accounts allowed every three to five years. Where beneficiaries are troublesome or when difficult transactions are reflected in the accounts, it may be advisable to seek more frequent allowance (i.e., every year or two). On the other hand, it may be appropriate to have accounts allowed less frequently than every three to five years, provided that no beneficiary objects, and the fiduciary is not concerned about his or her outstanding liability. Sometimes a trustee will file accounts annually but not present them for allowance until the trust has terminated.

Accounts of an executor or administrator may not be presented for allowance until nine months have expired from the date of giving bond in an estate where the decedent died prior to January 1, 1990, or one year has expired from the date of the decedent's death in an estate where the decedent died on or after January 1, 1990. Unif. Prob. Ct. Prac. XVII(a), (b).

§ 13.3.2 Failure to Present for Allowance

If a fiduciary files his or her accounts but fails to present them for allowance, a party interested in the estate or trust may force the issue by requesting and serving a citation. G.L. c. 206, § 23A. This may be accomplished by a motion with notice. See **Exhibit 13E** for a sample form.

If accounts are filed and neither the fiduciary, nor an interested party, nor the court requests a citation, it is not appropriate for the probate registry to issue a citation. This point is made clear by Unif. Prob. Ct. Prac. XVI(C), which provides that an account is deemed to be "filed for allowance" within the meaning of Mass. R. Civ. P. 72(b)(1) when it has been filed and a citation has been requested,

and which provides further that “no citation shall be issued on an account unless requested by the accountant or by some interested party or by the court.” If an unwanted citation is erroneously issued, it should be returned to the probate registry with the return of service made out to indicate that no service of the citation has been made because its issuance was not requested by any person entitled to do so.

§ 13.4 PROCEDURE FOR ALLOWANCE

§ 13.4.1 In General

There are three basic sources of authority regarding procedure for allowance of probate accounts.

(a) *General Laws c. 206, § 24*

This statute sets forth detailed requirements regarding the persons who should be notified and the manner in which notice should be given in connection with the allowance of various types of probate accounts. This statute and cases decided under it also govern the two fundamental questions of whether a guardian ad litem is necessary and under what circumstances an allowed account may be reopened. For discussion, see W. F. Kehoe, *Allowance of Probate Accounts*, 59 *Mass. L.Q.* 315 (Winter 1974–75).

(b) *Massachusetts Rule of Civil Procedure 72*

This rule, which took effect on July 1, 1977, codifies and confirms the previous practice with regard to allowance of uncontested accounts and provides for application of the modern trial and discovery concepts of the Massachusetts Rules of Civil Procedure to contested accounts. For discussion, see W. F. Kehoe, *Probate Accounts Revisited: New Mass. R. Civ. P. 72*, 62 *Mass. L.Q.* 113 (Summer 1977).

(c) *Uniform Probate Practice XVI*

This uniform probate practice implements the application of Mass. R. Civ. P. 72 to the allowance of probate accounts by clarifying various specific points.

§ 13.4.2 Issuance of Citation

Once an account has been filed, the first step to be taken toward securing its allowance is to request a citation. This may be done in person at the probate registry or by means of a letter to the registry. The request for a citation should be accompanied by a check for the \$15 fee now charged by the probate registry for the issuance of a citation.

The citation is a notice in an established format that is issued by the probate registry. The citation, specifying a return day, is accompanied by an order of notice for service on the interested parties by publication and mailing. In order to allow sufficient time for the required publication and mailing, the return day is usually set from four to six weeks ahead.

Return days on probate accounts are determined in accordance with Prob. Ct. R. 6. Mass. R. Civ. P 72(b)(1); Unif. Prob. Ct. Prac. XVI(D). Depending on the geographical residence of the persons interested, Prob. Ct. R. 6 may require the citation to be mailed fourteen days, one month, or two months prior to the return day. For this reason, the attorney for the fiduciary should be sure to ascertain the addresses of all interested parties before requesting the citation. If the facts of the case call for a one-month or a two-month mailing direction, the probate registry should be informed of this at the time the citation is requested.

§ 13.4.3 Service of Citation on Interested Parties

The citation is sent to the attorney requesting it, whose responsibility it is to see that the citation is properly served. If proper notice is given, a judgment allowing an account is conclusive on all parties interested. 2 *Newhall* § 29:14, at 227. Conversely, a beneficiary who has not been served notice in the requisite manner may have the judgment allowing the account revoked. *Bell v. Swift*, 322 Mass. 145, 76 N.E.2d 133 (1947); *Porotto v. Fiduciary Trust Co.*, 321 Mass. 638, 75 N.E.2d 17 (1947). Therefore, it is essential to make sure that all requirements regarding the giving of notice are carefully observed.

In the typical case, the citation on the allowance of a probate account is served by (1) delivery or mailing, and (2) publishing.

(a) *Delivery or Mailing*

The order of notice will direct that a copy of the citation be delivered or mailed at least fourteen days (or possibly one month or two months) prior to the return day. Who are the parties on whom service should be made in this manner? The

answer to this question will be found in the governing statute, G.L. c. 206, § 24, which should be consulted by the fiduciary's attorney in every instance.

