

Modifying or “Decanting” Irrevocable Trusts: New York’s Decanting Statute Annotated

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August 13, 2013³

I. Introduction⁴

“Decanting” is a term used to describe the transfer of trust res from an existing irrevocable trust to (i) another existing irrevocable trust or to (ii) a new irrevocable trust. Since the legal theory of decanting derives from the power of the trustee to appoint trust assets to the beneficiaries,

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³ Tax Lecture in Lake Success on August 13, 2013, providing continuing education credits for New York Certified Public Accountants.

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spendthrift language in the trust to be decanted will be trumped by the right and power of a the trustee to decant. Only the existence of express language in the trust sought to be decanted will trump the decanting statute, found in EPTL §10-6.6. This does not mean that the trustee should not be circumspect about decision to decant. As will be seen, the New York⁵ imposes strict notice requirements upon the trustee. Nevertheless, a trustee who exercises good faith and considers the tax ramifications of decanting should generally fare well under the statute. However, as the statute is newly revised, the courts will define the contours of the amended statute. Although the statute does not state in express terms that a trustee cannot be held liable for the failure to decant, so much can be fairly inferred.⁶

I. NEW YORK'S DECANTING STATUTE (EPTL §10-6.6) ANNOTATED

EPTL⁷ § 10-6.6: EXERCISE OF A POWER OF APPOINTMENT; EFFECT WHEN MORE EXTENSIVE OR LESS EXTENSIVE THAN AUTHORIZED; TRUSTEE'S AUTHORITY TO INVADE

⁵ New York is among eighteen states that currently have enacted decanting statutes.

⁶ If a trust is revocable, the grantor may revoke or amend the trust. However, trusts are often made irrevocable for tax or other reasons. Revoking or modifying irrevocable trusts while not impossible may be extremely difficult, especially if minor beneficiaries are involved. Before decanting statutes proliferated, modification of trusts could be made under the Uniform Trust Code (UTC). Under the UTC, a noncharitable irrevocable trust may be modified “upon the consent of all beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.” However, for the required court approval, either all beneficiaries must consent or the interest of those not consenting must be shown to have been adequately protected. Thus, trust modification under the UTC or under common law may simply not be possible. In those cases, the ability to modify the trust using a decanting statute becomes paramount. New York was the first state to enact a decanting statute, which effectively permits the trustee acting alone to amend the terms of an irrevocable trust.

⁷ NY Estates, Powers and Trusts Law

PRINCIPAL IN TRUST.⁸⁸

(a) An exercise of a power of appointment is not void because its exercise is:

- (1)** More extensive than was authorized but is valid to the extent authorized by the instrument creating the power.
- (2)** Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.

⁸ On August 17, 2011, Governor Cuomo signed legislation revising New York's decanting statute. Revised EPTL §10-6.6(b) is effective for trusts created before or after that date. Under prior law, decanting was possible only if the trustee had "absolute discretion" with respect to making distributions of principal. That requirement has now been relaxed, and even trusts in which the trustee possesses only limited discretion with respect to distributions of trust principal may now qualify for decanting. EPLT 10-6.6(j)(3) also now authorizes the trustee to decant only some of the assets of the old trust into a new trust. If the trustee has unlimited discretion with respect to distributions principal, the trustee may decant the trust in favor of one or more trust beneficiaries to the exclusion of other trust beneficiaries. The rationale for this rule is that since the trustee has unlimited discretion with respect to the decanted trust, the trustee had the implicit authority to distribute the entire trust to a single beneficiary.

If the trustee has only limited discretion to distribute trust principal, EPTL 10-6.6(c) provides that the current and remainder beneficiaries of both the decanted trust and the appointed trust must be identical. The appointed trust must also contain the same standard for distributions of income and principal. However, the term of the appointed trust may be longer than that of the decanted trust, and the distribution provisions may be modified during the extended period. In general, the power to appoint trust assets may not reduce or limit the right of any current beneficiary to receive mandatory distributions of income or principal. Nevertheless, even a mandatory right may be abridged if the power to appoint trust assets is made in favor of a supplemental needs trust created under EPTL 7-1.12.

