

Memorandum in Support TRUSTS AND ESTATES LAW SECTION

T&E #11

June 5, 2014

A. 9761

By: M. of A. Braunstein
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the estates, powers and trusts law, in relation to a trustee's authority to recant the invasion of a trust and the creation of a new trust.

LAW & SECTION REFERRED TO: Section 10-6.6 of the estates, powers and trusts law.

The Section has reviewed this bill and supports it in its entirety. The bill would permit a trustee who has exercised his or her power of invasion by decanting the principal of the trust to “recant” the decision to exercise such power before the decanting takes effect. The amendment would only allow a trustee to revoke the exercise of the decanting power during a specified period of time. The trustee would not have the power to amend the exercise of the power or the new trust. Further, the amendment clarifies that once the exercise of the power becomes irrevocable, the new trust can only be changed by a new exercise of the decanting power.

The current provisions of EPTL 10-6.6 permits a trustee to decant to a new trust and requires that notice of the decanting be served upon all persons interested in the invaded trust and new trust.¹ The exercise of the power must be in writing and, absent consent from the persons interested, becomes effective thirty (30) days after the date of service of the instrument.² Where consent is obtained from the persons interested, the effective date of the exercise of the power is date set forth in the written consent.³

To determine the period during which the trustee may have the ability to recant the exercise of the decanting power, we must first determine the date on which the decanting becomes irrevocable. It seems reasonable to state that the exercise of the decanting power should be revocable until the exercise of the decanting power takes effect. The holder of a special power of appointment (the trustee, in this case)⁴,

¹ See EPTL § 10-6.6(j).

² See *id.*

³ See *id.*

⁴ See EPTL 10-6.6(d) (providing that the exercise of the decanting power shall be considered the exercise of a special power of appointment as defined in EPTL 10-3.2).

determines when the exercise of the power becomes irrevocable by manifesting an intent that such exercise of the power be irrevocable.⁵ It follows, then, that after the effective date of the exercise of the decanting power has passed, whether set by statutory limits or set forth in the terms of the written consent, the decanting power becomes irrevocable.

This bill would amend paragraph (j) of EPTL 10-6.6 to clarify that the exercise of the power is irrevocable on the effective date, either thirty (30) days following service of notice of the decanting or on the effective date set forth in the written consent. As stated above, the statute requires the trustee to serve notice of the exercise of the decanting power to persons interested in the new trust and the invaded trust. Therefore, the bill would add a new subparagraph (7) of paragraph (j) which requires the trustee to serve notice of any revocation of the exercise of the decanting power to such interested persons where the trustee has previously served notice of the decanting. The notice of revocation must be served on all interested persons in the same manner as provided in paragraph (j)(2) of the statute.

Finally, allowing the trustee to revoke an exercise of the decanting power raises the issue of filing requirements with the court. Paragraph (j)(6) provides that the decanting instrument must be filed in the court having jurisdiction over the invaded trust. If the trustee files the decanting instrument with the court and then revokes the exercise of the power, the trustee would have the additional requirement of filing the revocation instrument with the court. To help prevent these situations, the bill would amend subparagraph (6) by directing that the decanting instrument should be filed within twenty (20) days of the *effective date* of the decanting instrument (emphasis added). With this added language, the trustee may wait until the decanting becomes effective before filing the decanting instrument with the court.

Conclusion

The bill would effectively clarify the potential ambiguity in the statute regarding the ability of a trustee to revoke the exercise of a decanting power and addresses the issues surrounding the decision of a trustee to revoke such exercise of the power. Accordingly, the Section supports the bill in its entirety.

Based on the foregoing, the Trusts and Estates Law Section **SUPPORTS** this legislation.

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⁵ See EPTL 10-9.1(b)(2) (providing that an exercise of a power of appointment is irrevocable when the power holder does not manifest an intent to reserve a power of revocation).