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Trust decanting post-'Kraft': the SJC speaks again

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The Supreme Judicial Court recently had an opportunity once more to provide common law guidance to trust and estate practitioners on the trust planning technique known as "decanting."

The decision, *Ferri v. Powell-Ferri*, 476 Mass. 651 (2017), follows the court's ruling in *Morse v. Kraft*, 466 Mass. 92 (2013). The *Ferri* case underscores the substantive law principles articulated in *Kraft*, and affirms the common-law authority of trustees of a Massachusetts irrevocable trust to decant the trust assets to a new irrevocable trust with different terms, provided that such decanting is permitted by the terms of the trust.

Additionally, in a concurring opinion by Chief Justice Ralph D. Gants, the bar was provided something of a preview as to how some members of the SJC might rule if a trust decanting case implicating public policy concerns reaches the state's highest court.

But absent further guidance from the SJC or the Legislature, trustees could find themselves conflicted in future cases in which their duty to act in the best interests of the beneficiary requires them to decant, but where such decanting could be deemed to violate public policy.

The *Ferri* case came to the SJC on certified questions from the Connecticut Supreme Court.

Paul Ferri Jr. and Nancy Powell-Ferri were going through a divorce in the Connecticut courts. The divorce action was begun by Powell-Ferri in October 2010.

In 1983, when Paul Jr. was 18, his father had created an irrevocable trust for Paul Jr.'s sole benefit. The 1983 trust was created in Massachusetts and was governed by Massachusetts law.

In March 2011, just six months after the divorce action was filed by the wife, the trustees of the 1983 trust created a declaration of trust for the sole benefit of Paul Jr. and distributed substantially all the assets in the 1983 trust to themselves as trustees of the 2011 trust.

The 1983 trust authorized the trustees, from time to time, to "pay to or segregate irrevocably for later payment to [the beneficiary], so much of the net income and principal of this trust as [the trustees] shall deem desirable for [the beneficiary's] benefit."

The 1983 trust also granted to Paul Jr. as beneficiary the right to demand withdrawals of certain trust percentages, ranging from a right to withdraw 25 percent of the trust corpus at age 35 to 100 percent at age 47.

At the time of the decanting in 2011, Paul Jr. possessed the right to withdraw up to 75 percent of the trust assets.

The 1983 trust also contained a standard spendthrift provision. Likewise, the 2011 trust is a spendthrift trust, but it contains no provision whereby the beneficiary could demand distribution of assets.

Paul Jr. took no part in the decanting; the trustees acted on their own, without informing Paul Jr. of their intentions or seeking his consent. The *Ferri* decision further recites that the trustees specifically undertook the decanting for the purpose of preventing Powell-Ferri from reaching the 1983 trust assets in the divorce action.

> While the *Ferri* decision provides further clarity regarding some aspects of the common law of decanting in Massachusetts, it also gives rise to new questions that must await further judicial guidance or legislative action.

After the Connecticut divorce court determined on cross-motions for summary judgment that the trustees lacked valid authority to decant the 1983 trust and ordered restoration of 75 percent of the assets back to the 1983 trust, the Connecticut Supreme Court certified three questions of Massachusetts law to the SJC:

First, whether the 1983 trust empowered the trustees to decant;

Second, if not, what remedy should apply to restore assets to the 1983 trust; and

Third, whether a court should consider an affidavit from the trust settlor in seeking to divine an intent to decant.

Ultimately, the SJC answered the first and third questions affirmatively, and did not need to reach the second.

In authorizing the decanting, the SJC expressly relied on its holding in *Kraft*.

In *Kraft*, the court had described decanting as a process to "amend an unamendable trust" by distributing trust assets from an original trust to another with different terms.

Whereas in some jurisdictions, such as New York and New Hampshire, the decanting process is authorized and governed by statute, Massachusetts has yet to enact a decanting statute.

According to the Massachusetts common-law doctrine of decanting as first articulated in *Kraft*, a trustee's power to decant is derived from the donor's intent as reflected in the trust instrument, even if the authority is not expressly granted in the trust itself.

The rationale underlying decanting is that, if a trustee has power to distribute principal to or for the benefit of a beneficiary or class of beneficiaries, the

trustee also has the power to distribute principal in further trust for the benefit of those same beneficiaries.