The statute specifies those persons to whom the citation should be delivered or mailed in connection with the allowance of accounts of various types of fiduciaries:

- for accounts of administrators, “to the heirs”;
- for accounts of executors and administrators cum testamento annexo (c.t.a.), “to all legatees and devisees and to all other persons entitled to share in the estate whose interests are not represented except by the accountant”;
- for accounts of guardians and conservators, “to the ward and to the persons who would be his heirs were he to die intestate at the time of the delivery or mailing of such notice”; and
- for accounts of trustees,

to all persons to whom or for whom income has been paid or accumulated or in the discretion of the trustee might have been paid or accumulated during the period covered by the account, and to those persons who during such period have received or were entitled to receive or in the discretion of the trustee might have received principal, and to all persons who at the mailing or delivery of such notice, in default of any appointment or otherwise, would be entitled to share in the income or principal if an existing tenancy for life or for years had then terminated or the trust estate were then distributable in whole or in part.

G.L. c. 206, § 24.

If there is an independent fiduciary in the picture who “represents” the interests of the beneficiaries within the meaning of the statute, notice to the beneficiaries may be dispensed with. In such a case, delivering or mailing the citation to the independent fiduciary is sufficient. In the leading case of *Claflin, petitioner*, 336 Mass. 578, 146 N.E.2d 914 (1958), it was held that, on the allowance of an executor's account, notice to an independent residuary trustee was sufficient and that the beneficiaries of the residuary trust were not entitled to notice. The same principle applies in a situation involving successor fiduciaries. For instance, where a guardian or trustee has died or resigned, and a successor has been appointed, notice on the former fiduciary's final account needs be given only to the

successor fiduciary and not to the beneficiaries. However, if there is any conflict of interest among the independent fiduciary's beneficiaries with respect to matters reflected in the account, the beneficiaries must be given notice. *New England Peabody Home for Crippled Children v. Page*, 325 Mass. 663, 92 N.E.2d 235 (1950). Similarly where there is a partial overlap of accounting and successor fiduciaries (sole executor, A, with pour over of residue to two trustees, A and B), the beneficiaries should be given notice. *Azarian v. First Nat'l Bank of Boston*, 383 Mass. 492, 423 N.E.2d 749 (1981).

What if a person entitled to notice by delivery or mailing has died? The answer to this question may be found in the provision of G.L. c. 206, § 24, requiring that notice be given "to the executor or administrator of any deceased person entitled to notice or to those in being who have succeeded to the interest of such deceased person." Thus the citation should be delivered or mailed to the executor or administrator of

- a deceased heir who survived the intestate on an administrator's account,
- a deceased legatee or devisee who survived the testator on an executor's account,
- a deceased ward on a guardian's or conservator's final account, or
- a deceased life beneficiary who was entitled or eligible to receive either income or principal during the period covered by a trustee's account.

If no executor or administrator of the estate of the deceased beneficiary has been appointed, notice should be sent to the heirs of the beneficiary. If the heirs cannot be readily ascertained, notice addressed to "Heirs at law of John Jones," or "Estate of John Jones," at the beneficiary's last known address is presumably sufficient.

"Delivering" as used in the statute means service in hand. 21 Dunphy, *Probate Law and Practice* (21 Massachusetts Practice Series) § 35:4, at 697 (West 2d ed. 1997). If there are very few persons interested (e.g., one or two heirs on an administrator's account) and the citation can be conveniently served on all of them in hand, this method may be employed. In the majority of cases, however, the alternative method of mailing is used.

The mailing required by G.L. c. 206, § 24(5) is "registered mail." This phrase is statutorily defined to include certified mail. G.L. c. 4, § 7, ¶ 44. Although certified

mail is permissible, some attorneys prefer registered mail because it is safer and more likely to reach the addressee.

As evidence that notice was mailed to the proper persons in the proper manner within the required time prior to the return day, the attorney for the fiduciary should prepare a memorandum for the file giving the date of mailing, listing the names and addresses of the persons to whom notice was sent, and attaching the registered or certified mail receipts and a copy of the citation. Though not required, it is also good practice to request return receipts when mailing the citation. If signed by the addressee, a return receipt is evidence that he or she received actual notice.

(b) Publishing

In addition to mailing, publication of the citation is required by G.L. c. 206, § 24(5), “unless all persons interested receive actual notice.” As a practical matter, this means that the citation will ordinarily be published as well as mailed except in the relatively rare case where there are a limited number of persons interested who can all be conveniently served with the citation in hand. On trustees’ accounts, the existence of contingent beneficiaries not entitled to notice by delivery or mailing, but who nonetheless are “persons interested” within the meaning of the statute, *Young v. Tudor*, 323 Mass. 508, 83 N.E.2d 1 (1948), will require publication in any event.

When publication has been completed, the newspaper pages should be retained in the attorney’s file along with the mailing memorandum. These documents will provide evidence that notice was properly given in the event that an interested person should subsequently seek to reopen the account by claiming that he or she was not notified on the allowance. Because the statute does not require receipt of actual notice by the interested persons, such evidence of proper publication and mailing should be sufficient to prevent reopening of the account on such grounds.

