Title

The Uniform Trust Decanting Act's conflicting official commentary

Summary

The texts of the myriad trust-related uniform statutes could be better coordinated and synchronized. So also could the official commentaries that accompany the myriad sections of the individual uniform statute. Take, for example, the Uniform Trust Decanting Act. In the official commentary accompanying §9 of the Act is the following sentence: "Decanting by definition is an exercise of fiduciary discretion and is not an alternative basis for a court modification of the trust." On the other hand, the commentary accompanying §4 of the Act has the following text: "The exercise of the decanting power need not be in accord with the literal terms of the first-trust instrument because decanting by definition is a modification of the terms of the first trust…Where the trustee has a duty to seek a deviation and the appropriate deviation could be achieved by an exercise of the decanting power, the trustee could fulfill such duty by an exercise of the decanting power rather than seeking a judicial deviation." The Act also is hardly a model of clarity when it comes to whether a decanting will give rise to a second trust. See generally §8.1.2 of *Loring and Rounds: A Trustee's Handbook* (2017) in this regard, which section is reproduced in its entirety below.

The Text

§8.1.2 *Exercise of Powers of Appointment in Further Trust* [from *Loring and Rounds: A Trustee's Handbook* 2017]

> *The donee of a presently exercisable general…[inter vivos]…power to appoint or power to withdraw trust property has the equivalent of the ownership of that property.*[327]

Exercise of nonfiduciary powers of appointment in further trust. *Nonfiduciary general powers***.** If the governing instrument is silent on the issue, may the holder of a *general* power of appointment exercise it in further trust (*e.g.*, instead of appointing the property outright and free of trust to *X*, appoint it to a trustee for the benefit of *X*)? The answer is yes.[328] This is inherent in the holder's overarching right to appoint to anyone, including himself,[329] or if the power is testamentary, including his probate estate. Even if the holder of a general power were not entitled to appoint in further trust, the same result could still be achieved in two steps: by first appointing to himself (or his estate if the power is testamentary) and then by impressing a trust upon the property for the benefit of *X*. The Restatement (Third) of Property goes so far as to propose that any term in a general power grant that purports to restrict the donee's right to appoint in further trust is ineffective.[330] Whether the exercise of a general power fails at the outset or at a later time, the doctrine of capture may be implicated, a topic that is taken up in Section 8.15.12 of this handbook.

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[327]Restatement (Third) of Trusts §74 cmt. g.

[328]*See generally* 1 Scott on Trusts §§17.2, 21; 1 Scott & Ascher §3.1.2; Bogert §43; Restatement (Third) of Property (Wills and Other Donative Transfers) §19.13(a).

[329]Restatement (Third) of Trusts §74 cmt. g.

[330]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.13 cmt. d.

*Nonfiduciary nongeneral powers***.** Authority, however, is split on whether, absent express authority in the governing instrument,[331] the holder of a *limited/special* power may exercise it in further trust.[332] If the holder may appoint to members of a class comprised of *X*, *Y*, and *Z*, some courts would hold an exercise in further trust to be impermissible, because title would pass to the trustee who would be someone other than a designated member of the class.[333] In the opinion of one learned commentator, however, the scales have now tipped in favor of a default presumption that such exercises are permissible.[334]

Thus, other courts would enforce the exercise in further trust of a limited power in the absence of express language in the granting instrument prohibiting such an exercise.[335] The Restatement (Third) of Property is fully supportive.[336] The class of trust beneficiaries, however, would have to be limited to *X*, *Y*, and/or *Z*, *i.e.*, to the specified objects of the power.[337] In one case, the holder of a limited testamentary power granted in a provision of her husband's inter vivos trust, attempted to exercise it in further trust by giving *X*, *Y*, and *Z* equitable life estates, but remainder interests to others, *i.e.*, to nonobjects. The court enforced the life estate provisions but severed and struck the remainder provisions.[338] Upon the termination of the life interests, the subject property would have to pass in accordance with the default provisions of the husband's inter vivos trust.[339]

The matter of appointments in further trust should be addressed in the governing instrument. When it is not, the trustee should next check for an applicable statute before turning to the cases.[340] As to how an exercise of a limited power of appointment in further trust could violate the Rule against Perpetuities, the reader is referred to Section 8.2.1.8 of this handbook. If the exercise of a nongeneral power of appointment in further trust creates another nongeneral power of appointment, it has been suggested that the *donee* of the new power need not necessarily be a permissible appointee under the old. This is a topic we take up in Section 8.1.1 of this handbook.

