

Dear Stewart Partners,

We hope you are continuing to enjoy this glorious New England summer. In this week's update, we are providing an article that addresses self-dealing by fiduciaries in the chain of title. The concepts in this article are relevant in all New England states. We are also providing information on appurtenant easements in Massachusetts and the effect of Massachusetts General Laws, Chapter 183, Section 15.

As a reminder, NELTA's upcoming annual convention will be in New Haven, Connecticut. Registration information can be found below. Lastly, you still have time to register for today's New Hampshire webinar on Mechanic's Liens happening today at 2PM.



Self-dealing by Fiduciaries in the Chain of Title By: Tracie M. Kester, Esq., Associate Senior Underwriting Counsel - Massachusetts

We are often asked by agents to review transactions involving fiduciaries – both for current deals and in the back chain of title. This includes the execution of a document by an agent acting under a power of attorney or by a trustee of a trust. Problems can arise when there is self-dealing by a fiduciary, or when a fiduciary transfers title for nominal consideration.

A fiduciary is a person who has been placed in a position of trust. Attorneys in fact appointed in a power of attorney, trustees, conservators and guardians, and personal representatives of an estate are all examples of persons acting as fiduciaries. The law holds fiduciaries to a higher standard of care, and a fiduciary is obligated to act solely in the best interest of the principal. In the context of a power of attorney, the agent must put the interests of the principal (the person who executed the power of attorney) ahead of their own interests. In a trust situation, the trustee must put the interest of the trust beneficiaries first. Therefore, any transaction by the fiduciary, where the fiduciary benefits or even a relative of the fiduciary benefits is considered “self-dealing” and may be problematic. If you see a conveyance in the chain of title by a fiduciary to themselves or a relative for any consideration, you need to carefully review the documents to determine whether they allow for self-dealing.

Fiduciaries also have the duty of loyalty, and inherent in that is the duty to obtain the highest and best price for any property being sold. Therefore, a conveyance for less than fair market value by the fiduciary should also be scrutinized.

Often we see a transaction that will have both self-dealing and a transfer for less than fair market value. For example, we'll see a deed in the chain signed by a child using a power of attorney on behalf of a parent to transfer the property to the child and her siblings for no consideration. This is both a self-dealing transaction and a gift, and we need to confirm that both are authorized.

Many powers of attorney do contain authority for self-dealing and/or gifting. For example, you may find that the document contains language allowing the agent to make gifts to certain categories of people, such as the principal's spouse, child, or grandchild. In the example above where an agent used the POA to convey the parent's property to herself and her siblings, this language supports the conveyance to the siblings. But what about the conveyance by the agent to herself – she's a child, so shouldn't it be authorized?

Not necessarily. We'd also want the power of attorney to have authorized self-dealing – in other words, we'd look for language specifically authorizing the agent to make gifts to herself or that benefit the agent. Ideally, the document would authorize the agent to “engage in self-dealing.”

Some states, such as Connecticut, have statutory forms of powers of attorney that include gifting language. For example, the Connecticut Long Form Durable Statutory Power of Attorney contains gifting language (limited by the annual federal gift tax exclusion). However, it also prohibits self-dealing in that it states that the agent may not use the principal's property “to benefit the agent or a dependent of the agent” unless otherwise set forth in the POA. See Conn. Gen. Stat. s. 1-352(a)(3).

Trustees of trusts are also fiduciaries with similar duties. When a trustee conveys trust property for nominal consideration, or conveys to themselves, that transaction must be closely examined. Generally, we're comfortable when we see a deed for nominal consideration from Jane Doe as Trustee of Jane Doe's Revocable Trust to herself, because presumably she retained the right to revoke her trust. We would not be as comfortable if the deed was from a trustee other than Jane for nominal consideration, or if the Trust was irrevocable.

Whether a trustee deed involves gifting, self-dealing or both, once the deed has been on record for a number of years, we may be able to insure because of statutes of limitation limiting the ability of the trust beneficiaries to challenge the acts of the trustee. For example, the Uniform Trust Code as enacted in Massachusetts contains a limitation of three years after the date the beneficiary knew or reasonably should have known of the breach of duty by the trustee to challenge the transaction. See MGL c. 203E, s. 1005(b).

