

**FIDUCIARY LITIGATION UPDATE**  
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**I. Overview**

- A. The decanting (or modifying) of trusts and related issues;
- B. Trust assets in divorce: Are discretionary and future interests part of the marital estate?
- C. Trends in tortious interference with inheritance rights.

**II. The Decanting (or Modifying) of Trusts**

- A. Decanting Defined, its effect and rationale;

“Decanting” refers to the distribution of assets from one trust into a second trust, like wine is decanted from the bottle to another vessel.”

- B. Variations across States
- C. Decanting Power and Trustee Discretion
- D. Special Needs Trust Exception
- E. Notice Requirements

F. *In re Estate of Sibley*, 246 Ariz. 498 (2018)

The rationale behind decanting is that if a trustee has discretion to distribute trust property to or for the benefit of a beneficiary, the trustee in effect has a limited power of appointment in favor of the beneficiary and thereby can appoint the property to a new or existing trust for the benefit of that beneficiary.

A trustee has discretion to “decant”—the authority to appoint or distribute trust property to a new or different existing trust with terms

that differ from those of the original trust—only when the trust instrument expressly provides. Ariz. Rev. Stat. Ann. § 14-10819(A).

Thus, it is a trustee's discretionary authority to make distributions in favor of a beneficiary that provides the premise for decanting

G. Matter of Fund for Encouragement of Self Reliance, 440 P.3d 30 (2019)

The issue presented by this appeal is whether the district court erred in ordering, under NRS 163.556, half of a wholly charitable trust's property "decanted" (i.e., appointed) into a newly created wholly charitable trust with the same purpose as the original charitable trust, to be administered solely by one trustee of the original trust, against the objection of co-trustees.

Because the terms of the trust instrument require the unanimous consent of all trustees to make a distribution of half of the trust's assets, the district court erred by ordering the wholly charitable trust decanted under NRS 163.556

H. *Hodges v. Johnson*, 177 A.3d 86 (2017) (N.H.)

Two irrevocable trusts – benefit of spouse and 5 children/step children  
Settlor directed decantings – exclusion of certain children, spouse

Duty of Impartiality – "requires a trustee of a trust with two or more beneficiaries to act impartially in administering, investing, managing, and distributing the trust property, given due regard to the beneficiaries' respective interests."

"A trustee, who makes unequal distributions among beneficiaries and/or eliminates a beneficiary's non-vested interest in an irrevocable trust through decanting, only when the trustee fails to treat the beneficiaries equitably in light of the purposes and terms of the trust."

Trial court: one purpose of 2004 trusts: support the beneficiaries  
Defendants failed to consider this purpose

"McDonald . . . never gave [the plaintiffs'] financial interest any consideration"

No "e-mails, memorand[a], or letters concerning, or research into, whether alternatives to complete disenfranchisement were considered or

explored as a solution that would take into account both the terms and purposes of the 2004 Trusts and the interests of the beneficiaries.”

Invalidated the decantings; removed the trustees

NH Supreme Court: Affirmed

“The statutory duty of impartiality is owed to all beneficiaries, regardless of whether their interests are present or future, vested or contingent.”

“determination . . . is supported by the record and not plainly erroneous as a matter of law.”

Decision to remove sustainable: “serious breach of trust when they . . . violated their duty of impartiality.”

Dissent: Issue of first impression, not properly briefed

“few, if any, cases exist that clarify a trustee’s fiduciary duties in the context of decanting or the extent to which he may (or should) exercise discretion to decant.”

#### I. Decanting in Divorce Context

*Ferri v. Powell-Ferri*, 476 Mass 651 (Mar. 20, 2017)

MA Trust, MA Trustees, CT Divorce  
1983 Trust for benefit of husband  
1995 Marriage, 2010 – wife files divorce action  
2011 – trustees decanted into spendthrift trust  
Trustees did not inform husband or obtain his consent

CT Trial Ct: Trustees not authorized to decant  
Restoration of 75% of assets, accounting and attorneys’ fees

Connecticut Supreme Certified Questions to MA SJC

‘83 Trust terms empowered trustees to decant  
Court should consider affidavit from settlor regarding intent

Connecticut Supreme Court, 326 Conn. 438; 326 Conn. 457 (2017)

Adopted “thorough and well-reasoned decision” of the MA SJC  
Reversed trial court finding that trustees did not have authority  
to decant

“although the trial court could not consider the assets decanted to the 2011 trust for equitable distribution purposes, it could, and did, consider [Husband’s] ability to earn additional income when creating its alimony orders.”

Trial court awarded substantially more of the marital assets to wife, including the marital home.

Enhanced alimony - \$300k per year, even though husband only earned \$200k when action commenced.

- J. Several interesting appellate cases refuse to allow a court-ordered modification; detailed requirements of trust modification statutes must be followed.

*Horgan v. Cosden* (Fla. Dist. Ct., May 25, 2018)

Action brought under Florida trust modification statutes that allow modification in the case of unanticipated circumstances.

