

**REPAIRING THE IRREPARABLE:
“Decanting” to a better trust in Massachusetts**

Estate Planning Council of Hampden County
May 14, 2013

Presented by: William E. Hart
whart@bulkley.com

7 North Pleasant Street, Suite 3
Amherst, MA 01002
413-256-0002

1500 Main Street, Suite 2700
Springfield, MA 01115-5507
413-272-6208

- A. Statutory tools for fixing irrevocable and unamendable trusts: Chapter 203E of Massachusetts General Laws, the “Massachusetts Uniform Trust Code.”
1. § 414: Uneconomic trusts can be modified or terminated.
 - (a) A trustee, after notice to “qualified beneficiaries,” can terminate a trust under \$200,000 in value.
 - (b) The court can modify or terminate a trust or replace a trustee if the “value of the trust property is insufficient to justify the costs of administration.”
 - (c) When terminated, the trustee shall distribute “in a manner consistent with the purposes of the trust.” This might permit decanting of a small trust.
 2. § 412: The court has power to modify or terminate any trust to further the purposes of the trust in “circumstances not anticipated by the settlor.”
 3. § 411: The court can modify or terminate a non-charitable irrevocable trust.
 - (a) Even in a manner inconsistent with a material purpose of the trust if the Settlor and all beneficiaries consent.
 - (b) May terminate if the trust is not necessary to achieve a material purpose or modify in a manner not inconsistent with a material purpose of the trust with consent of all beneficiaries.

- (c) Even without consent of all beneficiaries if they are “adequately protected.”
 - 4. § 111: A non-judicial settlement agreement is binding with regard to “any matter involving a trust,” but “only to the extent it does not violate a material purpose of the trust,” including the grant to a trustee of any “necessary or desirable power.”
 - 5. §303: A parent can “represent” a minor child beneficiary in a judicial or non-judicial settlement if there is no conflict of interest.
 - 6. §304: A person having a “substantially identical interest,” with no conflict of interest, can represent a minor, incapacitated, unborn, unidentified or absent beneficiary in a judicial or non-judicial settlement.
- B. A complex example.
- 1. Key:

D =	deceased artist	
SS =	surviving spouse (has no issue)	
C1 =	good surviving child of D	}
C2 =	good surviving child of D	
C3 =	good surviving child of D	
C4 =	good surviving child of D	
C5 =	bad surviving child of D	
G =	grandchild of D	
GG =	great-grandchildren of D	
\$ =	pecuniary gift	
 - 2. D’s QTIP trust for SS – now irrevocable:
 - (a) Corpus includes marketable securities and all of D’s marketable artwork.
 - (b) SS and C1 are trustees.
 - (c) All income to SS.
 - (d) Trustee shall pay to SS principal for SS’s “health, education, support or maintenance.”

- (e) Disclaimer trust is spray trust of income and principal for SS and D's issue, including C5. Not desired.
- (f) On death of SS.
 - (1) \$ to C5 if C5 survives SS.
 - (2) Remainder to C1-C4 who survive SS or issue of deceased child by right of representation. All contingent remainders.
- 3. The Problem: C1-C4 and SS want to run the long-term enterprise of marketing D's work together and benefit equally from the enterprise.
- 4. Solution Part I: Organize business by establishing an LLC with trustees as only members and SS and C1-C4 as managers with majority rule. Trustees assign all of D's works and some cash to LLC.
- 5. Solution Part II: Pay \$ to C5 now and get receipt and complete release of trustees.
- 6. Solution Part III: Distribute the LLC membership to SS with consent of adult contingent remaindermen for themselves, their children and their unborn children.
 - (a) Violates Q-TIP standard.
 - (b) Contingent remaindermen make gifts of their interests to SS, but of nominal value.
- 7. Solution Part IV: SS assigns LLC membership to new irrevocable FAMILY TRUST:
 - (a) SS and C1-C4 are Trustees, with majority rule.
 - (b) Unretained cash (income and principal) to be distributed equally among SS, C1, C2, C3, and C4 or to issue of deceased child by right of representation.
 - (c) Trust terminates 21 years after last currently living G dies and pays per capita to GGs then living and to deceased GG's issue by right of representation.
 - (d) SS has made a generation-skipping gift of 80% of value of LLC and files U.S. Gift Tax Return using part of both gift tax and generation-skipping transfer tax exemptions.

- (e) 20% of FAMILY TRUST is a grantor trust for income taxation while SS lives.
- (f) This is “decanting” the old fashioned way.

C. References

1. Morse v. Kraft, SJC Docket No. SJC-11233, brief of the Boston Bar Association, Amicus Curiae, filed March 22, 2013 argues that current Massachusetts law permits decanting whenever a trustee can or must distribute.
2. Phipps v. Palm Beach Trust Co., 142 Fla. 782 (1940). Permits decanting.
3. Delaware decanting statute: 12 Del C. § 3528.

D. Possible Massachusetts decanting language:

“Whenever the Trustee is required or empowered to distribute principal or income to one or more persons, the Trustee may distribute same to the trustee of an existing or newly created trust for the benefit of such person(s) having terms that, in the Trustee’s sole determination, further the intentions of the Settlor and/or more favorably benefit such person(s). The transferee trust may have the same Trustee as hereunder or a different trustee.”

1513838