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Introduction

The avid wine drinker has many tools at his disposal to maximize the experience of a wonderful bottle of wine. These tools include specially crafted glassware in different shapes and sizes, and the ever-popular wine decanter.[1] The decanter serves many functions, and its pros and cons are debatable, but one of the recognized uses is the aeration of the wine, which arguably allows a wine to quickly "come to life."[2] Similar to wine, trust assets may need modification in order to realize their full potential. It might be that the trust would operate at its best if it existed for an additional period of years beyond its original purpose, or that a new trust serves the beneficiaries better by taking advantage of tax benefits.[3] The year 1992 was a historic year for estate planners in New York, as a tool very

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1. A decanter is defined as "a vessel, usually an ornamental glass bottle, for holding and serving wine, brandy, or the like." Decanter, DICTIONARY.COM, http://dictionary.reference.com/browse/decanter (last visited Jan. 24, 2014).

2. Joseph Nase, *Proper Transference Makes Wine Taste Better. So Pour it Out!*, NEW YORK MAG., http://nymag.com/restaurants/articles/wine/essentials/decanting.htm (last visited Jan. 24, 2014).

3. For a discussion of the various benefits of decanting a trust, see *infra* Part III.

similar to the wine decanter became available for the use of trust assets. The 1992 addition of section 10-6.6 of the New York Estates, Powers and Trusts Law ("NY EPTL") marked the first state statute to allow the "pouring" of trust assets from one trust into another.[4]

Estate planning presents several challenges to attorneys and trustees who face the dilemma of serving their client's interests by anticipating future effects on their assets. Utilizing trust decanting provisions has become a critical tool for a trustee when determining how to best serve a client's interests for various reasons such as protection of assets from tax ramifications, or modification of existing trusts to create better utility. Acknowledging these practical utilities, decanting has left several questions unanswered: Is the decanting process a blatant slight to the traditions that New York State has held dear in the field of Trust and Estate law? Why are estate planners using a utility that currently sits in limbo as far as an Internal Revenue Service ("IRS") determination on what the eventual tax ramifications and treatment will be? While addressing what could be a major forthcoming issue on tax treatment of decanting, this Comment explores section 10-6.6 of the NY EPTL,[5] the history behind the amendments, and the various practical uses decanting offers to the modern estate planner. Furthermore, and most importantly, this Comment examines the overlooked clash between the New York legislature's granting of seemingly unbridled power in trust reformation with New York's longstanding commitment to honoring a settlor's intent.[6] The decanting statute and its modern use have disregarded the original intention of the statute, which was to allow estate planners to preserve the benefits of the Generation Skipping Transfer ("GST") tax exemptions.[7] Moreover, the reach of this statute has now

4. *See* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney 2002 & Supp. 2014). For a discussion of the legislative history, see *infra* Part I.B. For a discussion of the functionality of the statute, see *infra* Part II.

5. EST. POWERS & TRUSTS § 10-6.6.

6. For a discussion of case law that demonstrates New York's longstanding commitment to preserving settlor intent in the area of Trusts and Estates, see Part IV.B.

7. *See* Margaret Valentine Turano, *Practice Commentaries*, *in* EST. POWERS & TRUSTS § 10-6.6 [hereinafter Turano, *Practice Commentaries*]. For

placed it in complete conflict with New York's commitment to preserving settlor intent.

The Comment examines trust decanting in four parts. Part I reviews the historical evolution of decanting statutes, first from common law roots, and later focusing on the legislative history of New York's decanting statute. Part II briefly explains the functionality of section 10-6.6 of the NY EPTL; the "how does it work" explanation of the statute that authorizes decanting. Part III will discuss the many practical uses of the decanting statute. Finally, Part IV will transition into a discussion on how the trustee's use of this statute not only leaves him in limbo regarding the tax treatment of his actions, but places him in a head on clash with New York's longstanding commitment to honoring settlor intent.

I. The History of Decanting: How Did We Get Here?

A. *Common Law Roots*

The power to decant developed through common law, with the statutory authority essentially "putting flesh on the bones of an existing common law trustee power."[8] The power that the trustee wields through decanting is evident in modern statutory authority, but courts initially granted this power through common law determinations that still hold true in states not utilizing statutory authority.[9] The first American case to recognize the existence of this power as widely accepted[10] is *Phipps v. Palm Beach Trust Company*.[11]

a discussion of the Generation Skipping Transfer tax, see *infra* Part III.A.

8. Thomas E. Simmons, *Decanting and its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. REV. 253, 255 (2010).

9. Examples of these states include New Jersey and Iowa. For a discussion of case law from these states, see *infra* notes 21-50 and accompanying text.

10. Simmons, *supra* note 8, at 255-56; *see also* Farhad Aghdami & Jeffrey D. Chadwick, *Decanting Comes of Age*, 23 PROB. PRAC. REP. 1, 2 (2011).

11. 196 So. 299 (Fla. 1940).

