Revoking The Irrevocable Trust in a Divorce – or – Never Say Can't, Say Decant! – PART II*

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Even with *Pfannenstiehl* behind us, the complex interplay of the irrevocable trust and divorce continues to vex practitioners. The topic *du jour* is decanting and divorce — and the SJC just dove right in with *Ferri v. Powell Ferri*, 476 Mass. 651 (2017).

Before we go further, a quick primer. "Decanting" is the process of pouring assets from an irrevocable trust into a newly created trust. The big question at the heart of decanting and divorce: what if, during (or anticipating) a divorce, the trustee decanted the assets into a newly created trust that was, say, more divorce-proof than the original trust? But, before we examine that issue, what is the law about decanting generally? When can a trustee decant the assets in an irrevocable Massachusetts trust to another trust?

Since Massachusetts, unlike other states, has no decanting statute, we look to case law and, in particular, *Morse v. Kraft*, 466 Mass. 92 (2013). Essentially, the case involved an irrevocable trust created by Robert Kraft which contained four sub-trusts, one for each of the donor's sons who were very young when the trust was created in 1982. The sub-trusts were administered by a trustee, Morse, and, under the trust terms, the sons could not participate in any distribution decisions. Now that the children were all in their forties and financially sophisticated, Morse wanted to delegate some of his trustee powers to them.

Since the trust gave Morse no explicit right to decant and Massachusetts has no decanting statute, Morse filed a petition asking the court to interpret the trust's language as authorizing decanting without court approval. The SJC agreed with Morse's position – that the trust authorized him to decant.

In its analysis, the SJC reminded practitioners that, in interpreting a trust, the donor's intent is the paramount consideration. Here, because the trust gave Morse broad discretion to make outright distributions to or for the benefit of the beneficiaries, the SJC concluded that the discretion, therefore, encompassed a distribution to a new trust if doing so would serve the beneficiaries' best interests. In addition to considering the language of the trust, the Court also relied on affidavits from the donor, the drafter, and Morse to the effect that each intended the trustee to have the right to decant.

Notably, the *Morse* court put on notice drafters of future, post-Morse, trusts: if you want a trustee to have a right to decant, you would be best served by articulating that power in the trust. With that brief background, let us return to the main issue — decanting the assets during (or anticipating) a divorce to a more divorce-proof trust.

So, let's dispose of the easy case first: with a post-Morse Massachusetts irrevocable trust without an explicit power to decant, it is likely that decanting would not be permissible.

With a pre-*Morse* Massachusetts irrevocable trust without an explicit power to decant, we look to *Morse v. Kraft*. That is, a trustee may well be permitted to decant if the trustee's discretion is sufficiently broad to make outright distributions to or for the benefit of the beneficiaries, if it is in line with the donor's intent, and it is in the beneficiaries' best interests.

The recent *Ferri* decision involved a Connecticut divorce and a 1983 pre-*Morse* irrevocable Massachusetts trust that did not articulate an explicit decanting power for the trustee. The trustee decanted to another trust in the context of a divorce. The Connecticut Supreme Court certified three questions to the SJC — the essence of the inquiry for our purposes was that they sought a ruling on whether the trustee had the power to decant per the terms of the 1983 trust.

Reviewing the trust language in detail, which is beyond our scope here, the SJC found that the trustee's powers were broad enough to encompass the authority to decant. Notable, too, was the SJC's reliance on the affidavit of the settlor who stated his intention that the trustee had the authority to decant, particularly in light of the pending divorce and the need to protect the trust assets from the wife as a potential creditor. The Connecticut Supreme Court found that because the husband was unaware of the decanting, it did not violate that state's public policy.

Before divorce attorneys and estate planners get too excited about what they may be able to accomplish for their divorcing clients, such a decanting may not work in Massachusetts. The concurring opinion made clear that whether such a decanting would violate state public policy remains an open question:

Where, as here, the trustees created a new spendthrift trust for the sole purpose of decanting the assets of an earlier trust that, at least in part, would be included within the [marital estate] … [our law] would require us to consider whether the creation of the new spendthrift trust was contrary to public policy.

As decanting becomes more widespread nationwide, it will continue to surface in more of our cases involving divorcing parties. *Morse* and *Ferri* provide welcome guidance to the bar– and we await future case law and/or legislation to sharpen the contours. In any event, it would behoove both the estate planning practitioner as well as the domestic relations bar to become versed in the legal trends to best steer our clients down this new path.

* In light of the recent *Ferri* case, this is an update and revision of an article that originally appeared in the FMQ.