District court allowed but appellate court refused.

*Shire v. Unknown /Undiscovered Heirs* (Nebraska)

Modification would have likely been consistent with the settlor’s intent, but modification did not fit squarely within requirements of trust modification statute.

Court refused modification.

### **III. Disputes Over Trust Assets in Divorce**

- A. Can a divorcing spouse reach the other spouse’s beneficial interest in a trust?
  1. Does Timing Matter?

During the divorce proceeding v. Post-Divorce Enforcement of Spousal and Child Support Orders

2. Different Paradigms (Variations Across States)

a. Statutory Schemes

“New York Style System” – Generally Excludes

DRL § 236B(1)(2): “Separate property shall mean . . . property acquired by bequest, devise or descent, or gift from a party other than the spouse”

Distinguished from Alimony (may consider trust interests)

b. Common Law

i. Present discretionary interest

*Levitian v. Rosen*, 95 Mass.App.Ct 248 (2019)

Whether a trust may be included in the marital estate requires close examination of the particular trust instrument to determine whether the interest is a fixed and enforceable property right or whether the party’s interest is too remote or speculative to be included. *Mass. Gen. Laws Ann. ch. 208, § 34*.

While a judge is not necessarily precluded from including within the marital estate for purposes of equitable division of marital estate a party’s beneficial interest in a discretionary trust, interests in discretionary trusts generally are treated as expectancies and as too remote for inclusion in a marital estate because the interest is not present and enforceable; the beneficiary must rely on the trustee’s exercise of discretion, does not have a present right to use the trust principal, and cannot compel distributions. *Mass. Gen. Laws Ann. ch. 208, § 34*.

*Court held that:*

- *funds that wife withdrew from trust were distributions;*
- *wife’s share of trust was subject to equitable distribution as part of marital estate;*

- *wife's share of trust was only able to be distributed to her; and*

*Hoops v Hoops*, 2018 Westlaw 3590416 (July 9, 2018)

The wife's father established a trust in 1993 with approximately \$750,000. In the ensuing years, the family has added to that trust with income from the husband's law practice and has withdrawn significant sums. Traditionally, the family has withdrawn approximately \$55,000 each year from the trust, but in 2016, they withdrew \$109,000 and in 2017 they withdrew \$51,000. During the course of the marriage, they withdrew \$700,000 from its principal.

The wife is able to withdraw 5% of the trust principal or approximately \$50,000 per year in her discretion. Any further withdrawals must be approved by her siblings who are the trustees.

The wife has always been able to access the trust for funds and has never been refused funds thus establishing a regular and recurring source of income. A court may find that consistent and recurrent gifts in the past are likely to continue into the future and a court may consider those sums in fashioning its financial orders. *Lusa v. Grunberg*, 101 Conn.App. 739 (2007).

The wife's claimed expenses are an astounding \$6,500 per week. Even more than in the husband's case, the court finds many of her expenses extravagant or unnecessary, including household improvements (which will not be recurring), second mortgage (paid by the husband), repairs for her brand-new car, automobile insurance (paid by the husband), alcohol and tobacco products, groceries, entertainment, vacation, charitable contributions and children's activities, camps, clothing and allowances. The court finds that the wife's necessary and fixed expenses are approximately \$1,300 per week

The husband is offering no alimony, arguing that the wife has an earning capacity and has a regular and recurring income stream from both her trust and from her family, which has always been more than generous.

The plaintiff shall pay to the defendant alimony in the amount of \$1,300 per week commencing July 6, 2018.

*Pfannenstiehl v. Pfannenstiehl*, 475 Mass 105 (Aug. 4, 2016)

Trust: \$24,920,217.37

Open class of beneficiaries – living issue of husband’s father 11 beneficiaries at time of trial – husband’s share: 1/11

“whether the present value of the husband’s beneficial interest in a discretionary spendthrift trust . . . may be included in the parties divisible marital estate.”

“The question turns on the attributes of the specific trust at issue, rather than on principles of general application . . . and therefore requires evaluation of the facts and circumstances of each case.”

Speculative and remote v. fixed and enforceable

Husband’s “present right to distributions . . . is speculative, because the terms of the trust permit unequal distributions among an open class that already includes numerous beneficiaries, and because his right to receive anything is subject to the condition precedent of the trustee having first exercised his discretion”

ii. Contingent v. Vested Remainder Interest

## B. Preserving the Status Quo – Preserving Assets During the Divorce Case

- CA Trust, CT Trustee, MA Divorce

Discretionary, Spendthrift trust settled by husband’s uncle; MA Court ruling: Preserve assets until trial; Trustee selling trust assets (husband’s interest > \$1 million); Trustee refused to provide information, comply with court order; Injunction in CT

## C. Compelling Trustees to Provide Information Regarding Trust Assets

- DE Trust, NY Trustee, CT Divorce

Discretionary, spendthrift trust(s)

Multiple beneficiaries – not party to divorce proceeding  
Confidentiality concerns, particularly for non-party beneficiaries  
Motion to Compel (1 month before trial)  
Court: “I have 230 motions to decide first”

#### D. Practice Considerations

- Jurisdiction over trustee;
- Conflict of laws;
- Timing; and
- Confidentiality.