(b) An authorized trustee⁹ with **unlimited discretion to invade trust principal**¹⁰ may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, **more than one or all of the current beneficiaries**¹¹ of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust shall be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one or more of such successor and remainder beneficiaries).

(1) An authorized trustee exercising the power under this paragraph **may grant**¹² **a discretionary power of appointment** as defined in paragraph (c) of section 10-3.4 of this article (including a presently exercisable power of appointment) in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint could receive the principal outright under the terms of

⁹ EPTL §10-6.6(s)(2) states that the term “authorized trustee” means, “as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).”

¹⁰ The two operative provisions at the heart of EPTL 10-6.6, subsections (b) and (c), both require that the “invaded” trust be irrevocable, and that the trustee have the power to invade principal.

¹¹ As the statute then provides, current beneficiaries may be excluded as beneficiaries of the appointed trust. The rationale for this is that since the trustee has unlimited discretion to invade principal, he could invade principal for the benefit of only one beneficiary. The statute can therefore be employed to eliminate beneficiaries. By prudent use of powers of appointment, the appointed trust can also effectively add new beneficiaries as well.

¹² The statute permits the trustee to grant a power of appointment to a beneficiary with the right to receive an outright distribution of trust principal. The grant of the power may be presently exercisable or only in the future. The ability of the trustee to grant powers of attorney to beneficiaries creates an opportunity for the trustee and beneficiary to add new beneficiaries.

the invaded trust.

- (2) If the authorized trustee **grants a power of appointment** under subparagraph (l) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.
 - (3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.¹³
 - (4) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of such class.¹⁴
- (c) An authorized trustee with the power to invade trust principal **but without unlimited discretion**¹⁵ may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the

¹³ The power of appointment granted to the beneficiary may not be narrower than that in the invaded trust.

¹⁴ This could include unborn children.

¹⁵ Such a trust would be one which provides for invasions of trust principal limited to an ascertainable standard, such as one for the "health, education, maintenance, and support" of the beneficiary, also known as a "HEMS" standard. Careful attention, however, must be paid to EPTL 10-6.6(s)(9), *infra*, which clarifies that a power to invade "limited" by words such as "best interests, welfare, comfort, or happiness" would not result in the trust principal being subject to an ascertainable standard. In other words, such words would be cause the decanting to be subject to paragraph (a), which describes the right of a trustee to decant where the trustee has unlimited discretion to invade principal.

successor and remainder beneficiaries of the invaded trust.¹⁶

- (1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.¹⁷
- (2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.¹⁸
- (3) If the beneficiary or beneficiaries of the invaded trust are described by a

¹⁶ For example, an irrevocable trust might provide for a mandatory distribution of principal at age 25, with final principal distribution at age 30. However, such mandatory distributions might be inadvisable if the beneficiary has creditor problems, or is profligate or immature. In *In re Rockefeller*, NYLJ Aug. 24, 1999 (Surr. Ct. N.Y. Cty.), the Surrogate allowed trust assets to be decanted into a new trust which contained a spendthrift provision. Under the revised decanting statute, the appointed trust could extend the date when the beneficiary was entitled to a mandatory distribution. However, the distribution standard (e.g., “HEMS”) could not be changed in the appointed trust.

¹⁷ Therefore, if the invaded trust required distributions to be made pursuant to an ascertainable standard, the appointed trust could not allow the trustee to distribute principal without reference to the identical ascertainable standard, at least until after the trust would otherwise have allowed the trustee to exercise absolute discretion..

¹⁸ For example, assume beneficiary was entitled to distributions of principal based upon a HEMS standard until age 25, when trust principal was required to be distributed outright. By reason of creditor problems, the trustee (or grantor) decides to decant into a new trust. The new trust would be constrained by the HEMS standard until the beneficiary reached age 25. After the beneficiary reached age 25, the appointed trust could provide for distributions in the trustee’s absolute discretion. This means that the trustee could hold the assets in trust for the entire lifetime of the beneficiary.

class, the beneficiary or beneficiaries of the appointed trust shall include present or future members of such class.