*Whether the exercise of a nonfiduciary power in further trust creates a new trust***.** If a *general* power of appointment is exercised in further trust, is a new trust created or are the terms of the original trust merely altered or extended? Most general powers are drafted broadly enough so that either result is permissible.[341] Unfortunately, the question is not susceptible of any easy answer.[342]

In the case of the exercise of a general inter vivos power, a new trust is probably created, the donee of

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[331]1 Scott & Ascher §3.1.2.

[332]*See generally* 1 Scott & Ascher §17.2; Bogert §43.

[333]*See* 1 Scott & Ascher §17.2 n.5 and accompanying text. *Cf.* Jimenez v. Corr, 764 S.E.2d 115 (Va. Sup. Ct. 2014) (In a case involving the interpretation of a corporate shareholders' agreement, the court held that the non-immediate-family-member trustees of a revocable inter vivos trust for the benefit of certain immediate family members of a signatory to the agreement are legally/equitably autonomous, that is to say they may not be deemed mere alter egos of the family members).

[334]1 Scott & Ascher §3.1.2. *See also* Bogert, Trusts and Trustees §43 (in accord).

[335]*See, e.g.*, Vetrick v. Keating, 2004 WL 1254356 (Fla. Ct. App.).

[336]Restatement (Third) of Property (Wills and Other Donative Transfers) §19.14 cmt. e.

[337]Vetrick v. Keating, 2004 WL 1254356 (Fla. Ct. App.). *See generally* 1 Scott & Ascher §3.1.2; Restatement (Third) of Property (Wills and Other Donative Transfers) §19.15 cmt. e.

[338]Vetrick v. Keating, 2004 WL 1254356 (Fla. Ct. App.) (finding authority in Restatement (Second) of Property §23.1 cmts. a, d).

[339]*See generally* 1 Scott & Ascher §3.1.2.

[340]*See* 1 Scott on Trusts §17.2 n.7 and accompanying text. *See, e.g.*, Mass. Gen. Laws ch. 190B, §2-608(b) (presuming that limited powers may be exercised in further trust).

[341]Lewin ¶3-57.

[342]*See generally* Scott on Trusts §17.2.

such a power having the equivalent of outright ownership of the underlying property.[343] If the power included a right to terminate, which is likely the case, then it is hard to see how the donee is not the constructive settlor of the new trust.[344] When the power was exercised in further trust, the trustee of the old trust essentially also became an agent of the donee for purposes of transferring the subject property to the trustee of the new trust.[345] Thus, should the new trust fail at some point or its purposes be accomplished without the trust estate having been exhausted,[346] the property would revert upon a resulting trust to the donee or the donee's probate estate.[347] "The result is the same as if the beneficiary had terminated the old trust, received a conveyance of the trust property from the original trustee, and then transferred the property to the new trustee."[348]

In the case of a general testamentary power, however, it may depend upon how the power is exercised. If, for example, a general testamentary power is exercised without specific reference to the power so that the trust property is "blended" with the assets of the powerholder's probate estate, we could well have a two-trust situation.[349] Ultimately it's a question of the intention of the donee of the power.[350] Recall that "[a] blending clause purports to blend the appointive property with the donee's property in a common disposition." The subject of blending will come up again in our discussion of the doctrine of selective allocation (marshalling), specifically at Section 8.15.79 of this handbook, and in our discussion of the capture doctrine, specifically at Section 8.15.12 of this handbook.