1. *Phipps v. Palm Beach Trust Company*

The background of the *Phipps* case involved an irrevocable trust created by Margarita C. Phipps for the benefit of her four children, and named Palm Beach Trust Company and John S. Phipps, her husband, as co-trustees.[12] The trust instrument provided that John S. Phipps, as the individual trustee, had "sole and absolute discretion" of the trust estate, including "directing the payment of the entire trust estate" to one or more of the beneficiaries.[13] The issue in the case arose when John Phipps directed the corporate trustee to transfer the estate into a new trust for the benefit of the original descendants of the donor, with the added wrinkle that a provision be added for the payment of income to the wife of John H. Phipps, the grantor's son and one of the original beneficiaries, if he provided so in his will.[14] Palm Beach Trust, unsure if this transfer "was within the scope of . . . powers granted in the original trust . . . [,] brought . . . suit in equity [seeking] . . . construction of the original trust."[15] "[T]he Chancellor ruled that the individual trustee was authorized to create the second trust and [directed] the corporate trustee to [follow the orders of the individual trustee]."[16]

The case was appealed by one of the original beneficiaries[17] and the Florida Supreme Court affirmed, noting that "[i]f a trustee has a special power of appointment, that is a power to appoint among the members of a specified class, whether he can effectively appoint a trustee for members of the class depends upon the terms of the power vested in him."[18] The court reasoned that the "unlimited confidence and discretion in the individual trustee . . . clothed him with absolute power to administer and dispose of the trust estate to anyone of the named beneficiaries to the exclusion of the others."[19] Once the

12. *Id.* at 300.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 300-01.
17. Simmons, *supra* note 8, at 257.
18. *Phipps*, 196 So. at 301 (citation omitted).
19. *Id.*

court acknowledged the power afforded to the trustee, it had no difficulty finding that the trustee could create a trust with the sole limitation that one of the descendants of the donor in the original trust be named a beneficiary.[20] The court justified its decision by acknowledging the "absolute power" afforded the trustee in allowing the trustee to move the trust estate into a new trust, but as discussed below, New York has enhanced this power by no longer requiring absolute discretion.[21]

2. *In re Estate of Spencer*

Interpretation of the decanting power continued in Iowa, which uniquely recognized the power through case law before codification through statute.[22] *In re Estate of Spencer*[23] involved the construction of the will of Fern Spencer, who left her children a life estate in a trust funded by farmland she owned with the remainder going to her grandchildren.[24] Her husband, L.J. Spencer, was appointed as trustee with the "power to dispose of the real estate by will or deed" when he distributed his own farm land, the larger section of the parcel, in the same manner as Fern's land.[25] If any of Fern and L.J.'s children died childless, "the share of such child went to his or her surviving brothers and sister."[26] Her husband survived Fern for another twenty-eight years and did not exercise the power of appointment throughout his lifetime.[27] In his will, he appointed the property in the original trust created in Fern's will along with the remaining property owned by him into a new trust created through his will for the benefit of his four children for as long as the law would allow.[28] The trial court found that the appointment power exercised in L.J.'s will violated the terms of the original trust because L.J.'s attempted exercise of power

20. *Id.*
21. *See infra* Part II.
22. Simmons, *supra* note 8, at 255.
23. 232 N.W.2d 491 (Iowa 1975).
24. *Id.* at 493; Simmons, *supra* note 8, at 257-58.
25. *In re Estate of Spencer*, 232 N.W.2d at 493.
26. *Id.*
27. *Id.* at 494.
28. *Id.*

exceeded the authority granted in the trust and that Fern's intent, being the granting of a life estate to her children and remainder to her grandchildren, was being frustrated.[29]

On appeal, the court confronted the issue of whether L.J.'s exercise of the power of appointment exceeded the authority granted by Fern.[30] The court identified L.J.'s power of appointment as a special power[31] which is an important distinction in deciding whether he could use this power through the appointed trust.[32] The Iowa court examined section 17 of the Restatement (Second) of Trusts and stated that a trust may be created by "appointment by one person having a power of appointment to another person as trustee for the donee of the power or for a third person"[33] and examined further the comments which allowed the donee of a special power to appoint interests to trustees for the benefit of objects unless the donor had manifested a contrary intent.[34] The court recognized that there were "plausible, logical, and persuasive" arguments on both sides, but held that nothing in Fern's will "manifest[ed] a contrary intent."[35] This led the court to affirm and reverse in part, holding that L.J. could use the power of appointment to create the trust, but by the terms of the trust creation which designated that the trust continue as long as possible, it would violate the intent of Fern which was that her grandchildren receive the property at the death of her children.[36] The decision invites two differing interpretations. Read narrowly, the decision would allow a trustee who is granted special power of appointment, to exercise that power through an outright appointment *or* through a trust instrument, so long as "the grant of the power does not

29. *See id*. at 494-95.

30. *Id*. at 495.

31. *Id*. at 496. The court, citing to the RESTATEMENT (FIRST) OF PROP. § 320 (1940), stated that an appointment "power is special if (a) it can be exercised only in favor of persons, not including the donee, who constitute a group not unreasonably large, and (b) the donor does not manifest an intent to create or reserve the power primarily for the benefit of the donee." *In re Estate of Spencer*, 232 N.W.2d at 496 (internal quotations marks omitted).

32. *In re Estate of Spencer*, 232 N.W.2d at 496.

33. *Id*. (quoting RESTATEMENT (SECOND) OF TRUSTS § 17 (1959)).

34. *Id*.

35. *Id*. at 497.