- (4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.
- (d) **An exercise of the power to invade trust principal under** paragraphs (b) and (c) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2 of this article.
- (e) **The appointed trust to which an authorized trustee appoints the** assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.
- (f) **If an authorized trustee has unlimited discretion to invade the** principal of a trust and the same trustee or another trustee has the power to invade principal under the trust instrument which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (b) of this section.
- (g) **An authorized trustee may exercise the power to appoint in favor of** an appointed trust under paragraphs (b) and (c) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.
- (h) **An authorized trustee exercising the power under this section has** a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.
- (i) **Unless the authorized trustee provides otherwise:**

- (1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and
 - (2) The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust; such assets shall remain the assets of the invaded trust.
- (j) **The exercise of the power to appoint to an appointed trust** under paragraph (b) or (c) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date.
 - (1) An authorized trustee may exercise the power authorized by paragraphs (b) and (c) of this section without the consent of the creator, or of the persons interested in the invaded trust, and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.
 - (2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust.
 - (3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all the assets comprising the principal of the invaded trust and if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

- (4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.
- (5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power of appointment pursuant to paragraph (b) or (c) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account.
- (6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required.
- (k) **This section shall not be construed to abridge the right of any** trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.
- (1) **Nothing in this section is intended to create or imply a duty to** exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (b) or (c) of this section.¹⁹

¹⁹ A trustee might seek to utilize EPTL §10-6.6 to accomplish any of the following objectives: (i) to extend the termination date of the trust; (ii) to add or modify spendthrift provisions; (iii) to create a supplemental needs trust for a beneficiary who is or has become disabled; (iv) to consolidate multiple trusts; (v) to modify trustee provisions; (vi) to change trust situs; (vii) to correct drafting errors; (viii) to modify trust provisions to reflect new law; (ix) to reduce state income tax imposed on trust assets; (x) to vary investment strategies for beneficiaries; or (xi) to create marital and non-marital trusts.

If more than one trust has been created for a beneficiary, overall liquidity may be enhanced by transferring the assets of one trust into another trust. So too, combining
(continued...)

- (m) A power authorized by paragraph (b) or (c) of this section may be exercised,** subject to the provisions of paragraph (h) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under paragraph (b) or (c) of this section.
- (n) An authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to effect any of the following:**
- (1)** To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust

¹⁹(...continued)

multiple trusts into a single trust may greatly reduce administrative expenses. In *In Re Vetlesen*, NYLJ June 29, 1999 (Surr. Ct. N.Y. Cty.), the court authorized the trustee to appoint trust assets to a testamentary trust with identical provisions to reduce administrative expenses.

EPTL §10-6.6(b) is particularly well suited to address problems where it may be desirable to appoint new trustees. In *re Klingenstein*, NYLJ, Apr. 20, 2000 (Surr. Ct. Westchester Cty.) authorized the decanting of assets into multiple trusts which granted the beneficiary of each trust the power to remove the trustee. The creation of new trusts in *Klingenstein* also allowed the removal of the impractical limitation requiring any trustee acting as sole trustee to appoint a corporate co-Trustee, and allowed for the elimination of successor Trustee appointments. The decanting statute could also be utilized to modify trustee compensation.

EPTL §10-6.6(b) may also be utilized to change the situs of a trust for privacy reasons. The grantor of a trust may not want minor beneficiaries to become aware of the trust. To preserve secrecy, the trustee might wish to change the situs of the trust to Delaware, which limits the trustee's duty to disclose. If trust property is also located out of New York, changing the situs of the trust might also facilitate trust administration.