The final step in the process of serving the citation is the return of service. The return is made in the space provided at the end of the citation by signing, dating, and specifying the method by which the citation was served. The return of service is made under oath and constitutes a representation of fact and law that the proper persons have been served in the proper manner, which representation will be relied upon by the court in allowing the account. For this reason the return of service should be signed by the attorney for the fiduciary and not by some nonlawyer employee such as a secretary or paralegal assistant. *See Prob. Ct. R. 28.*

§ 13.4.4 Notice to the Attorney General's Office and Other Public Agencies

(a) *Attorney General*

Pursuant to G.L. c. 206, § 24, notice on the allowance of a probate account must be given by delivery or mailing “to the Attorney General if there are public charitable interests.” Moreover, Unif. Prob. Ct. Prac. XXXIV requires notice to the Attorney General in connection with the allowance of accounts of an executor or administrator when (1) the will contains a devise or bequest to a named charity or for charitable purposes, or (2) the will contains a devise or bequest to the trustee(s) of an inter vivos trust which provides for a charitable gift and (a) either the probate fiduciary(ies) and the trustee(s) are the same persons or entities or (b) one of the trustees has a beneficial interest in the estate or trust. Allowance of a trustee’s account requires notice to the Attorney General if any of the trust beneficiaries (including contingent remainder beneficiaries) are charities. G.L. c. 206, § 24. The term “public charity” is broadly interpreted to include any kind of nonprofit educational, religious, or charitable organization located inside or outside Massachusetts and presumably includes an organization that is classified as a “private foundation” under the Internal Revenue Code. Copies of the accounts should be sent to the Attorney General’s office along with the citation.

(b) *Department of Mental Health*

The requirement that notice be given to the Department of Mental Health in the case of mentally ill persons was eliminated by 1997 Mass. Acts c. 165, § 7, amending G.L. c. 206, § 24.

(c) *Department of Mental Retardation*

The statute requires notice by delivery or mailing “to the department of mental retardation in the case of mentally retarded persons.” G.L. c. 206, § 24, *amended by* 1997 Mass. Acts c. 165, § 7.

(d) *Veterans Administration*

The statute requires notice by delivery or mailing “to the Veterans Administration if interested.” This means that the Veterans Administration should be sent notice on any guardian’s or conservator’s account where the ward receives benefits payable through the Veterans Administration.

§ 13.4.5 Is a Guardian Ad Litem Necessary?

General Laws c. 206, § 24(5) provides that “if the interests of persons unborn, unascertained or legally incompetent to act in their own behalf are not represented except by the accountant, the court shall appoint as guardian ad litem a competent and disinterested person to represent such interests and persons.” It should be noted that where the specified circumstances exist, the appointment of a guardian ad litem on allowance of accounts is mandatory, not discretionary. Because the allowance of an account is not binding on a person for whom a guardian ad litem should have been appointed but was not, 2 *Newhall* § 29:13, at n.17,,it is important for the fiduciary’s counsel to be certain that a guardian ad litem is appointed whenever required.

A guardian ad litem for persons unborn or unascertained is typically appointed on an executor’s or trustee’s account where any of the following interests are created by the will:

- income to the issue of the testator or of some other person living at dates of payment; or
- remainder to the issue of the testator or of some other person living at the date of termination; or
- contingent remainder to the heirs of the testator or of some other person determined as of the date of termination; or
- takers in default of the exercise of a power of appointment (determined as under the second or third item. above).

The other typical instance of the appointment of a guardian ad litem on allowance of accounts is where there is a minor or an adult incompetent who is interested in the account and who has no legal guardian other than the accountant. This means, for instance, that whenever an interim account of a guardian or conservator is presented for allowance, a guardian ad litem must be appointed for the ward. However, this is not so with respect to the guardian or conservator’s final account, where the ward will have either come of age or been discharged or died; in such a case, the final account is rendered to the former ward or to his or her executor or administrator, and no guardian ad litem is necessary. *Lynde v. Vose*, 326 Mass. 621, 96 N.E.2d 172 (1951). Similarly, where a trust providing for a life interest has terminated, and the remaindermen have been ascertained, the trustee’s final account is rendered to the remaindermen, and the executor or administrator of the deceased life tenant without any need for a guardian ad litem. If one of the remaindermen is incompetent, an independent legal guardian

will presumably be appointed to receive his or her share, thus rendering the appointment of a guardian ad litem unnecessary.

While the appointment of a guardian ad litem for incompetents or for unborn or unascertained persons is presumptively required on the allowance of an account, it may nonetheless be possible to dispense with a guardian ad litem. It should be borne in mind that the guardian ad litem's fee must be paid out of the estate or trust. Accordingly, counsel for the fiduciary should take care to avoid unnecessary expense by having a guardian ad litem only when legally required for a valid allowance.

The chief instance in which a guardian ad litem may be dispensed with on the allowance of accounts is where the interests of persons unborn, unascertained, or legally incompetent to act in their own behalf are represented by someone other than the accountant. For instance, if a minor or an adult incompetent has a legal guardian who is someone other than the accountant, his or her interests are represented, and there is no need for a guardian ad litem. The leading case interpreting this aspect of the statute is *Claflin, petitioner*, 336 Mass. 578, 146 N.E.2d 914 (1958), in which the Supreme Judicial Court held that on the allowance of the executors' account the beneficiaries of the testamentary trust were represented by the trustee, who was independent of the executors, so that no guardian ad litem was required under the statute.

The principle of the *Claflin* case applies as between fiduciaries of different types (e.g., executor and trustee; guardian or conservator and executor; special administrator and executor). In addition, the principle applies as between successive fiduciaries of the same type (e.g., trustee and succeeding trustee). Thus if a trustee or guardian or conservator dies or resigns, his or her final account may be allowed without a guardian ad litem because the interests of the beneficiaries are represented by the successor fiduciary.

