Opinion

Legislature should act on uniform decanting bill

EDITORIAL

Trust "decanting" isn't a particularly sexy topic. But it's still an important issue for the Legislature to address.

Decanting is the act of distributing assets from one irrevocable trust to a second irrevocable trust with different terms. In essence, it allows a trustee to leave behind the unwanted terms in the original trust by pouring the assets into a new trust.

Decanting can be a valuable mechanism for dealing with provisions in irrevocable trusts that no longer carry out the settlor's intent, are impractical to administer because circumstances have changed, or would not be in a beneficiary's best interest. For example, if a designated beneficiary develops a disability that means an outright distribution is unwise, decanting could place the assets into a special needs trust that would better protect him or her.

Twenty-eight states already have some kind of decanting statute, and the Supreme Judicial Court recognized a common law right to decant in 2013, then extended it in 2017.

A bill introduced in January by Sen. Cynthia Creem would incorporate the Uniform Trust Decanting Act into the Massachusetts Uniform Trust Code. But S.896, which was referred to the Joint Committee on the Judiciary, hasn't moved forward since then.

If adopted, the UTDA would require a trustee to provide notice of the intent to decant to all qualified beneficiaries as well as the settlor, if he or she is still living. There's no such requirement under common law, and in fact in one of the cases that went up to the SJC the trustees decanted a multi-million-dollar trust without informing the beneficiary in order to keep the trust assets out of the reach of a would-be ex-spouse.

Once notice is received, the statute would give beneficiaries the opportunity to seek court review.

The UTDA would also put into place safeguards on the exercise of the decanting power when the original trust contains a charitable interest. Specifically, it would treat the Attorney's General's Office as a "qualified beneficiary" of such trusts. That means the AG's office would be entitled to the same rights to notice and to challenge the proposed use of the decanting power as any other beneficiary.

The statute would not impose a duty on trustees to exercise their decanting power, and clients would still be able to provide that a trust could not be altered. The controlling document simply would have to be drafted to limit the power to decant.

The main benefit of a statutory change would be predictability. Trustees could feel confident that if they adhered to the procedures outlined in the law, any efforts to decant should withstand a later challenge.

That's especially important for corporate fiduciaries, which are often hesitant to decant because of fears of a lawsuit. And it would also help level the playing field: While trustees for wealthy family trusts might be willing to take the risk of decanting and seeing a resulting lawsuit go all the way to the SJC, that's not an option for everyone.

A secondary benefit would be uniformity. With more than half the states making statutory provision for decanting, clients who move from Massachusetts to another state wouldn't find themselves affected by different rules.

Compared with neighboring states, Massachusetts has a reputation for being slow to address trust issues. Both New Hampshire and Rhode Island have decanting statutes, and New Hampshire has become a significant competitor for trust business. But given the recent overhaul of the probate and trust codes to enact significant portions of the proposed uniform codes for each, incorporating the Uniform Trust Decanting Act is the next logical step.

Further, the change has broad support from the estate planning bar and the endorsement of both the Massachusetts Bar Association's House of Delegates and the Boston Bar Association.

We urge the Legislature to move forward on this quickly. MLW

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LETTER TO THE EDITOR

Scores of judges join salute to Flaschner Judicial Institute

To the editor:

We, the undersigned retired judges of the commonwealth, join former Supreme Judicial Court Justice John M. Greaney's recent "Salute to the Flaschner Judicial Institute on its 40th Anniversary," published in the March 11 edition of Lawyers Weekly.

Having participated in the Flaschner Institute's programs during our judicial careers, there's no doubt that it promotes the highest standards of professionalism throughout the Massachusetts judiciary.

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