New Technical Corrections and Clarifying Amendments to Decanting Statute

By Joseph T. La Ferlita

Having been substantially revised in August 2011, New York's decanting statute was again amended on November 13, 2013. The legislative history (in the form of an Assembly Memorandum in Support) characterizes the changes, which originated as Assembly Bill A7061 and became effective immediately, as "technical corrections and clarifying amendments" to the decanting statute, codified at EPTL 10-6.6.

The 2013 amendments alter the decanting statute in six ways, which are summarized below.

1. Exclusion of Successor and Remainder Beneficiaries When Trustee Has Absolute Discretion

The 2013 amendments clarify that the appointed trust may properly exclude all of the successor and remainder beneficiaries of the invaded trust when the invaded trust confers on the trustee absolute discretion to invade principal. Prior to the 2013 amendments, EPTL 10-6.6(b) stated, in relevant part, "The successor and remainder beneficiaries of such appointed trust shall be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one or more of such successor and remainder beneficiaries)." A literal interpretation of this would require the appointed trust to include at least one of the successor and remainder beneficiaries of the invaded trust.

The purpose of this requirement appears to have been to protect the interests of at least one of the successor and remainder beneficiaries when a trustee decants, but many practitioners concluded that such protections were unwarranted and probably inconsistent with the grantor's intent. As the legislative history of the 2013 amendments explains, since the grantor gave the trustee absolute discretion to distribute principal to the current beneficiary (which is a requirement for decanting under EPTL 10-6.6(b)), the grantor necessarily rendered the successor and remainder beneficiaries' interests "susceptible to exclusion." In other words, the rights of a successor and remainder beneficiary should not be greater when the trustee decants than when he makes an outright distribution to the current beneficiary.

The newly amended EPTL 10-6.6(b) addresses this problem, and now states, in pertinent part, "The successor and remainder beneficiaries of such appointed trust may be one, more than one, or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries)."

2. Statute of Limitations

The newly revised statute addresses the effect a decanting has on the six year statute of limitations for compelling a trustee to account. Actually, it punts on the issue. The question is whether a decanting starts the running of the statute, either because it constitutes a "repudiation" under *Matter of Barabash*, 31 N.Y.2d 76, 334 N.Y.S.2d 890 (1972) (statute begins to run on repudiation of the trust relationship), or a "termination" under *Matter of Tydings*, 11 N.Y.3d 195, 868 N.Y.S.2d 563 (2008) (statute begins to run on known termination of trust relationship by appointment of successor trustee).

The legislative history reveals that the legislature considered making every decanting trigger the running of the statute of limitations—a bright line test that was rejected. Although this solution would create certainty, the legislature was concerned that it would make it too easy for a trustee to start the running of the statute to the detriment of unsuspecting beneficiaries, who could unknowingly find themselves without recourse for breaches of fiduciary duty. The legislature was mindful that not every decanting is created equally. One decanting could involve an appointed trust that has the same trustees, beneficiaries, and dispositive provisions as the invaded trust, but one that differs from the invaded trust only in connection with an obscure (at least to a layman) administrative provision. Another decanting could involve an appointed trust that has a different trustee and a completely different dispositive scheme in relation to the invaded trust. The legislative history strongly suggests that the former example should not trigger the running of the statute, whereas the latter should. The test in the legislative history appears to be whether a beneficiary reasonably could be expected to identify the circumstances that give rise to the running of the statute of limitations.

Notwithstanding this, it is important to note that the newly revised decanting statute does not resolve the issue one way or the other; it does not state when a decanting does or does not trigger the statute of limitations. Instead, it does two things: (1) adds to the end of EPTL 10-6.6(j)(5) the statement, "Whether the exercise of a power under paragraph (b) or (c) begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation[;]" and (2) requires the decanting instrument, which the decanting trustee

is required to serve on the interested parties, to state that "in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time."

Another bright-line solution—which also was not adopted—would be to have the statute of limitations begin to run when the decanting covers all of the invaded trust's assets, but not begin to run when it covers only part of same. In conjunction with this, the decanting instrument, which the 2011 decanting statute already required to be served on the interested parties and to state whether the decanting covered all or only some of the invaded trust's assets, would have to state explicitly whether the decanting at issue has triggered the running of the statute of limitations (*i.e.*, when the decanting covers all of the assets) or not (*i.e.*, when the decanting covers only part of the assets). It is not clear if the legislature ever considered this option.