While it is the default law that the exercise of a *limited* power in further trust does not give rise to a second trust, the terms of the trust that grant the *limited* power may authorize an exercise that creates a second settlement,[351] in which case the donor of the power will be deemed the settlor of the new trust.[352] Thus, whether after the exercise of such a power we are then left with the original trust constructively amended or a separate new trust that either coexists with the original or supersedes it will depend upon the terms of its exercise.[353] Whether we have one or two trusts also may depend upon who wants to know. Let us assume, for example, that *A* transfers property inter vivos to *B* in trust for *C*, who is given a *general* testamentary power of appointment. *C* exercises the power by providing in his or her will that *B* shall continue to hold the property in trust for the benefit of *X*. In this case *C* has expressed the intention that no new trust be created and that the terms of the original trust are merely to be extended. On the other hand, the creditors of *C* might demand that *B* turn the trust property over to *C* 's estate so that it may be available to satisfy their claims.[354] Once the claims are satisfied, a new trust presumably would arise for the benefit of *X*. Moreover, the court having jurisdiction over *C* 's estate might assert that this new trust is now a testamentary trust requiring its continuing supervision.

Regardless of the form of the arrangement, *i.e.*, whether there is a continuing trust or the termination of one and the starting up of another, when it comes to substantive rights there are two trusts. The donee who exercises the general power for all intents and purposes is the settlor of a new trust to which his or her creditors, spouse, the taxing authorities—perhaps even the welfare department—all may have

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[343]*See, e.g.*, 1 Scott & Ascher §3.1.2 (confirming that the donee of the general inter vivos power would be the settlor of the new trust). *See also* 6 Scott & Ascher §41.19.

[344]6 Scott & Ascher §41.19.

[345]6 Scott & Ascher §41.19.

[346]*See generally* 6 Scott & Ascher §41.19 (Failure); 6 Scott & Ascher §42.9 (Surplus).

[347]6 Scott & Ascher §41.19. *See generally* §4.1.1.1 of this handbook (the resulting trust).

[348]6 Scott & Ascher §41.19.

[349]Restatement (Second) of Property (Wills and Other Donative Transfers) §22.1.

[350]Lewin ¶3-57.

[351]Lewin ¶¶3-58, 3-63, 3-64, 3-65, 3-66.

[352]1 Scott & Ascher §3.1.2.

[353]Lewin ¶3-62.

[354]Restatement (Second) of Property (Wills and Other Donative Transfers) §22.1.

access.[355] Even for purposes of the Rule against Perpetuities, the holder of a general inter vivos power is deemed to have a vested interest in the property subject to the power.[356]

The form of the arrangement seems to be up to the settlor. If the settlor expresses an intention that the *limited/special/nongeneral* powerholder may appoint new trustees upon an exercise in further trust, then such an appointment will be honored.[357] One learned commentator, however, suggests that absent language in the governing instrument to the contrary, inherent in the right to exercise a limited power in further trust, express or otherwise, is the right to appoint new trustees, although there are older cases to the contrary.[358] There is generally no requirement that the new trustees be members of the class of permissible appointees.[359]

Whether a decanting, the exercise of a *fiduciary* power or appointment in further trust, will spawn a second, discrete trust is taken up at the end of this section. Decanting is covered generally in §3.5.3.2(a) of this handbook.

Whether the exercise of a nonfiduciary testamentary power in further trust converts an inter vivos trust into a court trust. Could the exercise of a *general* testamentary power of appointment have the effect of converting an inter vivos trust into a testamentary trust requiring subsequent periodic accountings to the court?[360] The attendant publicity and expense would make this an unfortunate result. Moreover, it would fly in the face of the very concept of the power of appointment—a power of disposition, a power to direct. The holder who exercises the general testamentary power in further trust is either directing that the property stay with the current trustee or directing one trustee to transfer title to another. In neither case is it expected that the estate of the powerholder will take unto itself more of an interest in the property (or that the court will acquire more supervision over the new arrangement) than is reasonably necessary to accommodate the interests of those having a claim against the estate.[361]

With respect to the exercise of a *limited* testamentary power of appointment in further trust, there should be no excuse whatsoever for a court's converting an inter vivos trust into a testamentary trust. The deceased holder is for all intents and purposes no more than an agent of the settlor, the holder's estate having no ownership interest, constructive or otherwise, in the property subject to the power. On the other hand, the exercise in further trust of a general testamentary power created under a *testamentary* trust as a practical matter might bring about a transfer of jurisdiction over the testamentary trust to the court supervising the administration of the powerholder's estate. This, however, is as much a conflict-of-laws issue as it is an issue rooted in the nature of the power of appointment itself.