36. *Id*. at 499.

expressly prohibit it."[37] A broad reading would allow the "trustee to decant trust property to a new trust unless plainly prohibited by the terms of the original trust."[38]

3. *Wiedenmayer v. Johnson*

Wiedenmayer v. Johnson[39] involved an inter vivos trust established by a father for the benefit of his son.[40] John Seward Johnson established a trust for his son, John Seward Johnson, Jr., which was funded by Johnson & Johnson stock worth $18 million.[41] The trustees were directed to pay net income from the trust to John Seward Johnson Jr. or his guardian *ad litem* "from time to time and whenever in their absolute and uncontrolled discretion they deem it to be for his best interests,"[42] and the property was deemed "to be his absolutely, outright and forever."[43] The trustees decided to "condition the distribution [made to John Seward Johnson Jr.] upon his setting up a substituted trust" for the funds to which he agreed.[44]

The disposition was challenged by the guardian *ad litem* for John Seward Johnson, Jr.'s children who argued that the disposition would eliminate their contingent remainder interest.[45] The court did not seem deterred by this outcome instead focusing on the power afforded in the trustees in the original trust instrument.[46] The court based its reasoning on the "absolute discretion" bestowed on the trustees to make decisions based on "the son's best interests."[47] The court reasoned that it could "not substitute [its own] opinions as to the son's 'best interests,' as opposed to the opinion of the

37. Simmons, *supra* note 8, at 260.
38. *Id.*
39. 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969).
40. *Id.* at 535; Simmons, *supra* note 8, at 260.
41. *Wiedenmayer*, 254 A.2d at 535.
42. *Id.*
43. *Id.*
44. *Id.* at 536.
45. *Id.*
46. *Id.*
47. *Id.* at 535-56.

trustees" who had the ultimate discretion on this point.[48] The court did find it necessary to discuss that the trustees likely based their decision on the matrimonial problems that John Seward Johnson, Jr. was facing, noting that it is not always a pecuniary interest that serves as the best interest of the beneficiary, but rather the granting of "peace of mind" may be sufficient so long as the trustees deemed it in the best interest of the beneficiary.[49]

The dissent took issue with the majority's decision, arguing that there was no disposition and what had occurred was an "impermissible alteration of the substantive trust terms."[50] The dissent found the actions of the trustees and John Seward Johnson, Jr. to be a scheme concocted to remove his children as contingent remaindermen and instead have him create a new trust mirroring the terms and reverting the interest back to the trustees.[51] In understanding *Wiedenmeyer*, it should be noted that both the dissent and majority recognized the issue as an examination of the "construction and breadth of the trustee's distribution powers."[52] The notable difference between the decisions in *Spencer* and *Phipps* and the decision in *Wiedenmayer* is that in the latter there was no "specific power of appointment" being analyzed.[53] *Wiedenmayer* is the first case to consider decanting power not as a specialized power of appointment prescribed by a trust, but rather as an "implied trustee distribution power."[54] Even so, as will be discussed further in the next subpart, New York chose to enable decanting through the powers, among them the power of appointment, which are discussed in *Spencer* and *Phipps*.[55]

B. *The Legislative History of Section 10-6.6 of the NY EPTL*

As previously discussed, some states allowed decanting

48. *Id.* at 536.
49. *Id.*
50. *Id.* (Conford, J., dissenting).
51. *See id.* at 537.
52. Simmons, *supra* note 8, at 262.
53. *Id.*
54. *Id.*
55. *See infra* Part I.B.

through common law interpretation of power of appointment[56] or implied power of a trustee.[57] Codification of decanting through the enactment of section 10-6.6 of the NY EPTL marked the first state enacted legislation that permitted decanting.[58] Jonathan Blattmachr, a renowned New York attorney from Milbank, Tweed, Hadley & McCloy, authored New York's decanting statute, based on forms he used in practice, in an attempt "to create maximum flexibility."[59] Support for a decanting statute was founded on the idea that the common law already authorized this power[60] and that legislation was simply codifying "the existing common law theories underlying a trustee's special power of appointment."[61] New York principally enacted the decanting statute "to confirm the authority of a New York trustee to exercise an invasion power in further trust [Generation Skipping Transfer] purposes,"[62] but numerous other purposes were subsequently recognized and approved by New York courts.[63]

In 1992, sections (b) through (e) were added to the existing power of appointment found within the NY EPTL.[64] Section (b)(1) gave a trustee who had absolute discretion to invade a trust for the benefit of an income beneficiary or beneficiaries, the power to appoint the principal of the trust into another instrument provided the consent of all interested persons was given.[65] This appointment could be done without prior court approval so long as the fixed income interest of any beneficiary

56. *See supra* notes 11-38 and accompanying text.

57. Wiedenmayer v. Johnson, 254 A.2d 534, 535 (N.J. Super. Ct. App. Div. 1969); *see also supra* notes 38-53 and accompanying text.

58. Diana S.C. Zeydel & Jonathan G. Blattmachr, *Tax Effects of Decanting-Obtaining and Preserving the Benefits*, 111 J. TAX'N 288, 289 (2009).

59. *See* Dan W. Holbrook, *Can't Trust a Trust? Decant!*, 40 TENN. B.J. 20, 21 n.3 (Aug. 2004); *see also* Simmons, *supra* note 8, at 271.

60. Alan Halperin & Michelle R. Wandler, *Decanting Discretionary Trusts: State Law and Tax Considerations*, 29 TAX MGMT. EST. GIFTS & TR. J. 219, 225 n.45 (2004).

61. Simmons, *supra* note 8, at 271.

62. Zeydel & Blattmachr, *supra* note 58, at 290.

63. *Id.*

64. Act of July 24, 1992, ch. 591, sec. 2, § 10-6.6, 1992 N.Y. Laws 3520, 3521 (codified as amended at N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney 2002 & Supp. 2014)).