In sum, make sure that any deed by a fiduciary in your chain is specifically authorized by the operative instrument (i.e., the POA or trust). If the transaction is questionable, confirm that sufficient time has passed such that it can no longer be challenged under an applicable statute of limitations.

As always, please reach out to your Stewart underwriters if you encounter a questionable transaction by a fiduciary in your chain of title.



Massachusetts

The two main types of easements we deal with in real estate are appurtenant easements and easements in gross. Each of these has unique characteristics, legal implications, and aspects related to transferability. An easement is presumed to be appurtenant, unless expressly stated otherwise or it is clearly intended to be an easement in gross. In this article I will be discussing appurtenant easements.

An appurtenant easement typically involves two neighboring properties. A very common appurtenant easement we see is an access easement. These easements are fairly straightforward, in that they are agreements between property owners, whereby one property owner grants to another property owner rights to travel across their property to gain access to the other property owner's land. Generally, the grant is for a specific location, but broader rights can be granted. The property that has the right to use someone else's property for access is called the dominant estate, while the property subject to the easement, or that has the easement over it, is called the servient estate. Easements can be created because land might be landlocked, or simply because an easement may provide for more convenient access. Likewise, a shared driveway between neighboring lots demonstrates how an appurtenant easement can allow shared use of an access route, benefiting both property owners by providing mutual access. There are situations where the appurtenant easement benefits the property but does not necessarily abut the dominant estate such as beach rights in a neighborhood association.

Because an appurtenant easement runs with the land, it transfers with the property, ensuring continuity in easement rights between successive property owners. Often as underwriters we receive a question as to whether an appurtenant easement needs to be included in every conveyance. From a technical standpoint, the answer to this question is no. Pursuant to Massachusetts General Laws Chapter, c.183, §15: Easements, privileges and appurtenances belonging to the granted estate, it is not necessary to include every appurtenant right in each deed. The statute states the following:

"In a conveyance of real estate all rights, easements, privileges and appurtenances belonging to the granted estate shall be included in the conveyance, unless the contrary shall be stated in the deed, and it shall be unnecessary to enumerate or mention them either generally or specifically."

This statute is very helpful, as you can imagine the headaches caused if appurtenant rights could be lost if not included in each deed. This would be especially cumbersome in a condominium where there are many appurtenant rights that you typically see in the first unit deed out of a newly declared condominium. Fortunately, appurtenant rights are automatically included in the conveyance pursuant to M.G.L. c.183, §15.

Sometimes we are asked to insure appurtenant easements. Insuring an easement is possible, but it is important to remember to run a full title search on the servient parcel and take exception for matters affecting title to that parcel. The title search is important to determine what might impact the easement and to confirm nothing has caused the easement to be eliminated. For example, if the servient parcel granted an easement to an abutting landowner, and at the time of the grant, the servient parcel was encumbered by a

mortgage, if that mortgage holder didn't subordinate to the easement and a foreclosure occurred, the easement could have been wiped out by the foreclosing lender.

As always, reach out to one of our underwriters if you have any questions. Also, mark your calendars for October 8, 2025, as I will be presenting a webinar that will include a full discussion on the different types of easements, how to insure them and other related issues regarding easements.



Upcoming Education

New Hampshire Webinar – August 13, 2025

Please join us for a New Hampshire webinar on August 13th. Michelle Radie-Coffin, New Hampshire State Counsel and State Manager, will be discussing mechanic's liens. To register, please follow this link: [Register here](#)

2025 NELTA Annual Convention – September 7-9, 2025, New Haven Connecticut

The New England Land Title Association (NELTA) Annual Convention is being held in New Haven, Connecticut from September 7 through September 9, 2025. The deadline to register for a discounted conference rate and reserve a discounted hotel room is August 17, 2025. Continuing education credits have been applied for in Connecticut, Maine, New Hampshire, Vermont, and Rhode Island.

You can find information on registering for the conference and hotel, along with the schedule of events, at NELTA's website here: <https://nelta.org/event/25ACAttReg>



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