The trust decanting statutes: Nuisances that should be repealed.

Inherent in a trustee's discretionary authority to make a distribution of trust property outright and free of trust to a permissible beneficiary of the trust may well be the authority to distribute the property instead to another trustee for the benefit of that beneficiary. That is the essence of the concept of "decanting" in the trust context. In recent years, a number of state legislatures (U.S.) have seen fit to codify the concept. Massachusetts has not. No need. On July 29, 2013, its Supreme Judicial Court found that a trustee of a certain discretionary trust had implied common law decanting authority: "We regard this broad grant of almost unlimited discretion as evidence of the settlor's intent that the disinterested trustee have the authority to distribute assets in further trust for the beneficiaries' benefit." Morse v. Kraft, 2013 WL 3853152 (Mass.)). Charles E. Rounds, Jr., in §3.5.3.2(a) of *Loring and Rounds: A Trustee's Handbook* (2013), questions the wisdom of barnicalizing by statute this very simple equity-based concept. The relevant portions of the section are reproduced below.

Trust Decanting

[From §3.5.3.2(a) of Charles E. Rounds, Jr., *Loring and Rounds: A Trustee's Handbook* (2013), with modifications and enhancements]

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Decanting: Discretionary fiduciary distributions of principal in further trust. Inherent in a trustee's unqualified power to make discretionary distributions of principal outright and free of trust to or for the benefit of a beneficiary is the lesser power to make a distribution of principal to another trustee upon a different trust to or for the benefit of that beneficiary.[467] The Restatement (Third) of Property is in accord.[468] Moving property from one trust to another in this way is referred to as decanting in some circles.[469] On the other hand, a decanting for the benefit of someone other than that beneficiary could implicate the fraud on a power doctrine, which is covered generally in Section 8.15.26 of this handbook. In New York, such distributions in further trust are authorized by statute.[470]

It has been suggested that the legal premise underlying the statute is that a trustee with an absolute fiduciary power to invade principal is analogous to a donee of a nonfiduciary

[467]Phipps v. Palm Beach Trust Co., 142 Fla. 782, 196 So. 299 (1940) (holding that the power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than a fee, unless the donor clearly indicates a contrary intent) (U.S.); Lewin on Trusts ¶¶3-59, 3-67 (England). *See generally* Restatement (Second) of Property (Donative Transfers) §11.1; Restatement (Third) of Property (Wills and Other Donative Transfers) §19.14.

[468] Restatement (Third) of Property (Wills and Other Donative Transfers) §19.14, cmt. f.

[469] Restatement (Third) of Property (Wills and Other Donative Transfers) §19.14, Reporter's Note.

[470]Est. Powers & Trusts Law §10-6.6. Alaska, Arizona, Delaware, Florida, Illinois, Indiana, Kentucky, Missouri, Nevada, New Hampshire, North Carolina, Ohio, South Dakota, Tennessee, and Virginia also have decanting statutes.

special/limited power of appointment who may exercise the power in further trust.[471] The analogy, however, would seem a false one as trustees are constrained by the fiduciary principle in the exercise of their powers; donees of nonfiduciary powers of appointment generally are not.[1]Thus, a power in a trustee to select his successor, by decanting or otherwise, is held in a fiduciary capacity. At minimum this translates into a fiduciary duty on the part of the trustee to exercise due diligence in the selection of an appropriate successor.

Decanting can be a way for *the trustee* of an irrevocable trust to modify its administrative provisions, accommodate a beneficiary-related change of circumstances, respond to changes in the tax laws, or correct errors or ambiguities in the governing trust instrument. The trustee, of course, would be subject to fiduciary constraints in the exercise of his discretionary decanting authority, and any such exercise would have to be done prudently. Thus, the failure of the trustee to give due advance consideration to the tax consequences, if any, of a discretionary trust-to-trust decanting would amount to a prima facie breach of his duty to administer the trust prudently.

A transfer of property to a trustee in breach of some fiduciary duty to the legal or equitable owner of the property is subject to rescission and restitution.[2] Thus, if an agent in breach of a fiduciary duty to the principal transfers the principal's property to a trustee, the trustee is "liable in restitution" to the principal.[3] So also if a trustee in breach of trust decants to another trust with a different trustee and different beneficiaries, absent special facts. The trustee of the other trust and, indirectly, the beneficiaries of the other trust are "liable in restitution" to the beneficiaries of the inception trust "as necessary to avoid unjust enrichment."[4]

Ultimately, whether or not there is decanting authority in the trustee should simply hinge on the intent of the settlor of the trust as divined from its terms, as well as on the motives of the trustee. If, for example, decanting would thwart the wishes of the settlor, then such a distribution in further trust ought to be judicially voidable. So also if decanting is merely an attempt on the part of the inception trustee to end-run the ancient proscription against delegating to agents the entire administration of the trust or to avoid having to monitor the activities of agents to whom fiduciary discretions have been properly delegated.[5] When it comes to the motives of a trustee, equity looks to substance rather than to form.[6] One cannot forget that the trust, first and foremost, is a principles-based creature of equity.[7] Thus, whether decanting is permissible should be determined on a case by case basis taking into account the terms of the particular trust and the motives of the particular trustee.[8] To promulgate some hard and fast rule either way by statute

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[471]Matter of Estate of Mayer, 176 Misc. 2d 562, 672 N.Y.S.2d 998 (1998); Phipps v. Palm Beach Trust Co., 142 Fla. 782, 196 So. 299 (1940). *See generally* §8.1.2 of this handbook (exercising of powers of appointment in further trust).

[1] *See generally* §8.1.1 of this handbook (powers of appointment).

[2] *See* Restatement (Third) of Restitution and Unjust Enrichment § 17 (lack of authority).

[3] *See* Restatement (Third) of Restitution and Unjust Enrichment § 17 (lack of authority). *See generally* §3.4.1of this handbook (whether an agent acting under a durable power of attorney can effectively transfer the principal's property in trust).

[4] *See* Restatement (Third) of Restitution and Unjust Enrichment § 17 (lack of authority).

[5] *See generally* §6.1.4 of this handbook (delegation).

[6] *See generally* §8.12 of this handbook (equity's maxims).

[7] *See generally* Chap. 1 of this handbook (equity in the Anglo-American legal tradition). equity).

[8] *See* Phipps v. Palm Beach Trust Co., 142 Fla. 782, 785, 196 So. 299, 301 (1940) (whether decanting is permissible turns on the facts of the particular case and the terms of the instrument creating the trust).

only serves to further stultify and barnicalize the law of trusts.

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