The fiduciary whose presence makes the appointment of a guardian ad litem unnecessary must be someone other than the accountant. Obviously the *Claflin* principle does not apply to the fairly common situation where the same person serves as both executor and trustee. An assent by the trustee to his or her own acts as executor would be of no effect and would not bind the beneficiaries. *Waite v. Harvey*, 312 Mass. 384, 395, 45 N.E.2d 1, 7 (1942); Mass. R. Civ. P. 72(a) (last sentence). In such a situation a guardian ad litem for unborn, unascertained, or incompetent trust beneficiaries is necessary on the allowance of the executor's accounts.

An exception to the *Claflin* principle would arise if the interests of the independent fiduciary's beneficiaries were in conflict with reference to matters reflected in the account. *New England Peabody Home for Crippled Children v. Page*, 325

Mass. 663, 92 N.E.2d 235 (1950). In such event, the fiduciary could not adequately represent his or her beneficiaries, and guardians ad litem for the conflicting classes of beneficiaries would have to be appointed.

If an account is to be allowed without a guardian ad litem under the *Claflin* doctrine because of the presence of an independent fiduciary, it would seem that the giving of notice to the independent fiduciary and his or her failure to object to the account are all that need appear. Nonetheless, it is often the practice to obtain the written assent of the independent fiduciary and to file the assent with the account. Although not strictly necessary, obtaining the assent makes it clear to the court that the independent fiduciary has actual knowledge of the matter and also serves to put the independent fiduciary on notice of the responsibility which he or she is assuming in not objecting to the account.

In a situation where there is a partial overlap of accounting and successor fiduciaries (sole executor, A, with pour over of residue to two trustees, A and B), the need for appointment of a guardian ad litem has been clarified by the adoption of Unif. Prob. Ct. Prac. XVIA (effective May 1, 1984). The case of *Azarian v. First National Bank of Boston*, 383 Mass. 492, 423 N.E.2d 749 (1981), in its application of the *Claflin* rule to a particular overlap situation, had raised a number of unanswered questions. Uniform Probate Practice XVIA makes it clear that, in an accounting situation where there is partial identity of fiduciaries, the appointment of a guardian ad litem for minors or persons unborn or unascertained may be dispensed with if the accounting fiduciary files an appropriate motion to waive such appointment accompanied by an affidavit of certain basic facts signed by the independent (nonaccounting) successor cofiduciary. See **Exhibits 13F and 13G** for sample forms.

There are two other instances where the court may waive the appointment of a guardian ad litem. First, the appointment of a guardian ad litem “may be waived by the court in its discretion” where a legally competent person entitled to notice on the allowance of the accounts has a power to withdraw the entire trust property or has either a general power or a broad special power to appoint the entire trust property. The procedure to be followed in requesting such waiver of appointment is set forth in Unif. Prob. Ct. Prac. XVIB (effective Jan. 2, 1987).

Second, G.L. c. 206, § 24(5) provides:

[I]f a deceased person in his duly allowed will has either nominated a person or persons, even though interested, to represent the interests of persons unborn or unascertained or has requested that such representation be dispensed with, the court, in the absence of good

cause shown, shall comply with the expressed desire of the deceased with respect to such representation.

Counsel should note that this waiver is applicable only to the appointment of a guardian ad litem for unborn or unascertained beneficiaries; the appointment of a guardian ad litem for minors and other incompetents cannot be waived pursuant to this section.

In the case of a charitable trust, ordinarily no guardian ad litem is appointed in connection with the allowance of the trustee's accounts. This is because the Attorney General, who, by G.L. c. 12, § 8, has the power of supervision over trustees of charitable trusts, is deemed to "represent" the charitable interests under the trust within the meaning of G.L. c. 206, § 24(5) and the *Claffin* case. If the trust is a charitable one, the required notice should be given to the interested charity or charities and to the Attorney General and, in the absence of any objections, the account can be allowed without the appointment of a guardian ad litem. Where "special circumstances" are involved, it has been held that a probate judge in his or her discretion may appoint a guardian ad litem in connection with the allowance of the accounts of a charitable trust. *In re Will of Crabtree*, 440 Mass. 177, 190–94 (2003). In its decision in that case, the Supreme Judicial Court directed that

before a guardian ad litem is appointed to review the activities of the trustees of a charitable trust, the Attorney General should be informed of a judge's intent to make the appointment, and of his reasons for doing so. The Attorney General should be provided with a reasonable date by which to register an objection, if any, to such appointment. If the Attorney General does not respond within the designated period, the judge may conclude that there is, in fact, no opposition to the appointment of a guardian ad litem, and that the Attorney General has no objection to the expenditure of charitable trust resources to pay for such services.

In re Will of Crabtree, 440 Mass. 177, at 193–94.

Where the court appoints a guardian ad litem where none is necessary, an appeal may be taken from the appointment. *Lynde v. Vose*, 326 Mass. 621 (1951).

Where a guardian ad litem is necessary, the attorney for the accountant should prepare the appropriate guardian ad litem form (see **Exhibit 13H**), and file it with the return of service and the military affidavit on the return day. Counsel

should be mindful that the appointment of a guardian ad litem does not substitute as notice to minors or incompetents, but rather, that the guardian ad litem's appointment is in addition to the statute's mandate of notice upon such persons. G.L. c. 206, § 24; *see also* 2 *Newhall* § 29:13. Under the provisions of G.L. c. 206, § 24, only those minors and adult incompetents who are entitled to notice by delivery or mailing need be listed on the guardian ad litem form. Other minors and adult incompetents who may be interested need not be listed unless the court so orders. The statute also provides that the guardian ad litem "shall without further notice or action by the court also represent with respect to such account all interested persons who may be born after the date of his appointment." This means that the attorney for the accountant need only be certain to list on the guardian ad litem form the names of all minors entitled to notice by delivery or mailing who are in being as of the return day. If others are born after the guardian ad litem is appointed, it is not necessary to move to add their names to those listed on the guardian ad litem form.