With respect to the Ferri 1983 trust, the court noted the trustee's "extremely broad discretion" to distribute principal, and the explicit authority for the trustee to "segregate irrevocably for later payment to" the beneficiary. To the SJC, employing dictionary definitions of "segregate," this language represented an indication of the settlor's intent to allow decanting.

As could be expected, Powell-Ferri, the wife, pointed to the beneficiary withdrawal provisions in the 1983 trust as inconsistent with authority to decant. She asserted that decanting the assets from the 1983 trust to the 2011 trust, which did not contain any withdrawal rights, impaired the interests of the beneficiary to exercise such rights in contravention of the settlor's intent.

The SJC disagreed. The court noted that, despite the fact that a certain percentage of trust assets were subject to withdrawal by the beneficiary, until the assets were actually withdrawn the trustee continued to have power to control and manage the assets and, in fact, had legal title over them.

In other words, although the beneficiary had the legal right to divest the trustee of certain assets, unless or until the beneficiary exercised his authority the trustee retained full authority over the assets, including the authority to decant the assets to a new trust.

Accordingly, the court held that decanting was authorized "if the trustee deemed decanting to be in the beneficiary's best interests."

Of note in this regard, Massachusetts' body of law on decanting differs from that statutorily imposed by our neighboring state of New Hampshire. The decanting statute in New Hampshire places limits on the authority to decant and states that a trustee "may not decant to the extent that the terms of the second trust reduce or eliminate a currently exercisable power of withdrawal." N.H. Rev. Stat. F 564-B: 4-481(g). The New York decanting statute contains the same limitations.

Thus, an apparently unintended consequence of the *Ferri* decision is that the power to decant in Massachusetts may be broader than in either New York or New Hampshire in this respect.

Regarding the third question certified to the court, the SJC had no difficulty finding that the settlor's affidavit could be properly considered by a trial court in divining the settlor's intent to authorize decanting.

Again, the court referenced the *Kraft* case where it considered the settlor's affidavit as affirmative evidence in support of an intent to authorize decanting. In *Ferri*, where the affidavit did not contradict or alter the terms of the trust, it was properly considered by the SJC simply to "further support the settlor's evident intent."

Finally, the *Ferri* case featured a concurring opinion authored by Gants, joined by Justices Barbara A. Lenk and Kimberly S. Budd. The concurring justices wrote "separately to emphasize what we did not decide in answering the reported questions certified to us" — namely, whether Massachusetts law would permit trustees to decant for the sole purpose of transferring trust assets out of a beneficiary's marital estate to avoid division in a divorce proceeding.

That issue had been decided for purposes of the *Ferri* case by the Connecticut Supreme Court, which found that the public policy against depleting marital assets to deprive a divorcing spouse of those assets did not apply here because the beneficiary husband played no role in creating the new 2011 trust or in the decanting itself. *Ferri v. Powell-Ferri*, 317 Conn. 223, 223-34 (2015).

In the concurring opinion, while not offering any prediction as to how the SJC will decide the issue, Gants appeared to go out of his way to underscore that, under the Massachusetts Uniform Trust Code, G.L.c. 203E, §404, and earlier common law decisions of the court, Massachusetts law would at least require inquiry as to whether a similar decanting would be void as contrary to public policy.

The concurrence also notes that at least 25 states have enacted decanting legislation, and ends by urging the Massachusetts Legislature to consider the use of decanting presented in the case if it chooses to codify its own decanting statute.

While the *Ferri* decision provides further clarity regarding some aspects of the common law of decanting in Massachusetts, it also gives rise to new questions that must await further judicial guidance or legislative action.

The concurring opinion in particular raises the possibility that a second trust created for the purpose of facilitating decanting could be deemed against public policy in certain circumstances, including perhaps on facts similar to this case.

While the SJC appropriately confined its holding to the certified questions before it from the Connecticut Supreme Court, its decision in *Ferri* could nevertheless leave trustees in a conflicted position. The SJC's majority opinion seemingly indicates that trustees not only have the ability to decant, but that they have a "duty to decant if the trustee deemed decanting to be in the beneficiary's best interest."

Trustees, feeling duty bound to decant, may soon test the limits of Massachusetts public policy, thus providing further clarity in this evolving area of the law. MLW

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