Drafting errors or changes in the tax law may also be occasions for seeking to distribute trust assets into a new trust. The Surrogate in *In re Ould Irrevocable Trust*, NYLJ Nov. 28, 2002 (Surr. Ct. N.Y. Cty.) authorized the transfer of trust assets into a new trust where the retention of certain powers by the insured in the original trust might have resulted in inclusion in the gross estate for federal tax purposes.

interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (b) or (c) of this section to appoint to an appointed trust that is a supplemental needs trust²⁰ that conforms to the provisions of section 7-1.12 of this chapter;

- (2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;
- (3) To eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section unless a court having jurisdiction over the trust specifies otherwise;
- (4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or
- (5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the internal revenue code, the marital deduction²¹ under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the internal revenue code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the internal revenue code, or (C) any other specific tax benefit for which a contribution originally qualified for

²⁰ The beneficiary may have become subject to a disability after the trust had been drafted. To become (or maintain) eligibility for public assistance, it might be necessary for the trust assets to be distributed to a supplemental needs trust. The Nassau Surrogate, in *In Re Hazan*, NYLJ April 11, 2000, authorized the trustee of a discretionary trust to distribute assets to a supplemental needs trust whose term had been extended to enable the beneficiary to continue to be eligible for public assistance.

²¹ If a marital QTIP trust were decanted into a new trust which granted the surviving spouse a power of attorney to appoint to new beneficiaries, the marital deduction could be lost.

income²², gift, estate²³, or generation-skipping transfer tax

²² Decanting should result in no adverse income tax consequences. For gain or loss to occur, there must be either a sale or exchange of property, or the property received must be materially different from the property surrendered. Treas. Reg. §1.1001-1(a). The Supreme Court in *Cottage Savings Ass'n v. Com'r*, 499 U.S. 554 (1991) seemed to read out the word “materially” from the term “materially different” in holding that an exchange of similar mortgages triggered a taxable event. Nevertheless, the IRS has stated in recent rulings that a distribution in further trust will not trigger income tax provided the distribution is permitted either by the trust instrument or by local law. PLR 200736002 appears to support the proposition that the transfer from one trust to a new trust is not a realization event. Similarly, Treas. Regs. §1.671-2(e)(5) state that the grantor of a trust who transfers property to a new trust is the grantor of the new trust.

If encumbered property is distributed pursuant a decanting statute, a potential income tax problem could arise under *Crane v. Com'r*, 331 U.S. 1 (1947), which held that the amount realized includes relief from liability. An argument could be made otherwise: IRC §643(e) provides that distributions from a trust generally do not produce taxable gain. Therefore, substantial authority would appear to exist for the reporting position that decanting produces no realized gain even if liabilities exceed basis. In view of the preparer penalties under IRC §6694, practitioners might consider disclosing the position on the return.

The decanting statutes of states having decanting statutes provide that the ability to decant trust assets into a new trust is the default rule, but that the default rule may be overridden by the trust instrument. Therefore, the grantor may wish to include in newly drafted trust instruments a provision specifically addressing the grantor's desires with respect to future trust decanting. The grantor may wish to limit the trustee's future ability to modify the trust or may want to give the trustee complete discretion to decant. In either case, specific reference to the grantor's wishes should be included in the trust instrument.

Grantor Trust Issues

It may be possible to convert a grantor trust to a non-grantor trust and vice versa, through decanting. Frequently, when drafting a grantor trust, the grantor retains the right to be reimbursed for income taxes. Many grantors are uncomfortable with making large gratuitous transfers to trusts -- even for legitimate estate tax planning (continued...)

²²(...continued)

reasons -- if they could be potentially liable for the entire income tax liability of the trust. Provided the invaded trust contains a tax reimbursement clause, the appointed trust may also contain this clause. However, if the invaded trust does not contain a tax reimbursement provision, this could be an impediment to inserting such a provision in the appointed trust. EPTL 7-1.1(a) appears to circumvent this problem in New York, as it provides that trustees of all inter vivos trusts in New York possess the discretionary power to reimburse the grantor for income taxes paid. This resolves the problem of the grantor being deemed a beneficiary of the appointed trust, where the grantor was not a beneficiary of the invaded trust.