65. § 10-6.6(b), 1992 N.Y. Laws at 3521.

was not reduced,[66] the exercise was in favor of the beneficiaries,[67] and there was no violation of the limitations imposed by NY EPTL 11-1.7.[68] Section (b)(2) allowed a court with proper jurisdiction to direct a trustee to appoint the trust in a similar fashion following a petition by the trustee and notice to interested parties.[69] Sections (c) through (e) discussed commissions of a trustee,[70] writing requirements,[71] and definitions of those requiring notice of the decanting.[72]

Section 10-6.6 of the NY EPTL has been amended three times since 1992. The 1995 amendment added paragraph (f), which defined the power in section (b) as a special power of appointment and acknowledged the limitations of the rule against perpetuities,[73] thus supporting the common law justification and parallel comparison with the property law power to invade principal.[74] The 2001 amendment[75] responded to IRS Treasury Regulation § 26.2554(b)(1)(ii), which exempts trusts from the GST only if a trustee could make distributions without the consent of beneficiaries.[76] The amendment removed any requirement of consent from beneficiaries in order to keep the benefit intact.[77]

Many states followed suit and enacted their own decanting statutes based upon New York's version.[78] While many of these states had similar provisions to the New York statute, others began to pass more permissive decanting statutes which did not require unlimited discretion to use the power.[79] The 2011

66. § 10-6.6(b)(1)(A), 1992 N.Y. Laws at 3521.
67. § 10-6.6(b)(1)(B), 1992 N.Y. Laws at 3521.
68. § 10-6.6(b)(1)(C), 1992 N.Y. Laws at 3521.
69. § 10-6.6(b)(2), 1992 N.Y. Laws at 3521.
70. § 10-6.6(c), 1992 N.Y. Laws at 3521.
71. § 10-6.6(d), 1992 N.Y. Laws at 3521.
72. § 10-6.6(e), 1992 N.Y. Laws at 3521.
73. Act of Aug. 2, 1995, ch. 479, sec. 1, § 10-6.6(f), 1995 N.Y. Laws 3332 (codified as amended at N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney 2002 & Supp. 2014)).
74. Halperin & Wandler, *supra* note 60, at 224.
75. Act of Aug. 20, 2001, ch. 204, sec. 1, §§ 10-6.6(b)-(d), (g), 2001 N.Y. Laws 1482 (codified as amended at EST. POWERS & TRUSTS LAW § 10-6.6).
76. Turano, *Practice Commentaries*, *supra* note 7.
77. *Id.*
78. *See* Simmons, *supra* note 8 at 272-73.
79. *See id.* (discussing several states who lacked a requirement of

amendment brought the New York decanting power back to the forefront of modern decanting statutes.[80] As previously discussed, the Legislature opened up the statute to enable decanting at a greater level, "believ[ing] it was too constricting to allow invasion for the purpose of creating another trust only when the trustee had absolute discretion."[81] Looking at the history of New York's decanting statute, it is evident that New York has made a great effort to remain a leading state in trust and estate law. The statute has gone through several evolutions and the most recent amendment attempts to keep New York in its leading role.[82]

II. Operation and Mechanics of Decanting Statutes

Different states have enacted decanting statutes, and each statute offers a different range of power to the trustee.[83] However, this Comment is focused on examining the New York decanting statute specifically. The 2011 amendment to the New York decanting statute is an example of the expansion of decanting power and the reestablishment of New York as a preeminent decanting state.[84]

Prior to discussing the operation of the statute, it would be useful to describe the terminology used when referring to the statute. The New York statute defines the terms for the purposes of the section in subsection (s).[85] The statute refers to both an "appointed trust," and an "invaded trust."[86] Additionally, the statute also makes reference to the term

"unlimited discretion.").

80. Ivan Taback & Nathaniel W. Birdsall, *The Ongoing Evolution of New York Trust Decanting*, 247 N.Y. L.J. S2, S2 (2012).

81. *See* Margaret Valentine Turano, *Supplementary Practice Commentaries*, *in* N.Y. EST. POWERS & TRUSTS § 10-6.6 (McKinney 2002 & Supp. 2014) [hereinafter Turano, *Supplementary Practice Commentaries*].

82. *See supra* notes 57-81 and accompanying text.

83. *See generally* Simmons, *supra* note 8, at 271-73 (discussing different state decanting statutes).

84. Act of Aug. 17, 2011, ch. 451, § 10-6.6, 2011 N.Y. Laws 1300 (codified as amended at N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney 2002 & Supp. 2014)); *see also* Taback & Birdsall, *supra* note 80, at S2.

85. *See* EST. POWERS & TRUSTS LAW § 10-6.6(s).

86. *Id.* § 10-6.6(s)(1), (6).

"principal."[87] The appointed trust is the trust that the principal is extracted from and the invaded trust is the trust that receives the trust principal.[88] Looking at it through the lens of a tangible example, the appointed trust serves as the "decanter," the invaded trust is the bottle of wine, and the principal is the wine itself.[89] An "authorized trustee" as to the invaded trust, is the trustee who has authority to utilize the decanting power authorized by statute.[90] When the statute refers to a "current beneficiary or beneficiaries," the reference is to "the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute principal at the time of the exercise of the power."[91] The statute also defines "unlimited discretion" as "the unlimited right to distribute principal that is not modified in any manner."[92] This definition is further enhanced by dispelling any limitation on "unlimited discretion" through words defining the power such as "best interests, welfare, comfort, or happiness."[93] The remainder of the terms defined in subsection (s) will be discussed as they are encountered.

