

# Probate and Fiduciary Litigation Newsletter

## March 20, 2017

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This week has brought a much-anticipated decision by the Supreme Judicial Court regarding trust decanting, and the past month also brought the latest chapters in two cases that we reported on previously.

First, in *Ferri v. Powell-Ferri*, Case No. SJC-12070, 2017 Mass. LEXIS 198 (Mar. 20, 2017), the SJC answered questions regarding trust decanting that had been certified to it from the Connecticut Supreme Court. Most importantly, the SJC answered “yes” to the question of whether the terms of a 1983 trust established by the settlor for the benefit of his son allowed the trustees to decant all the trust assets to a new spendthrift trust.

In March 2011, following the filing of a divorce action in Connecticut between the beneficiary and his wife, the trustees of the 1983 trust decanted its assets to the new spendthrift trust without informing the beneficiary and without his consent. The trial court in Connecticut ordered the assets to be restored to the 1983 trust. On appeal, the Connecticut Supreme asked for guidance from the SJC by way of the certified questions, because the 1983 trust was a Massachusetts trust. In answering that Massachusetts law permits the decanting of the 1983 trust, the SJC relied on its earlier decision in *Morse v. Kraft*, 466 Mass. 92 (2013) to the effect that if a trustee has the discretionary power to distribute property to or for the benefit of the beneficiaries, then the trustee likewise has the authority to distribute the property to another trust for the benefit of those same beneficiaries. This is so even in the absence of express authority to decant, because the authority to decant may exist based on other trust language and a reading of the settlor’s intent.

The SJC explained that a trustee’s broad discretion to distribute the assets of an irrevocable trust may indicate the settlor’s intent to permit decanting without seeking court approval. In fact, the SJC noted that the language of the 1983 trust gives the trustees far more expansive discretion to act than even the broad discretion that was afforded under the trust instrument in *Morse v. Kraft*, with no oversight other than the requirement to report from time to time at the request of the beneficiary. The SJC further explained that the anti-alienation language of the 1983 trust, which evidences the settlor’s intent to protect the trust income and principal from invasion by the beneficiary’s creditors, is not inconsistent with the discretionary authority to decant. “It follows that if a settlor intended a trust’s assets to be protected from creditors, he or she necessarily intended that the trustee have the means to protect the trust assets, consistent with his or her fiduciary duties.”

The SJC rejected the argument of the beneficiary’s wife that the beneficiary’s right to withdraw principal from the 1983 trust is inconsistent with the authority to decant. The SJC reasoned that if

the trustees were unable to decant the portion of the trust's assets made "withdrawable" by the beneficiary at certain milestone ages, then the trustees would effectively lose the ability to manage those trust assets upon the beneficiary's reaching those ages, which would make little sense. The trustees have fiduciary duties to manage 100% of the assets held in the trust, regardless of a withdrawal right (which, the SJC noted, had been exercised only sparingly by the beneficiary). The broad discretion to make distributions and the beneficiary's right to withdraw principal are not mutually exclusive. "Accordingly, reading the entirety of [the 1983 trust] in harmony, it provides that, unless and until all of the trust assets were distributed in response to the beneficiary's request for withdrawal, the trustee could exercise his or her powers and obligations under the 1983 Trust, including the duty to decant if the trustee deemed decanting to be in the beneficiary's best interest."

The SJC also answered "yes" to another question certified from the Connecticut Supreme Court, namely whether a court could consider an affidavit by the settlor regarding what he intended when creating the trust. The SJC held that where, as here, there is any question of ambiguity concerning the settlor's intent, Massachusetts courts may consider extrinsic evidence. The SJC pointed to its decision in *Morse v. Kraft*, where it considered the settlor's affidavit, and to its history of considering affidavits in trust reformation cases, where an affidavit by the drafter of a trust has been permitted to show that the language of the instrument is inconsistent with the settlor's intent.

Finally, in a concurring opinion, Chief Justice Gants made clear that while he agrees with the majority opinion, he was writing separately to make clear that the SJC was not deciding whether Massachusetts law will permit trustees to decant for the sole purpose of removing the trust's assets from the marital estate that might be distributed to the beneficiary's spouse in a divorce action. "I do not offer any prediction as to whether this court might invalidate as contrary to public policy a new spendthrift trust created for the sole purpose of decanting the assets from an existing non-spendthrift trust in order to deny the beneficiary's spouse any equitable distribution of these trust assets. I simply make clear that, in this opinion, we do not decide this issue; we will await a case that presents such an issue before we decide it."

Second, in *Brady v. Citizens Union Savings Bank*, Case No. 16-P-308, 2017 Mass. App. LEXIS 26 (Mar. 9, 2017), the Appeals Court addressed the question of whether a probate court's award of litigation fees and costs to trustees should be reduced based on the availability of insurance coverage for those same fees and costs. In an earlier decision in the same case (*Brady v. Citizens Union Savings Bank*, 88 Mass. App. Ct. 416 (2015)), the Appeals Court had remanded this question to the probate court with the instruction that "the judge should take the trustees' insurance coverage into account, giving it as much or as little weight as the judge deems appropriate, in arriving at a just and equitable award." On remand the probate court declined to reduce the award of fees and costs based on the availability of the insurance coverage, explaining that the plaintiff's claims were meritless and vexatious and that the plaintiff had needlessly prolonged the litigation. Therefore, the probate court reasoned, offsetting the fees and costs paid by the trust, to the extent covered by insurance, would have created an inequitable windfall for the plaintiff. The Appeals Court affirmed, holding that the probate court had not abused its discretion.

Third, in *De Prins v. Michaelles*, Civil Action No. 15-40093-TSH, 2017 U.S. Dist. LEXIS 21558 (D. Mass. Feb. 15, 2017), the plaintiff holds a wrongful-death judgment against the estate of Donald Belanger, who had murdered the plaintiff's parents and then committed suicide. In an effort to collect the judgment, plaintiff is seeking to reach and apply the assets of a trust that Donald Belanger had established—allegedly as a fraudulent conveyance—shortly before the murder-suicide. The defendant trustee moved to dismiss the plaintiff's claims. In denying the motion to dismiss, the Court noted that a creditor may reach and apply a debtor's interest in intangible property that is not otherwise subject to execution in an action at law, including a debtor's beneficial interest in a trust. This is true even where the trust contains a spendthrift clause, under certain circumstances, because Massachusetts follows the rule from the Restatement in situations where the settlor created the trust for his own benefit and attempted to immunize it from creditors: "Where a person creates for his own benefit a trust for support or a discretionary trust, his ... creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit." (Citation omitted.) Therefore, even if the trustee chooses not to make any discretionary payments to the beneficiary, a creditor can nevertheless reach the maximum amount that the trustee is permitted to pay.

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