

Decanting By Various Means

by James F. McDonough, Jr. on October 8, 2013

Decanting is a popular topic among wealth advisers, trust companies, and tax professionals. In the wine industry, it means putting old wine into a new bottle. In the trust field, it means to transfer assets to a new trust to be governed by a new trust instrument that takes into account changes in law and in the circumstances of the beneficiaries. In legal terms, decanting is the exercise of a discretionary power by a fiduciary to appoint assets to a trust or similar arrangement.

The issue is the source of the discretionary power. Is it found in common law, statute or in the trust instrument? In the absence of a specific case or statute, how does one go about construing this trust law.

Many jurisdictions look to the Restatement of Trusts for guidance in the absence of statutory authority or case law. In 1940, the Florida Supreme Court held that the power to make outright distributions includes the power to create a lesser estate, that is, one in trust. Thus, the trustee could establish a new trust for the beneficiary and transfer assets from the old trust. If the trustee could make an outright distribution of assets to the beneficiary, why not permit a transfer to a new trust created for the benefit of the beneficiary.

The State of Michigan enacted a decanting statute and thereby joined New York, Alaska, Delaware, Nevada, Florida and eight other states. The fact that a statute was enacted gives you some idea of the uncertainty involved. Before these statutes were enacted, common law controlled whether decanting was possible. In New Jersey, there is only one case on point. In *Wiedenmeyer v. Johnson*, the Appellate Division focused on the trust instrument that gave the trustee's absolute and uncontrolled discretion to distribute assets in the best interests of the beneficiary. The court stated it would analyze whether the trustee's exercise of this power constituted an abuse of discretion. The decision implied that common law did not prohibit decanting but it is unclear whether the decision authorized decanting in other situations. What does one do where the identical language is not present? New Jersey has yet to adopt the Uniform Trust Code, where said bill has died in committee in each of the past two years, nor has the legislature addressed this specific issue.

New York's statute requires that if the existing trust limits the trustee's discretion to make distributions, the receiving trust must have the same limitations on trustee's discretion and the same beneficiaries.

Delaware goes a bit further than most states in that it permits the new trust to grant powers of appointment that may be exercised in favor of persons who are not beneficiaries in the original trust. Where the trustee is a beneficiary, decanting the beneficiary-trustee is prohibited. Most states consider the power to decant to be a special power of appointment and prohibit the addition of new beneficiaries.

The Massachusetts Supreme Judicial Court in *Morse v. Kraft* (yes, the owner of the Patriots), authorized the transfer of property to new subtrusts without the consent of beneficiaries or a court. Relying on *Phipps* and *Wiedenmayer*, the Court relied on trust language giving the trustee discretion to distribute property directly to the beneficiary or for the benefit of the beneficiary which included distribution in further trust. Massachusetts has adopted the Uniform Trust Code and the Uniform Probate Code so perhaps the court was seeking to limit the reach of its decision and defer to statutes enacted by the legislature.

The absence of uniformity among the states suggests that forum shopping shall continue.