The statute begins with a subsection that essentially derived from prior statute and codifies existing case law.[94] Subparagraph (a)(1) is essentially stating that when the decanting power is exercised beyond the allowable scope, the power "is valid to the extent it is allowed, and invalid as to the excess."[95] The following subsection, (a)(2), allows the power to be used to a lesser extent than allowed, unless the donor has provided otherwise.[96] The power to decant itself is more fully authorized in subsections (b) and (c) as discussed below.[97]

87. *Id.* § 10-6.6(s)(8).
88. *Id.* § 10-6.6(s)(1), (6).
89. For the definition of a wine decanter, see *supra* note 1.
90. *See* EST. POWERS & TRUSTS § 10-6.6(s)(6).
91. *Id.* § 10-6.6(s)(4).
92. *Id.* § 10-6.6(s)(9).
93. *Id.*
94. Turano, *Practice Commentaries*, *supra* note 7.
95. *Id.* (citing Hillen v. Iselin, 39 N.E. 368 (N.Y. 1895); *In re* Will of Block, 598 N.Y.S.2d 668 (Sur. Ct. N.Y. County 1993)).
96. *Id.*
97. *See infra* text accompanying notes 98-116.

The 2011 amendment essentially "create[d] two categories of decanting power, depending on whether the trustee has unlimited or limited discretion to invade principal on behalf of a beneficiary."[98] Subsection (b) as amended, continues to describe the power an authorized trustee with unlimited discretion has to invade trust principal, and appoint that principal to a new trust.[99] The power allotted to a trustee with unlimited discretion as outlined in subsection (b) is not new to the amendment.[100] When the trustee has unlimited discretion in the invaded trust, "the appointed trust must be for the benefit of one, more or all of the beneficiaries of the invaded trust, but not necessarily all" of them.[101] Specifically, the trustee is not bound to include the same beneficiaries of the invaded trust and is authorized to exclude one or more beneficiaries.[102]

Subsection (c) represents the major change in the 2011 amendment,[103] which extends decanting power to a trustee with "power to invade trust principal but without unlimited discretion."[104] An example of limited discretion would be a trust created by the settlor for the health, education, maintenance and support of the beneficiary.[105] The trustee may still use appointment powers, but the appointed trust must retain the current beneficiaries from the invaded trust, as well as the successor remainder beneficiaries.[106] This language also applies to a class designation, in which "the beneficiary or beneficiaries

98. Taback & Birdsall, *supra* note 80, at S2.

99. *See* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(d) (McKinney 2002 & Supp. 2014).

100. *See* Taback & Birdsall, *supra* note 80, at S2.

101. Turano, *Supplementary Practice Commentaries*, *supra* note 81.

102. *Id.*

103. Act of Aug. 17, 2011, ch. 451, sec. 2, § 10-6.6(c), 2011 N.Y. Laws 1300 (codified as amended at EST. POWERS & TRUSTS LAW § 10-6.6(c)).

104. EST. POWERS & TRUSTS § 10-6.6(c).

105. This specific example refers to a support trust which is defined as "[a] discretionary trust in which the settlor authorizes the trustee to pay to the beneficiary as much income or principal as the trustee believes is needed for support, esp. for 'comfortable support' or 'support in accordance with the beneficiary's standard of living.'" BLACK'S LAW DICTIONARY 1654 (9th ed. 2009).

106. MARTIN W. O'TOOLE ET AL., HARRIS 5TH EDITION N.Y. ESTATES: ESTATE PLANNING & TAXATION § 11:86 (5th ed. 2012).

of the appointed trust may include present or future members of the class."[107] The trust must also "include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust."[108] Additionally, if the trustee chooses to extend the life of the appointed trust beyond the applicable period of the invaded trust, the trustees must be given "unlimited discretion to invade the principal of the appointed trust" during the term that extends beyond the original term of years.[109] Lastly, if the invaded trust granted power of appointment to a beneficiary, the appointed trust must include this power, and the class of permissible appointees must remain the same as originally authorized in the invaded trust.[110]

The remainder of the statute contains provisions common to trustees with both unlimited and limited discretion.[111] In both instances, the authorized trustee has a fiduciary duty when exercising the power, to do so in the best interests of one or more beneficiaries, and must exercise the power "as a prudent person would exercise the power under the prevailing circumstances."[112] Like the pre-amendment statute, any invasion of the trust must still honor the settlor's wishes.[113] Essentially the trustee "cannot exercise the power . . . if there is substantial evidence that the creator would not have wanted the change."[114] Language in the original trust that "generally prohibit[s] amendment or revocation alone" is insufficient to serve as the required "substantial evidence."[115] Lastly, and the most important point to this Comment, the trustee can exercise the power without the consent of the creator, beneficiaries, or without court approval, "provided that the authorized trustee may seek court approval" after giving notice to all those

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *See id.*
112. N.Y. EST. POWERS & TRUSTS § 10-6.6(h) (McKinney 2002 & Supp. 2014).
113. Turano, *Supplementary Practice Commentaries*, *supra* note 81.
114. *Id.*
115. *Id.* For a discussion of potential issues with this standard see *infra* Part III.

interested in the invaded trust.[116]

III. Examining the Many Practical Uses of Decanting

It would be imprudent to avoid acknowledging the many practical uses that decanting offers to the trustee. As previously addressed, section 10-6.6 of the NY EPTL was passed to allow a trustee to take advantage of the available GST tax exemptions available.[117] But estate planners soon began to utilize the decanting statute to take advantage of a multitude of different tax benefits beyond its original purpose. These uses gained approval from the New York courts subsequent to the enactment of the statute.[118]

A. *Generation Skipping Transfer Tax*

26 U.S.C. § 2601 states, "[a] tax is hereby imposed on every generation-skipping transfer."[119] The GST tax is essentially a tax on both outright gifts and transfers in trust that are defined as "*inter vivos* direct skips."[120] The IRS defines an *inter vivos* direct skip as a transfer that is: (1) "[s]ubject to the gift tax," (2) "[o]f an interest in property," and (3) "[m]ade to a skip person."[121] The gift must meet all three requirements to be subject to the GST tax.[122]

A transfer being subject to the gift tax, is more clearly defined in Schedule A of IRS Form 709 which indicates which transfers are classified as taxable gifts.[123] GST may also affect nontaxable gifts if they are made to a trust for the benefit of an

116. EST. POWERS & TRUSTS § 10-6.6(j)(1).

117. *See supra* notes 7, 61-63, 75-77 and accompanying text.