If accounts of two different trusts under the same will are being presented for allowance together, it is customary to request that both guardian ad litem appointments be given to the same person to avoid unnecessary duplication of effort and expense to the trust.

The guardian ad litem should be sent copies of the accounts plus a copy of the inventory (or the last account previously allowed) and a copy of the will (if any). In addition, arrangements should be made for the guardian ad litem to inspect the securities and the vouchers. When securities are held in nominee name, if a bank is acting as fiduciary (or as agent or custodian for the fiduciary), the guardian ad litem in lieu of physically examining such securities will accept and attach to his or her report a certification by the bank as to the securities. Unif. Prob. Ct. Prac. I; G.L. c. 167, § 54B. If securities are registered in the name of the fiduciary or in the name of the ward, Unif. Prob. Ct. Prac. I does not apply, and the guardian ad litem must examine the securities.

When the guardian ad litem's assent is filed, the attorney for the fiduciary should request that the accounts be allowed. If the guardian ad litem files a report containing an objection, the account is regarded as contested under Mass. R. Civ. P. 72(b)(4), and the matter must be marked for a hearing.

Where a guardian ad litem fails to perform his or her duties within a reasonable time, it is appropriate to bring a motion to compel the filing of his or her report, or in the alternative, to revoke his or her appointment and to have another person appointed. Although Mass. R. Civ. P. 72(b)(2) provides that the guardian ad litem shall file his or her report within ninety days after the return day, there is no penalty for failure to do so. A guardian ad litem's report may be filed late

without leave of court provided that no order inconsistent therewith has previously been entered by the court. Unif. Prob. Ct. Prac. XVI(H).

§ 13.4.6 Military Affidavit and Military Attorney

Before an account may be allowed, a military affidavit, see **Exhibit 13I**, must be filed stating whether any interested party is in the military service of the United States or its allies. Like the return of service, the military affidavit should be signed by the attorney for the fiduciary and not by a secretary or paralegal assistant. *See* Prob. Ct. R. 28.

If a person entitled to notice by delivery or mailing is in the military service, it is necessary either to obtain such person's assent to the account or to have a military attorney appointed to represent such person's interest. Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C. app. § 520(1). The duties of a military attorney are basically the same as a guardian ad litem's, and he or she is paid out of the estate. 1 *Newhall* § 2.2, at 44. Counsel for the fiduciary prepares a separate form for the appointment of the military attorney, see **Exhibit 13J**, which is similar to the guardian ad litem form. It is customary to request that the same person be appointed as guardian ad litem and military attorney in order to minimize the expense to the estate. Where no guardian ad litem is necessary, it is worth seeking the assent of the person in the military service in order to avoid having a military attorney.

§ 13.4.7 Estate and Inheritance Tax Documents

The present Massachusetts estate tax statute provides that, for dates of death on or after January 1, 1997, a certificate of the commissioner of revenue is not required for the allowance of the final account of an executor or administrator. G.L. c. 65C, § 6. For decedents dying prior to January 1, 1997, the final account of an executor or administrator may not be allowed unless and until the fiduciary files in the probate court a certificate of the commissioner showing either that the amount of the tax has been paid, that payment has been duly secured, or that no tax is due. G.L. c. 65C, § 6. With respect to estates subject to the former Massachusetts inheritance tax, it is provided that the final account of an executor may not be allowed unless there has been filed with the Probate and Family Court Department a waiver or closing letter evidencing payment of inheritance taxes in full on present interests and that the final account of an administrator or trustee may not be allowed without similar evidence that inheritance taxes have been paid in full on all interests. G.L. c. 65, §§ 23, 24. Whichever Massachusetts death tax statute the estate may be subject to, it is the responsibility of the attorney

for the fiduciary to file any required waiver or closing letter in order to obtain the allowance of the account.

Receipts or waivers for other taxes (e.g., federal estate tax, federal income tax, Massachusetts income tax) are not required to be filed. Unif. Prob. Ct. Prac. XVI(B).

§ 13.4.8 Allowance on Assents Without Citation

If all persons interested are ascertained and competent, it may be possible to have the account allowed on their assents without notice. This is based on the provision of G.L. c. 206, § 24 that “the written assent to an account or the waiver in writing of notice thereof by a person interested or by his guardian or legal representative shall be deemed equivalent to notice.” Mass. R. Civ. P. 72(a) provides that if the written assents of all interested parties are filed with the account, and any necessary death tax waivers or receipts are on file, the account may be allowed “forthwith” without a citation.

Dispensing with service of a citation can save time as well as costs of publication and mailing. Where the beneficiaries are cooperative and not too numerous, the allowance procedure can be greatly simplified by obtaining their assents. See **Exhibit 13K** for a sample form. Allowance on assents without notice is frequently possible with accounts of executors and administrators and with final accounts of guardians, conservators, and trustees. If there are charitable interests, service of a citation on the Attorney General can be avoided by sending a copy of the account to the Division of Public Charities with the request that an enclosed assent or waiver of notice be executed.

