Title

Ferri v. Powell-Ferri: A trust decanting decision that is less than meets the eye (Part II)

Summary

The Supreme Court of Connecticut (SCC) certified three trust-decanting questions of law to the Supreme Judicial Court of Massachusetts (SJC) incident to a divorce proceeding. On March 20, 2017, the SJC rendered its answers to the SCC. See Ferri v. Powell-Ferri, SJC-12070 and my JDSUPRA posting entitled *Ferri v. Powell-Ferri: A Trust decanting decision that is less than meets the eye* of the same date. This posting is a post script to my March 2017 posting. Here is the situation in a nutshell: The Husband, the beneficiary of a Massachusetts trust established by his father (Trust #1), possessed a general inter vivos power of appointment over 75% of the entrusted property. Husband and wife are the parties to a Connecticut divorce proceeding. The trustees (one of whom was the husband's brother) decanted the property into an irrevocable trust with a spendthrift clause for the husband's benefit (Trust #2). The sole purpose of the decanting was to remove the assets of Trust #1 from the reach of the wife. As a mechanical matter, were the trustees "empowered" by the terms of the trust to decant? Yes, answered Massachusetts. But, as the concurring opinion clarifies, unasked was whether the decanted assets in Trust #2 may nonetheless be reached by the wife in an equitable action to reach and apply incident to the divorce proceeding in light of the fact that the husband had possessed a general inter vivos power of appointment at the time of the decanting. The SJC having rendered its opinion that the trustees were empowered to decant, the SCC on Aug. 8, 2017 followed up by ruling that 75% of the decanted assets was not retrievable incident to the divorce litigation, even though the husband-beneficiary had possessed a general inter vivos power of appointment over the 75% at the time of the decanting. See Ferri v. Powell-Ferri (SC 19432) (SC 19433) [Conn.]. http://cases.justia.com/connecticut/supreme-court/2017-sc19432.pdf?ts=1502107260. This October 1, 2017 JDSUPRA posting is a critique of the Connecticut court's articulation of the applicable law.

Discussion

According to the Connecticut court "a beneficiary can only be deemed to be a settlor of a trust if he or she has some affirmative involvement in the creation or funding of the trust," the trust could not be deemed to be self-settled. But see UTC § 603(b): "During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust…to the extent of the property subject to the power."

The Restatement (Third) of Property's characterizes a general inter vivos power of appointment as an "ownership-equivalent" power. Certainly an equitable restitution order would have been available to the husband/powerholder had the trustee decanted without his express or implied informed consent. See Restatement (Third) of Property §17.4 cmt. f(1); §8.1.1 of *Loring and Rounds: A Trustee's Handbook* [page 861 of the 2017 Edition]. Thus, ordinarily a trustee

would have sought the assent of the powerholder before decanting property subject to a GPA. Again, the Restatement (Third) of Property's characterization of a general inter vivos power of appointment as an "ownership-equivalent" power suggest that there would be hell to pay were a trustee to decant without the express or implied informed consent of the powerholder. See §17.4 cmt. f(1). See also §8.1.1 of *Loring and Rounds: A Trustee's Handbook* [at page 861 of the 2017 Edition].

If there had been consent then it would seem that an equitable claw back of the decanted assets would be in order on public policy and/ or equitable grounds. Think fraudulent conveyance. Consent or no consent, the assets in Trust #2 should probably be returned to Trust #1 "to restore the status quo prior to decanting."

Note also that if entrusted property is available to the creditors of a trust beneficiary, so also as a matter of public policy and/or equity should it be available to his or her spouse in the divorce context, though the spouse, *qua* spouse, is technically not a creditor. Under the model Uniform Trust Code (UTC), the husband's creditors would have had access to the assets of the decanted trust, he having possessed--thanks to his father, not himself--a general inter vivos power of appointment. See model UTC § 505(b) (allowing for creditor access even though general inter vivos power had been granted to powerholder by a third party). As an aside, the Massachusetts UTC (MUTC) has no § 505(b), the legislature having deferred to pre-existing applicable "current Massachusetts law." No attempt is made in the official comment accompanying § 505 of the MUTC to explain what that law is, which is currently murky at best. Cf. State St. Trust Co. v. Kissel, 302 Mass. 328, 19 N.E.2d 25 (1939). Would § 505(b) of the model UTC merely have codified pre-existing Massachusetts equity doctrine had it been enacted? I suspect the SJC would answer yes, if specifically asked. That answer alone should probably be enough to pave the way for an equitable claw back of the decanted assets.

If I were the wife's counsel I might consider asserting that the husband's failure to seek to retrieve the decanted assets constitutes an equitable fraudulent conveyance, the decanting having taken place after the divorce action had been commenced. The husband having been unjustly enriched thereby, the wife, or at least the "marital estate," is entitled to restitution. The express trustees of the recipient trust (Trust #2) should be judicially declared constructive trustees of the decanted assets and issued an equitable specific performance order to convey legal title to the assets to an independent Connecticut custodial trustee. The trustee would retain title until such time as the rights, duties, and obligations of the parties to the divorce action can be sorted out. Bottom line: The husband's acquiescence in the decanting has made him the constructive settlor of the recipient trust (Trust #2).