Advisory

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Trusts in Divorce: The Connecticut Supreme Court Speaks in *Ferri*

Yesterday, the Connecticut Supreme Court issued opinions in the two related cases known as *Ferri*, which lie squarely at the intersection of matrimonial law and estate planning. Although the Court focused on the narrow issue of trust "decanting," *Ferri* appears to present a surprising planning opportunity and may have considerably broader implications for matrimonial and estate planning attorneys alike.

Background. Husband was the beneficiary of a trust established by his father ("Trust 1") and, having reached age 35, Husband had the right to withdraw assets of Trust 1. Husband had never exercised that right, and upon initiation of the divorce action between Husband and Wife, and without notice to Husband, the trustees of Trust 1 "decanted" all assets to a new trust ("Trust 2"), which could be described as a "spendthrift" trust. After doing so, the trustees filed a declaratory judgment action to approve their decanting. That declaratory judgment action, along with the underlying divorce action, comprise the two parallel *Ferri* cases.

Importantly, Trust 1 was governed by Massachusetts law. Questions on the propriety of the decanting were certified to the Supreme Judicial Court of Massachusetts, which issued a ruling in March 2017 in favor of the trustees: decanting Trust 1 was a valid exercise of the trustee's discretion.

That March ruling in Massachusetts left open several questions in Connecticut. Would decanting result in a self-settled trust in Connecticut, subject to the rights of a beneficiary's creditors? If the decanting was valid, would this decision present a huge and surprising planning opportunity for beneficiaries of "withdrawal" trusts? Could the opinion be limited to decanting, or would it say more about matrimonial and trust law in Connecticut?

The New Rulings. In the declaratory judgment action, the Connecticut Supreme Court ruled in favor of the Trustees, approving the decanting. The Court acknowledged that the assets of Trust 1 had been fully reachable in the divorce prior to the decanting and now were off limits – the decanting had worked as planned. The Court rejected the argument that decanting had created a "self-settled" trust subject to the reach of creditors, pointing to a record showing that actions were taken without Husband's awareness or consent. The Court's conclusion was even stronger: "In light of the trial court's finding that [Husband] took no active role in planning, funding, or creating the 2011 trust, we can find no authority for the proposition

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that it should be considered self-settled." (Emphasis added.) The Court rejected various other arguments, including that Husband and trustees had dissipated assets and acted in contempt of court.

The divorce action reached a parallel result, though not without a few surprises.

A Twist. The Connecticut Supreme Court rarely has spoken on the protections afforded to trust interests in Connecticut divorce actions, making the new *Ferri* opinions a meaningful data point for practitioners. Most practitioners would agree that a true "spendthrift" trust – with fully discretionary distribution standards in the hands of an independent trustee – should not be subject to division in a divorce. And, indeed, per the Court, a trial court cannot "reach" or even "consider" such trust assets in dividing a marital estate. However, in a twist, the Court upheld the trial court's award of "substantially more of the marital assets" to Wife *as well as an enhanced alimony award,* writing: the trial court "could, and did, consider [Husband's] ability to earn additional income when creating its alimony orders" noting that the trust "had routinely supported his investments."

What appears to be the Wife's consolation prize raises fundamental questions: Does *Ferri* open a side door for trust assets to enter a divorce proceeding? Does the answer depend on how a trust has been administered in the past?

Possible Implications of *Ferri*. There are many implications of *Ferri*, and it cannot easily be written off as a mere "decanting" case. The opinions appear to present a planning opportunity for trustees of "withdrawal" trusts (and possible other trusts with less than ideal terms vis-à-vis creditors), where the governing law of the trust arguably permits decanting. And the Court's discussion of equitable division and alimony awards, suggesting that trust assets – even with spendthrift trusts – could factor into a trial court's calculation, would seemingly have broad implications for trust administration, as well as for discovery and strategy in matrimonial actions.

To view the two opinions, please **click here** and **here**.

Wiggin and Dana attorneys routinely serve as experts and co-counsel where trust interests are at issue in matrimonial actions. Please contact one of us and we would be happy to discuss this case and its potential implications.