An assent to an account may be withdrawn prior to allowance but only with permission of the court. *Swift v. Hiscock*, 344 Mass. 691, 183 N.E.2d 875 (1962). Under G.L. c. 206, § 24, an account that has been allowed on assents—like an account that has been allowed after proper notice—cannot subsequently be reopened “except for fraud or manifest error.” *Old Colony Trust Co. v. Bravo*, 359 Mass. 34, 267 N.E.2d 892 (1971); *Sullivan v. Moran*, 340 Mass. 782, 162 N.E.2d 801 (1959); *Reynolds v. Remick*, 333 Mass. 1, 127 N.E.2d 653 (1955).

In certain instances it may be feasible not merely to dispense with notice but to dispense with the accounting itself. Where the fiduciary is also the sole person beneficially interested in the estate (e.g., where the executor is also the sole legatee and devisee under the will or where the administrator is also the sole heir at law), there is usually little point in going through the exercise of preparing a probate account and having it allowed. Another instance is where the guardianship of a minor has terminated and the former ward is willing to waive a formal accounting. In such a case, it is proper procedure to file and record a document

in which the former ward acknowledges receipt of all property due from the guardian and in which the ward releases the guardian and the sureties on his or her bond from liability. G.L. c. 215. § 50. See **Exhibit 13L** for a sample form.

§ 13.4.9 Entry of Judgment

If an account is in order for allowance and no appearance against it is on file, judgment may be entered allowing the account. Mass. R. Civ. P. 72(b)(7); Unif. Prob. Ct. Prac. XVI(E).

The earliest time at which a judgment may be entered allowing a probate account on which a citation has been issued is *the day after* the return day. Unif. Prob. Ct. Prac. XVI(A). This is because Mass. R. Civ. P. 72, which provides that an appearance against an account may be filed “on or before the return day,” gives an interested party until closing time on the return day to file an appearance with the registry. Thus the previous filing deadline for appearances of 10:00 a.m. on the return day (which still applies in other matters on the probate side of the court) has been abolished with respect to probate accounts and it is no longer proper for a judgment allowing an uncontested account to be entered on the morning of the return day.

The judgment is entered on an established form which in most counties is prepared by the probate registry. However, in some counties the judgment is required to be prepared and filed by the attorney representing the fiduciary. See **Exhibits 13M** and **13N** for sample forms. If there has been a guardian ad litem who has assented to the allowance of the account, the judgment should recite that fact.

Normally the court will not enter a judgment allowing an account unless the attorney for the fiduciary requests such action. When an account is in order for allowance, it is important that counsel request allowance promptly in order to eliminate the possibility that some interested party who has failed to file a timely appearance may seek permission of the court to file a late appearance. Prob. Ct. R. 2, last paragraph; Unif. Prob. Ct. Prac. XVI(F). Until judgment has been entered allowing the account, the filing of a late appearance by permission is a continuing possibility. See *Marsman v. Nasca*, 30 Mass. App. Ct. 789, 798, n.8, 573 N.E.2d 1025, 1031 n.8 (1991).

§ 13.5 CONTESTED ACCOUNTS

§ 13.5.1 In General

Under long-standing Massachusetts practice, the responsibility rests with the interested parties to scrutinize a probate account and to bring to the court's attention any items that they regard as objectionable. *Nat'l Acad. of Scis. v. Cambridge Trust Co.*, 370 Mass. 303, 310, 346 N.E.2d 879, 884 (1976); *Greene v. Springfield Safe Deposit & Trust Co.*, 295 Mass. 148, 154, 3 N.E.2d 254, 257 (1936); *Dowd v. Morin*, 18 Mass. App. Ct. 786, 792, 471 N.E.2d 120, 125 (1984), *review denied*, 393 Mass. 1105, 474 N.E.2d 181 (1985). If no question is raised by an interested party, neither the court nor the probate registry will inquire into the contents of an account.

An interested party who wishes to contest a probate account is required by Mass. R. Civ. P. 72 to take two separate steps, each of which must be timely taken. The first of these steps is the filing of a written appearance. The second is the filing of a written objection.

§ 13.5.2 Filing of Appearance

Under Mass. R. Civ. P. 72, the appearance must be filed with the probate registry "on or before the return day," that is, no later than closing time on the return day. Unif. Prob. Ct. Prac. XVI(A). If the account has not been allowed, it may be possible to file an appearance after the return day. However, leave of court must be obtained for such late filing. Prob. Ct. R. 2, last paragraph; Unif. Prob. Ct. Prac. XVI(F).

For sample form of appearance, see **Exhibit 130**.

Only a party with standing may file an appearance against a probate account. This well-established principle is reflected in Mass. R. Civ. P. 72(b)(1), pursuant to which the citation is addressed only to persons "having an interest affected by the account." If a person having no such interest files an appearance (or an appearance and an objection), the fiduciary may move to strike it. 1 *Newhall* § 2:2; 2 *Newhall* § 29:10, at n.69.

Timely filing of an appearance is an absolute prerequisite to filing an objection. This fact is reflected in the language of the citation under Mass. R. Civ. P. 72(b)(1)(A) to the effect that an interested person must file a timely appearance "if he desires to preserve his right to file an objection." If no appearance is filed by the return day, the account may be allowed as uncontested under

Mass. R. Civ. P. 72(b)(7)(B) and any subsequent attempt to file either an appearance or an objection will be futile.