*The failed exercise in further trust of a nonfiduciary power***.** If the holder of a *general* power of appointment attempts to exercise the power in further trust and the "new" trust fails at the outset, or later

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[355]*See generally* 2A Scott on Trusts §147.3. *See also* UTC §401(3) (available at <http://www.uniformlaws.org/Act.aspx?title=Trust%20Code>) (providing that a trust may be created by the exercise of a power of appointment in favor of a trustee). *Cf.* Restatement (Third) of Trusts §10, Reporter's Note to Comment g, re: Clause (e) (discussing who may be deemed a settlor for purposes of taxation, creditor accessibility, and equitable division in the context of divorce).

[356]Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 654 (1938).

[357]*See* Lovejoy v. Bucknam, 299 Mass. 446, 13 N.E.2d 23 (1938).

[358]1 Scott & Ascher §3.1.2.

[359]1 Scott & Ascher §3.1.2.

[360]*See generally* Restatement (Second) of Property (Wills and Other Donative Transfers) §§11.1 cmt. b, 13.4 cmt. b.

[361]*See generally* Restatement (Second) of Property (Wills and Other Donative Transfers) §§11.1 cmt. b, 13.4 cmt. b. *See also* In re Estate of Wylie, 342 So. 2d 996 (Fla. Dist. Ct. App. 1977); Aurora Nat'l Bank v. Old Second Nat'l Bank, 59 Ill. App. 3d 384, 375 N.E.2d 544 (1978).

fails or is fully performed without the trust estate having been exhausted,[362] the property may well pass as a resulting trust to the powerholder or the powerholder's probate estate under the doctrine of capture, a topic we take up in Section 8.15.12 of this handbook.[363] It does *not* pass back to the settlor of the "original" trust, or to the settlor's probate estate, unless the "original" trust instrument provides for a different disposition or unless the powerholder provided otherwise.[364] It is said that the property has been *captured* by the powerholder or the powerholder's probate estate.[365] The Restatement (Third) of Property would make certain alterations in traditional capture doctrine, a topic that is covered in some detail in Section 8.15.12 of this handbook.

If the holder of a *limited* power of appointment attempts to exercise the power in further trust and the "new" trust fails at the outset, or later fails or is fully performed without the trust estate having been exhausted,[366] there is no capture.[367] There are instead three possibilities, depending on the terms of the original trust or the law of the applicable jurisdiction: the property passes (1) to the takers in default,[368] (2) in equal shares to the class of permissible appointees,[369] or (3) back to the settlor of the "original" trust or his or her probate estate.[370] In no event can the trustee keep the property.[371] "If the donee of a special power of appointment by deed or by will makes an appointment by deed that is ineffective, there is nothing, of course, to preclude the donee from making another appointment, either by deed or by will."[372]

The capacity of a donee of a nonfiduciary power to exercise it in further trust . The Restatement (Third) of Trusts speaks to the capacity of the holder, *i.e.*, the donee, of a power to exercise it in further trust: "The donee of a power of appointment has the capacity to make an effective appointment in trust if the donee has capacity to make an effective transfer of owned property of like type to the trustee of a trust that is similar in testamentary, revocable, or irrevocable character."[373] Thus, the holder/donee of a testamentary power of appointment must have testamentary capacity to exercise it in further trust. The testamentary standard of capacity also would apply to a holder/donee who wished to establish a revocable trust by means of the exercise of a general inter vivos power of appointment. An exercise of a general inter vivos power of appointment in further trust giving rise to an irrevocable trust requires either a donative or contractual standard of capacity on the part of the holder/donee of the power.[374]

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[362]*See generally* 6 Scott & Ascher §§41.17 (Failure), 42.7 (Surplus).