3. Execution of the Appointed Trust

The 2011 version of the statute included in the definition of an appointed trust "a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust" (EPTL 10-6.6(s)(1)). The 2011 version of the statute went on to state, "[f]or purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be signed by the creator shall be deemed satisfied by the signature of the trustee of the appointed trust." The problem is that EPTL 7-1.17 now refers to "the person establishing such trust," and not "the creator." To make the decanting statute conform, EPTL 10-6.6(s)(1) now states, in pertinent part, "[f]or purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be executed and acknowledged by the person establishing such trust shall be deemed satisfied by the execution and acknowledgment of the trustee of the appointed trust."

One question inadvertently created by this technical amendment is whether EPTL 7-1.17 is deemed satisfied when the newly created appointed trust is executed by the trustee of the invaded trust in the presence of two witnesses instead of being acknowledged. Although logic would suggest it would, the explicit language of the newly revised decanting statute refers only to situations where the signature of the trustee of the invaded trust is acknowledged.

4. Whether the Appointed Trust Could Include a Discretionary Income Beneficiary

As revised in 2011, the decanting statute appeared to prohibit a trustee with absolute discretion from decanting to an appointed trust that carried over the interest of a discretionary income beneficiary of the invaded trust. The problem was that, under EPTL 10-6.6(b), a trustee "with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust *for, and only for,* the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries)" (emphasis added). Suppose, for example, that the invaded trust confers on the trustee absolute discretion to distribute (1) some, all, or none of the invaded trust's income to A, and (2) some, all, or none of the principal to B. Could the trustee decant to an appointed trust that has the same dispositive terms as the invaded trust, or must A's interest be eliminated in the appointed trust? The legislative history acknowledges that a literal interpretation of EPTL 10-6.6(b) would prohibit the appointed trust from including A's interest, but goes on to state that there is no reason why a grantor would not desire the continuation of A's interest in the appointed trust. The legislature handled this issue by amending the definition of "current beneficiary or beneficiaries," which is now "the person or persons…to whom the trustees may distribute principal at the time of the exercise of the power, *provided however that the interest of a beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust*" (EPTL 10-6.6(s)(4) (emphasis added)). Thus, in this example, A's interest may properly continue in the appointed trust.

5. Whether Decanting from a Non-Grantor Trust to a Grantor Trust Is Prohibited

The revised statute addresses a concern that decanting from an non-grantor trust to a grantor trust violates the general prohibition of having a new appointed trust contain beneficiaries who had no interest in the invaded trust (in other words, one generally cannot add beneficiaries when decanting). The question was whether, in this circumstance, the grantor is deemed a new beneficiary, thus rendering the decanting ineffective. The concern was rooted in existing EPTL 7-1.11, which allows a trustee to distribute trust principal to a grantor in order to reimburse him for income taxes that he incurred on behalf of the trust (*i.e.*, in the case of a grantor trust). The legislative history discusses this issue at length, and, in the end, characterizes the grantor's right to receive principal as reimbursement for income taxes incurred on behalf of the trust as a non-beneficial interest in the appointed trust. For that reason, the grantor is not deemed to be a "new beneficiary" in this case, thus rendering the decanting effective.

6. Does Decanting Require Co-Trustees to Exercise Their Authority to Invade Principal Unanimously?

There was some concern that, where an invaded trust had multiple trustees, unanimity among them

was required to decant. After all, EPTL 10-6.6 explicitly characterizes decanting as the exercise of a power of appointment and, under the general rule of EPTL 10-6.7, a power of appointment conferred on multiple donees must be exercised unanimously. Moreover, the statute that contains the "majority rules" test, EPTL 10-10.7, explicitly excludes powers of appointment. The legislature clarified that a mere majority of trustees is needed to effectuate a decanting. It did so by amending EPTL 10-6.7 by excluding decantings from its application, EPTL 10-10.7 by including decantings in its application, and 10-6.6 by adding an explicit reference to the former two sections (*see* EPTL 10-6.6(t)).

Conclusion

Recent technical corrections and clarifying amendments should, as a whole, help practitioners and trustees more successfully utilize New York's decanting statute.

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