118. Zeydel & Blattmachr, *supra* note 58, at 290-91.

119. 26 U.S.C. § 2601 (2012). Title 26 of the United States Code is the Internal Revenue Code. *See* Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29, 33 (2012).

120. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY , INSTRUCTIONS FOR FORM 709 7 (2014), *available at* http://www.irs.gov/pub/irs-pdf/i709.pdf (last visited Jan. 27, 2014) [hereinafter INSTRUCTIONS FOR FORM 709].

121. *Id.*

122. *Id.*

123. *See id.* at 6-7.

individual unless: "1. [d]uring the lifetime of the beneficiary, no corpus or income may be distributed to anyone other than the beneficiary, and 2. [i]f the beneficiary dies before the termination of the trust, the assets of the trust will be included in the gross estate of the beneficiary."[124]

After determining whether the transfer is subject to the gift tax, a determination must be made on whether the transfer consists of an interest in property, and whether it is made to a "skip person."[125] This is done by first ascertaining whether the "the donee is a 'natural person' or a 'trust.'"[126] The IRS definition of a trust for determining GST eligibility is more encompassing than the traditional definition[127] used by practitioners:

> For purposes of the GST tax, a *trust* includes not only an ordinary trust, but also any other arrangement (other than an estate) that although not explicitly a trust, has substantially the same effect as a trust. For example, a *trust* includes life estates with remainders, terms for years, and insurance and annuity contracts. A transfer of property that is conditional on the occurrence of an event is a transfer in trust.[128]

Natural persons are those who have an interest in the property

124. *Id.* at 7.
125. *Id.*
126. *Id.*
127. The more common definition of a trust is:

> The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*). For a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose. The two primary types of trusts are *private trusts* and *charitable trusts*.

BLACK'S LAW DICTIONARY 1647 (9th ed. 2009).
128. INSTRUCTIONS FOR FORM 709, *supra* note 120, at 7.

transferred to a trust as defined by the IRS.[129] The interest in the property can be either "a present right to receive income or corpus from the trust (such as an income interest for life) or is a permissible current recipient of income or corpus from the trust," including persons who possess a general power of appointment.[130]

The last requirement of the GST tax involves the determination of who is a "skip person" for purposes of the transfer.[131] A donee, who is a natural person, is considered a skip person if the person is "two or more generations below the generation assignment of the donor."[132] For more complex determinations of the generation of the donee and donor, the IRS includes direction on whether or not the donee has a familial relationship.[133] If the donee is a trust and all the interest in property is held by skip persons, or no interests in the property are currently held and the future interests are only held by skip persons, then the trust is considered a skip person.[134]

When utilizing the decanting statute, a trustee's primary concern with the GST tax is whether decanting will cause the trust that is currently exempt from GST taxation to lose its GST exempt status.[135] The exemption can either result from the trust having "grandfathered status" from before the institution of the GST tax, or from the allocation of a GST exemption.[136] Decanting is a useful tool in this area because it allows a trustee to appoint the exempt trust corpus into a new trust, thus extending the period in which the trust would be exempt from the tax.[137] This tool is allowed through the

129. *Id.* at 7-8.
130. *Id.* at 8.
131. *Id.*
132. *Id.*
133. *See id.*
134. *Id.*
135. Aghdami & Chadwick, *supra* note 10, at 7.
136. *See id.*; *see also* Jonathan G. Blattmachr et al., *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141, 166 (2012); Michael M. Gordon, Presentation to ALI-CLE Estate Planning in Depth at University of Wisconsin Law School: Use of State Decanting Statutes to Modify Irrevocable Trusts (June 26, 2013), *available at* http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/TSVB14_chapter_01_thumb.pdf.
137. 5-10 R. MARK DAVIS, NEW YORK CIVIL PRACTICE: EPTL ¶ 10-6.6[2][b]

Treasury Regulations, which "provide a set of rules and 'safe harbors' for grandfathered trusts in order to ensure that a decanting or modification of a grandfathered trust does not jeopardize [the] GST exempt status."[138] Treasury Regulation sections 26.2601-1(b)(4)(i)(A)[139] and 26.2601-1(b)(4)(i)(D)[140] provide these safe harbors, making the decanting tool an extremely useful mechanism for trustees. This benefit is also in line with New York's initial intended purpose for decanting.[141]

(2013).

138. Michael M. Gordon & Daniel F. Hayward, Presentation to Delaware Banker's Association: The Tax Consequences of Decanting: A Summary of the Gift, Estate, Income and Generation-Skipping Transfer Tax Considerations When Utilizing Delaware's Decanting Statute (Apr. 13, 2012), *available at*, http://gfmlaw.com/sites/default/files/pdfs/2012TaxConsequencesOfDecanting.pdf; *see* Aghdami & Chadwick, *supra* note 10, at 7-8.

139. Treas. Reg. § 26.2601-1(b)(4)(i)(A) (2004). Entitled the "Discretionary Test," the Regulation provides that:

> [D]ecanting will not taint GST-exempt status if the following conditions are satisfied: when the trust became irrevocable, either the terms of the trust instrument or local law (i.e., common law or state statute) authorize[d] the trustee to make distributions to a new trust; neither beneficiary consent nor court approval is required; and the new trust will not suspend or delay the vesting on an interest in trust beyond the federal perpetuities period, which is measured from the date the trust becomes irrevocable to the later of (i) some life in being plus twenty-one years or (ii) ninety years.