### IV. **Interference with Inheritance**

#### A. Elements

- Knowledge by defendant of the expectancy;
- Tortious conduct by defendant(s); and
- Damage suffered by plaintiff.

#### B. Advantages of the Cause of Action

- Longer statutes of limitation;
- Interested witness testimony;
- Punitive damages;
- Jury trial; and
- Commencement prior to donor’s death.

#### C. Disadvantages

- Inconsistent with donor’s freedom of disposition;
- Difficulty in determining true intent;
- Conflict with principled policies and specialized rules/remedies (*i.e.* constructive trust); and
- Uncertainty in recognition across (and within) States.

#### D. Recent Cases

*Bieselete v. Mattena*, 2019 UT 30

- Punitive damages awards of \$308,555.46 against each daughter with regard to stepdaughters' tort claims, including conversion, breach of fiduciary duty, and intentional interference with inheritance, were not excessive, where the ratios between the compensatory damages awards and punitive damages awards were both well under 2:1. Utah Code Ann. § 78B-8-201(2); Utah R. Civ. P. 59(a)(5).

*Matter of Certification of Question of Law from U.S. District Court, South Dakota*, 07/02/2019

- A cause of action for tortious interference with inheritance or expectancy of inheritance does not exist in South Dakota.
- We, therefore, focus on jurisdictions with decisions from the state's highest court. Our review shows that only a small number of the highest courts in other states have adopted the tort without qualification or limitation.<sup>2</sup> These courts allow the claim to proceed regardless of other available remedies so long as the plaintiff has sufficiently pleaded the requisite elements. According to the Iowa Supreme Court, the tort is "an independent cause of action for the wrongful interference with a bequest[.]" *Frohwein v. Haesemeyer*, 264 N.W.2d 792, 795 (Iowa 1978); accord *Barone v. Barone*, 170 W.Va. 407, 294 S.E.2d 260, 264 (1982). Maine likewise treats the tort independently from a will or trust dispute, and in fact, allows a cause of action "even before the testator has died." *Plimpton v. Gerrard*, 668 A.2d 882, 886 (Me. 1995). Notably, the Oregon Supreme Court remarked that "[a] tort claim does not become a will contest simply because it arises out of facts relating to the making or unmaking of a will." *Allen v. Hall*, 328 Or. 276, 974 P.2d 199, 204 (1999) (en banc). Therefore, a plaintiff need not first bring a probate challenge to proceed in tort. *Frakes v. Nay*, 254 Or.App. 236, 295 P.3d 94, 114 (2012).

*Kinsel v. Lindsey*, No. 15-0403, 2017 WL 2324392 (Tex. May 26, 2017, rehearing overruled, Sept. 22, 2017)

- "Neither our precedent nor the Legislature has blessed tortious interference with an inheritance as a cause of action in Texas. Its viability is an open question."

- “No compelling reason to consider a previously unrecognized tort if the constructive trust proved to be an adequate remedy.”
- “A constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment.”
- Jury awarded \$3.056 million in damages on each cause of action – but less \$2 million available because the defendants depleted the funds to pay for attorneys’ fees.
- Facts of case do not warrant enlarging the body of tort law, as “[t]he law provides an adequate remedy in this case; the [plaintiffs] were simply unsuccessful in fully attaining it.”

*Rice v. Rice*, 2017 WL4273189 (Tex. App. Houston-14<sup>th</sup> Dist.) (2017)

- Trial court dismissed tortious interference claim, but invalidated will based on lack of capacity and undue influence
- Court did not dismiss appeal as “moot” in light of *Kinsel*, but declined to find cause of action – plaintiffs “can be made whole by their existing causes of action.”

#### E. *Restatement (Third) of Torts*

Scheduled for presentation to ALI membership for a vote

Carries forward the tort, but:

- Should not “interfere with probate law or to provide a way for a plaintiff to avoid its limits and restrictions;”
- Should be applied in a manner that “complement[s] restitutionary remedies, not displace[s] them;”
- Should not be allowed if a probate court has a process for reopening a case, even if: (i) probate offers less generous relief than would be attainable in tort; (ii) the probate limitations period has expired; or (iii) the defendant’s fraud or other misconduct has prevented the plaintiff from making a timely claim in probate;”
- Cautions against an award of punitive damages if the plaintiff prevailed on the basis of a presumption of undue influence rather

than direct evidence of the kind of egregious conduct that would warrant such damages;

- Idea to harmonize liability in tort and restitution, to take away incentive to choose one or the other; and
- Give real to teeth to “relief in probate” limit.

#### V. Questions

#### **DISCLAIMER**

This presentation is a summary of legal principles. Nothing in this presentation constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.