Sometimes an interested party who desires more information about an account may file a timely appearance simply in order to save his or her rights. After obtaining the desired information and ascertaining that he or she has no objection to the account, the party may then withdraw the appearance. Mass. R. Civ. P. 72(b)(5)(A). Such withdrawal permits the account to be allowed as uncontested under Mass. R. Civ. P. 72(b)(7)(B).

§ 13.5.3 Filing of Objection

In addition to filing a written appearance on or before the return day, an interested party who wishes to contest a probate account must also file a written objection within thirty days after the return day. The objection is a written statement specifying each item of the account to which the party objects “together with the grounds for each objection thereto.” Mass. R. Civ. P. 72(b)(1)(C). If the account is regarded as being analogous to the complaint in a civil action, the written objection required by Mass. R. Civ. P. 72 corresponds to the answer.

For sample form of objection, see **Exhibit 13P**.

The time for filing the objection may be extended by the court on motion with notice to the fiduciary. Mass. R. Civ. P. 72(b)(1)(C). Presumably such a motion should be filed before the expiration of the thirty-day deadline for filing the objection. *See* Prob. Ct. R. 16.

An interested party who has not filed an appearance cannot file an objection. Unif. Prob. Ct. Prac. XVI(F) provides that “no objection shall be accepted for filing unless there is an appearance of the objecting party on file.”

Failure to file the objection on time will render a party’s previously filed appearance vulnerable to being stricken. If thirty days expire after the return day and no objection has been filed and no extension of the time for filing the objection has been sought, the fiduciary may bring a motion under Mass. R. Civ. P. 72(b)(3) to strike the appearance, see **Exhibit 13Q**. Allowance of such a motion will permit the account to be allowed as uncontested. Mass. R. Civ. P. 72(b)(7)(B); *see Guardianship of Freida*, 43 Mass. App. Ct. 45, 48, 680 N.E.2d 949, 951 (1997).

Filing an objection under Mass. R. Civ. P. 72 does two things: It puts in issue those items of the account designated as being objected to, and it concedes as proper those items so not designated. An attorney who represents an objecting party should draw the objection with care, since the client will effectually be

bound by those items of the account that are not included in the objection. Although it is possible to obtain subsequent leave to amend the objection “when justice so requires” under Mass. R. Civ. P. 15(a), the court is likely to be somewhat sparing in permitting amendment of the objection in a contested accounting proceeding, where the fiduciary has the burden of justifying each contested item and will be preparing his or her case in reliance on the objection as filed.

If an objection is filed that is frivolous or that fails to state a valid ground of objection, the fiduciary may bring a motion under Mass. R. Civ. P. 72(b)(5)(B) to strike the objection, see **Exhibit 13R**. An objection which merely listed a number of items in the account as being objected to without specifying any grounds therefor would be clearly insufficient and vulnerable to being stricken. If only part of an objection is frivolous or inadequate, that part may be stricken, and the valid parts allowed to stand. If the entire objection is stricken, the objecting party’s appearance should be stricken along with it for failure to comply with the requirement of filing a sufficient objection within the required time. In such a case, the striking of the objection and the appearance will permit the account to be allowed as uncontested under Mass. R. Civ. P. 72(b)(7)(B).

§ 13.5.4 Applicability of Portions of Massachusetts Rules of Civil Procedure

It is provided by Mass. R. Civ. P. 72(b)(4) that the timely filing of an objection by an interested person, or the filing of a guardian ad litem’s report containing an objection, causes the account to be regarded as contested so that “further proceedings shall be governed by [enumerated portions of the Massachusetts Rules of Civil Procedure], in addition to this rule, and none other.” Those portions of the Massachusetts Rules of Civil Procedure that might create problems regarding pleadings, parties, counterclaims, and class actions if made applicable to probate accounts have been omitted from this list, as have those portions that deal with jury trials. Among those portions of the Massachusetts Rules of Civil Procedure that are enumerated as governing “further proceedings” on a contested account, the most significant are the rules dealing with amendment of pleadings (Rule 15), pretrial procedure (Rule 16), discovery (Rules 26 through 37), evidence (Rules 43 and 44), findings by the court (Rule 52), masters (Rule 53), summary judgment (Rule 56), and new trials (Rule 59). Application of Mass. R. Civ. P. 60 is expressly limited by Mass. R. Civ. P. 72 to make it clear that the “fraud or manifest error” standard of G.L. c. 206, § 24 governs the reopening of allowed accounts.

Filing an appearance does not cause an account to be regarded as contested under Mass. R. Civ. P. 72(b)(4). The filing of an objection triggers this result. On the other hand, filing a timely appearance prevents an account from being regarded

as uncontested (and therefore in order for allowance) under Mass. R. Civ. P. 72(b)(7)(B). Thus between the time of filing the appearance and the time of filing the objection, an account is held in a sort of limbo where it is treated as being neither contested nor uncontested. During this interim period, the account has not attained fully contested status and is therefore not ripe for such procedural steps as pretrial conference, appointment of a master, summary judgment, or marking for trial. Unif. Prob. Ct. Prac. XVI(G). Similarly, discovery under Mass. R. Civ. P. 26–37 does not go forward until the account has been placed in contested status by the filing of an objection.

§ 13.5.5 Hearings on Contested Accounts

The fiduciary may be required to appear at the hearing on a contested account and to testify under oath about any matters reflected in the account. G.L. c. 206, § 3. The fiduciary may also be required to produce relevant documents and estate assets at the hearing. G.L. c. 206, § 4.