²³ Under New York's revised decanting statute, the trustee is explicitly permitted to consider tax consequences of decanting. In furtherance of the objective to provide sanguine tax results, the statute provides that no power to appoint trust assets may be exercised if such exercise would imperil (i) the marital deduction; (ii) the charitable deduction; (iii) the gift tax annual exclusion under IRC §2503(b); or (iv) any transfer tax benefit.

Transfer Tax Consequences

A GST Exempt Trust is not subject to Generation Skipping Transfer Tax. Treas. Reg. §26.2601-1(b)(v)(B) states that the extension of an Exempt Trust in favor of another trust will not trigger GST tax. However, actual additions or deemed additions to a GST Exempt Trust would cause it to lose its exempt status. Therefore, care must be taken when utilizing EPTL §10-6.6(b) not to make an actual or deemed addition to the trust which would cause a GST Exempt Trust to lose its exempt status. If GST implications resulting from distributions to a new trust under EPTL §10-6.6(b) are unclear, a private letter ruling from the IRS should be obtained in advance.

The IRS could argue that decanting causes a taxable gift by the beneficiary to the trust: If the beneficiary is entitled to receive trust distributions at a certain age, and decanting the trust assets would result in a longer trust term, unless the beneficiary objects to the decanting, the IRS could argue that the beneficiary has released a general power of appointment, which would result in a taxable gift. The problem with this argument is that since the beneficiary likely does not have a strong argument for objecting to the decanting, the beneficiary may actually possess no general power of appointment. The beneficiary cannot release a power he does not possess.

(continued...)

purposes under the internal revenue code.

- (o) **An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (b) or (c) of this section.**²⁴
- (p) **An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power.**²⁵
- (q)
- (1) **Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to change the provisions regarding the determination of the compensation of any trustee; the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.**

²³(...continued)

On the other hand, if the beneficiary could actually forestall an attempt by the trustee to decant, then the gift tax argument gains credibility. To attenuate the argument that a taxable gift may have occurred, the beneficiary could be given a limited power over trust assets in the new trust. The retention of a limited power of appointment generally should prevent the release from being a taxable gift. Treas. Reg. §25.2511-2(b).

²⁴ New York income tax considerations may provide a compelling reason for decanting trust assets. Under Tax Law §603(b)(3)(D), even if the trust is situated in New York, if there is (i) no trustee domiciled in New York, (ii) no New York source income, and (iii) no real or tangible property located in New York, the accumulated income and capital gains will not be subject to New York income tax. Accordingly, if a trust situated in New York holds considerable assets outside of New York, decanting those assets into a trust in another jurisdiction might avoid New York income tax on capital gains and accumulated income sourced outside of New York.

²⁵ Decanting cannot be used to extend the perpetuities period. New York follows the common law Rule Against Perpetuities.

- (2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (b) or (c) of this section.
- (r) **Unless the invaded trust expressly provides otherwise, this section applies to:**
 - (1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and
 - (2) Any trust that has a trustee who is an individual domiciled in this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.
- (s) **For purposes of this section:**
 - (1) The term "appointed trust" means an irrevocable trust which receives principal from an invaded trust under paragraph (b) or (c) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust. For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be signed by the creator shall be deemed satisfied by the signature of the trustee of the appointed trust.
 - (2) The term "authorized trustee" means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).²⁶
 - (3) References to sections of the "internal revenue code" refer to the United States internal revenue code of 1986, as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and also

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Accordingly, a beneficiary who is also a trustee may not decant.

refer to corresponding provisions of state law.

- (4) The term "current beneficiary or beneficiaries" means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute principal at the time of the exercise of the power.
- (5) The term "invade" shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.
- (6) The term "invaded trust" means any existing irrevocable inter vivos or testamentary trust whose principal is appointed under paragraph (b) or (c) of this section.
- (7) The term "person or persons interested in the invaded trust" shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act.
- (8) The term "principal" shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.
- (9) The term "unlimited discretion" means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.