Aghdami & Chadwick, *supra* note 10, at 7.

140. Treas. Reg. § 26.2601-1(b)(4)(i)(D) (2004). If the decanting does not satisfy the "Discretionary Test," the decanting may still satisfy the "Modification Test," if it "does not shift a beneficial interest in the trust to a beneficiary occupying a lower generation than the person holding the interest under the original trust; and does not extend the time for vesting of any beneficial interest in the trust beyond the period provided in the original trust." Aghdami & Chadwick, *supra* note 10, at 7.

141. Holbrook, *supra* note 59, at 21 n.3; *see also* DAVIS, *supra* note 137, at ¶ 10-6.6[2][a][2] (discussing *In re* Genovese, 224 N.Y. L.J. 30, 30 (2000), a decision of the Nassau County Surrogate's Court where the court allowed a trust to be decanted into six separate trusts to preserve a GST exemption).

B. *Trust Situs*

The "situs" of a trust is the place where a trustee performs their active duties.[142] Trust situs "is determined by an interpretation of the words by which the trust is created" along with other factors such as "the parties' intention, the trustee's place of business or domicile, and the location of the trust res."[143] Of these factors, "the settlor's intent, if it can be ascertained, has been increasingly emphasized."[144] Additionally, if the settlor selects a bank or trust company to act as trustee, the state where either is located is held to be the situs.[145] If the foregoing rule is inapplicable, other circumstances may be considered such as "the domicile of the settlor, the situs of the trust res, or other similar circumstances."[146] This has led to differing holdings on the importance of the place of execution of the trust instrument, or the domicile of the beneficiaries.[147]

The importance of trust situs ties directly into the beneficial use of decanting for many reasons. Different states look to generate revenue in different ways, and one of these ways is "enacting laws to attract business."[148] Grantors, beneficiaries, and fiduciaries now focus on identifying which states provide greater protection or flexibility on several different issues.[149] Several of these important issues include the lack of a rule against perpetuities enabling the maximum optimization of tax exemptions for GST, no state income tax on gains for non-grantor trusts, privacy on trust provisions and assets for grantors or beneficiaries, greater asset protection

142. 90 C.J.S. *Trusts* § 224 (2013).

143. *Id.* "Trust Res" is another term for corpus which is defined as "[t]he property for which a trustee is responsible; the trust principal." BLACK'S LAW DICTIONARY 395 (9th ed. 2009).

144. 90 C.J.S. *Trusts* § 224 (2013).

145. *Id.* This also holds true if the principal office of the bank or trust company is used to determine the situs. *Id.*

146. *Id.*

147. *Id.*

148. Douglas Moore, *Situs Shopping*, TR. & EST., Jan. 2010, at 33, *available at*, http://wealthmanagement.com/practice-management/situs-shopping-0.

149. *Id.*

against creditors, greater flexibility to use decanting mechanism, and greater allowance of a modification of trust provisions.[150]

Noting all these important issues that estate planners are monitoring, decanting can be an important tool in changing the situs of a trust.[151] By changing the situs of a trust one might be able to capitalize on several tax benefits, or obtain more flexibility for the trust.[152] An example of this would be "if property of an irrevocable trust is administered in [a state] for the benefit of [that state's] residents, trust property could be decanted to a trust with a situs in another state that does not tax income of a trust administered for the benefit of nonresidents."[153] Even if the trust itself does not allow a change of a trust's situs or principal place of administration, decanting can still "be used to modify the trust to permit changes to the trust's governing law, situs, or principal place of administration."[154]

B. *Modifying a Trust to Address a Change in Circumstance*

In addition to the various tax benefits realized by the use of trust decanting, the mechanism serves other valuable functions to the modern estate planner. It may become apparent that a trust no longer serves its purpose properly in the eyes of the attorney or the beneficiary. Various circumstances may arise that could not possibly be foreseen by the settlor of the trust, and may warrant a change to the instrument to better reflect common trends and usefulness.

Different scenarios present a strong justification for attorneys to make the decision of advising their client to decant. One such circumstance that has prompted decanting includes the change of realistic and beneficial investment options that are limited by the terms of a trust. An example

150. *Id.*

151. William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 15 (2010).

152. *See id.*; *see also* Moore, *supra* note 148, at 33-34.

153. Culp & Mellen, *supra* note 151, at 15.

154. *Id.* at 15-16.

might be a trust that has limited its investments to United States stocks or bonds, which in today's world, is a very limited form of investment and arguably does not constitute the best use of the principal in the trust.[155] By decanting the assets of the trust into a new appointed trust, the trustee could broaden the scope of allowable investments and thus make better use of the principal.

An attorney might also advise the use of decanting if the circumstances of the beneficiaries have changed since the time of the trust's creation. This scenario can present itself in a multitude of ways. One such scenario might be the creation of a trust by the settlor to care for his family for life. At some point that family line may dwindle to one person who does not care to have children, at which point if the last beneficiary passes, the corpus would go to distant relatives.[156] Decanting the trust would allow the beneficiary to modify the terms if he/she so chooses, and have the principal pass to a charity or other beneficiary of his choosing.[157] A trustee may also choose to utilize decanting power to:

> [L]imit[] distributions to beneficiaries with substance abuse problems or those engaging in other unproductive behaviors; transfer[] assets to a special needs trust for a disabled beneficiary; limit[] beneficiary rights to obtain information about the nature and extent of their trust interest by moving assets to a state . . . where the trustee's duty to provide such information can be restricted; divid[e] single "pot" sprinkle trusts into separate trusts for each branch of the family; or eliminat[e] a beneficiary altogether.[158]

There is also the possibility that the financial circumstances of the beneficiaries have changed, thus warranting a change in the distribution of the trust's principal.