The burden of justifying each contested item in the account rests with the fiduciary. *First Nat'l Bank of Boston v. Brink*, 372 Mass. 257, 263, 361 N.E.2d 406, 410 (1977); *Gallagher v. Phinney*, 284 Mass. 255, 258, 187 N.E. 612, 614 (1933); *Wood v. Farwell*, 195 Mass. 559, 560, 81 N.E. 294, 294 (1907). Because those portions of the Massachusetts Rules of Civil Procedure that Mass. R. Civ. P. 72(b)(4) make applicable to contested accounts contain no provision dealing with the allocation of either the burden of going forward or the burden of persuasion as between the parties to a civil action, traditional probate law on this point remains unchanged.

After the hearing, the court may allow or disallow the items of the account to which objection has been made. The court in settling a contested account has full power to enter orders for the repayment of moneys improperly applied, and execution may be issued thereon directly against the fiduciary without any need for a separate civil action for enforcement. G.L. c. 206, § 4.

§ 13.5.6 Appeals

An appeal from a judgment allowing or disallowing a contested account is taken by filing a notice of appeal in the probate registry within thirty days after the judgment is entered. G.L. c. 215, § 9; Mass. R. App. P. 3, 4.

§ 13.6 REOPENING OF ALLOWED ACCOUNTS

§ 13.6.1 Finality of Judgment on Probate Accounts

Under G.L. c. 206, § 24(5), a final decree allowing an account “shall not be impeached except for fraud or manifest error.” The decided cases have construed the statutory phrase “fraud or manifest error” fairly strictly so that reopening has generally been denied. *See, e.g., Taylor v. Worcester County Nat’l Bank*, 360 Mass. 687, 277 N.E.2d 487 (1971); *Burlingham v. Worcester*, 351 Mass. 198, 218 N.E.2d 123 (1966); *Reynolds v. Remick*, 333 Mass. 1, 127 N.E.2d 653 (1955); *Guardianship of Freida*, 43 Mass. App. Ct. 45, 680 N.E.2d 949 (1997); *Dowd v. Morin*, 18 Mass. App. Ct. 786, 471 N.E.2d 120 (1984), *review denied*, 393 Mass. 1105, 474 N.E.2d 181 (1985); *Svenson v. First Nat’l Bank of Boston*, 5 Mass. App. Ct. 440, 363 N.E.2d 1129 (1977). As a result, judgments allowing probate accounts have come to be relied upon by Massachusetts lawyers and fiduciaries as having considerable finality. The practical fact is that, in the absence of extraordinary circumstances, a properly allowed account cannot be reopened.

Leading cases construing the “fraud or manifest error” provision of the statute to permit reopening of allowed accounts are *O’Brien v. Dwight*, 363 Mass. 256, 285–89, 294 N.E.2d 363, 380–82 (1973), and *Jose v. Lyman*, 316 Mass. 271, 55 N.E.2d 433 (1944), both involving self-dealing by a fiduciary that was not adequately disclosed in the account. It was held in *National Academy of Sciences v. Cambridge Trust Co.*, 370 Mass. 303, 346 N.E.2d 879 (1976), that deliberate intent to deceive need not be shown to establish “fraud” within the meaning of the statute. It was held in *National Academy of Sciences* that “constructive or technical fraud” arising out of a trustee’s negligent misrepresentations of fact in its accounts was sufficient to permit their being reopened.

§ 13.6.2 Reopening Under Massachusetts Rule of Civil Procedure 72

Massachusetts Rule of Civil Procedure 72 makes no change in the substantive law regarding reopening of judgments on probate accounts. It is provided by Mass. R. Civ. P. 72, once with regard to contested accounts and once again with regard to uncontested accounts, that “the provisions of G.L. c. 206, § 24 shall govern the granting of any relief under Rule 60(b)[.] and Rule 60(b)(3) shall not apply.” Mass. R. Civ. P. 72(b)(4). This means that reopening of allowed accounts continues to be governed by G.L. c. 206, § 24 and the cases construing its standard of “fraud or manifest error.” *Dowd v. Morin*, 18 Mass. App. Ct. 786, 789, 471 N.E.2d 120, 123 (1984), *review denied*, 393 Mass. 1105, 474 N.E.2d 181 (1985) (citing text). The rather different grounds for reopening judgments that

are enumerated in Mass. R. Civ. P. 60(b)—i.e., mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; etc.—are not applicable to probate accounts.

Under Mass. R. Civ. P. 72, the question of the time within which a party may seek to reopen an allowed account is left to existing law. There is no specific time limit, and the matter is basically left to the discretion of the court, although laches may be a bar. 2 *Newhall* § 29:15, at n.56. The separate proviso of Mass. R. Civ. P. 72 that “Rule 60(b)(3) shall not apply,” prevents any possible problem from arising in this regard with the one-year time limit on bringing a Rule 60(b) motion to reopen for “fraud.” Eliminating the application of Rule 60(b)(3) avoids any possible implication that a party seeking to reopen a probate account on the statutory grounds of “fraud” might be barred after one year had elapsed from the entry of judgment. No Rule 60(b) motion is available to reopen a probate account for “fraud.” This may be done only by way of the traditional independent action (a petition to revoke a decree allowing an account), which form of proceeding is expressly reserved by Rule 60(b), and the time for the bringing of which is governed by existing law.

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