[363]*See generally* 6 Scott & Ascher §41.17 (Trust Created by Exercise of General Power of Appointment). *See also* §4.1.1.1 of this handbook (the resulting trust).

[364]5 Scott on Trusts §426; 6 Scott & Ascher §41.17.

[365]*See generally* §8.15.12 of this handbook (the capture doctrine).

[366]*See generally* 6 Scott & Ascher §41.17 (Failure); 6 Scott & Ascher §42.8 (Surplus).

[367]*See generally* 6 Scott & Ascher §§41.17 (Trust Created by Exercise of General Power of Appointment), 41.18 (Trust Created by Exercise of Special Power of Appointment).

[368]*See generally* 6 Scott & Ascher §41.18 (Gift Overs in Default of Effective Exercise).

[369]*See generally* 6 Scott & Ascher §41.18 (Trust Created by Exercise of Special Power of Appointment). *See* Loring v. Marshall, 396 Mass. 166, 484 N.E.2d 1315 (1985) (citing with approval Tentative Draft No. 7, 1984, of Restatement (Second) of Property (Wills and Other Donative Transfers) §24.2, which provides that in the absence of takers in default of the exercise of a limited power of appointment and in the absence of an expression of contrary intention in the instrument creating the power, property that is not appointed passes to the objects of the power).

[370]5 Scott on Trusts §427; 6 Scott & Ascher §41.18. *See generally* §4.1.1.1 of this handbook (the resulting trust).

[371]6 Scott & Ascher §41.18. For a discussion of the few situations in which a trustee with impunity may walk away with the trust property, see §4.1.1.1 of this handbook.

[372]6 Scott & Ascher §41.18.

[373]Restatement (Third) of Trusts §11 cmt. d. *See generally* Chapter 1 of this handbook (discussing in part the capacity one needs to establish a trust other than through the exercise of a power of appointment).

[374]*See* the capacity discussion in Chapter 1 of this handbook.

The exercise in further trust of a fiduciary power of appointment. Assume the terms of a certain trust expressly grant to the trustee a fiduciary discretionary power to make distributions of principal to the beneficiary for the beneficiary's benefit. Inherent in that authority may well be the equitable authority to make distributions not only outright and free of trust but also to a trustee for the benefit of the beneficiary. Such "decanting" authority is taken up generally in §3.5.3.2(a) of this handbook. Were the trustee effectively to elect to exercise the fiduciary power in further trust, would there now be two discrete trusts in the fact pattern, or still just one. Under classic principles of equity, the answer is two. The decanting power derives from the express fiduciary power in the trustee to make discretionary distributions of principal. Now the Uniform Trust Decanting Act is muddling and unsettling the applicable law. There will always be only one trust in the fact pattern, unless there ends up beng two:

> The Uniform Trust Decanting Act views the decanting power as a power to modify the first trust, either by changing the terms of the first trust or by distributing property from the first trust to a second trust. While the act generally modulates the extent of the authorized fiduciary's power to decant according to the degree of discretion granted to the authorized fiduciary over principal, the power to decant is distinct from the power to distribute. Thus the authorized fiduciary may exercise the decanting power by modifying the first trust, in which the case the "second trust" is merely the modified first trust…If the decanting power is exercised by modifying the terms of the first trust, the trustee could either treat the second trust as a new trust or treat the second trust as a continuation of the first trust.[1]

Time will tell whether such sacrifices of doctrinal coherence and certainty on the altar of administrative convenience (we have in mind obviating the need to retitle decanted property, obtain a tax identification number for the recipient or "second" trust, and/or effect an actual physical distribution of the subject property) is a price worth paying.

Cross-reference. For a discussion of how an exercise in further trust could violate the Rule against Perpetuities, the reader is referred to Section 8.2.1.8 of this handbook.

[1] Uniform Trust Decanting Act, Prefatory Note.