155. *See* Arden Dale, *Getting Personal: Rule Book to Decant Trusts May Change*, DOW JONES NEWSWIRE, June 18, 2012.

156. *Id.*

157. *Id.*

158. Aghdami & Chadwick, *supra* note 10, at 3.

If a trust is set to pay two children, one who is wealthy and another who is not, the trust can be modified through the use of decanting to better care for the less fortunate beneficiary.[159] This example is one of the many issues that is discussed further in the following section as a possible harm realized by the use of decanting.[160]

IV. The Inherent Flaws of Decanting

Along with the many useful functions of decanting that were discussed in the previous part comes uncertainty, and perhaps a call for reflection, on whether decanting conforms with past protections of settlor intent. The justification for allowing decanting is clear through the many uses that trustees have found for the function. But sensible thought asks that the legal scholar and practicing attorney reflect on what the potential impact and implications are of allowing such power. Additionally, trustees remain in limbo regarding the potential tax consequences of their action. Although an answer regarding this treatment appears to be forthcoming from the IRS, it may be an answer that trustees are not happy to hear.

A. *Uncertainty of Tax Ramifications*

On December 27, 2011, the IRS issued Notice 2011-101 in Internal Revenue Bulletin 2011-52, requesting comments

> [R]egarding when (and under what circumstances) transfers by a trustee of all or a portion of the principal of an irrevocable trust (Distributing Trust) to another irrevocable trust (Receiving Trust), sometimes called "decanting," that result in a change in the beneficial interests in the trust are not subject to income, gift, estate, and/or generation-skipping transfer (GST)

159. Dale, *supra* note 155. This example assumes that the invaded trust specifies that the beneficiaries are to receive equal distributions from the trust.

160. *See infra* Part IV.B.

taxes.[161]

Previously, the IRS had issued private letter rulings ["PLRs"] on transfers resulting in a change in beneficial interests,[162] but the notice stated that there would be no further PLRs while the issue was under study.[163]

The Treasury Department and the IRS invited comments from the public on "relevance and effect of the various facts and circumstances . . . [and] other factors that may affect the tax consequences."[164] The Treasury Department and IRS identified the following 13 potential facts and circumstances that might potentially affect one or more tax consequences:

> 1. A beneficiary's right to or interest in trust principal or income is changed (including the right or interest of a charitable beneficiary); 2. Trust principal and/or income may be used to benefit new (additional) beneficiaries; 3. A beneficial interest (including any power to appoint income or corpus, whether general or limited, or other power) is added, deleted, or changed; 4. The transfer takes place from a trust treated as partially or wholly owned by a person under §§671 through 678 of the Internal Revenue Code (a "grantor trust") to one which is not a grantor trust, or vice versa; 5. The situs or governing law of the Receiving Trust differs from that of the Distributing Trust, resulting in a termination date of the Receiving Trust that is subsequent to the termination date of the Distributing Trust; 6. A court order and/or approval of the state Attorney General is required for the transfer by the terms of the Distributing Trust and/or applicable law; 7. The

161. I.R.S. Notice 2011-101, 2011-52 I.R.B 932 [hereinafter IRS Bulletin 2011-52].

162. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200607015 (Feb. 17, 2006).

163. IRS Bulletin 2011-52, *supra* note 161.

164. *Id.*

> beneficiaries are required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law; 8. The beneficiaries are not required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law; 9. Consent of the beneficiaries and/or a court order (or approval of the state Attorney General) is not required but is obtained; 10. The effect of state law or the silence of state law on any of the above scenarios; 11. A change in the identity of a donor or transferor for gift and/or GST tax purposes; 12. The Distributing Trust is exempt from GST tax under §26.2601-1, has an inclusion ratio of zero under §2632, or is exempt from GST under §2663; and 13. None of the changes described above are made, but a future power to make any such changes is created.[165]

After Notice 2011-101 was issued, several agencies submitted comments suggesting different forms of tax treatment on each of the issues identified.[166]

Despite the comments submitted by these different organizations, in Internal Revenue Bulletin 2013-1,[167] the IRS declined to make a ruling, and stated that "rulings or determination letters will not be issued until the service resolves the issue through publication of a revenue ruling, a revenue procedure, regulations or otherwise."[168] By doing so, the IRS has essentially left estate planners with no answer

165. *Id.*

166. *See, e.g.*, Letter from Sharon Klein, Chair, Comm. on Trusts, Estates & Surrogate's Courts, N.Y. City Bar & Brit L. Geiger, Comm. on Estate & Gift Taxation, N.Y. City Bar, to Internal Revenue Serv. (on file with author), *available at* http://www2.nycbar.org/pdf/report/uploads/20072279-CommentstotheIRSonNotice2011-101.pdf; Letter from Louis A. Mezzullo, President, The Am. Coll. of Trust & Estate Counsel, to Internal Revenue Serv. (Apr. 2, 2012) (on file with author), *available at* http://www.actec.org/Documents/misc/Mezzullo_Comments_04_02_12.pdf; Letter from Richard E. Piluso, President, N.Y. State Soc'y of Certified Pub. Accountants, to Internal Revenue Serv. (Apr. 19, 2012) (on file with author), *available at* http://www.nysscpa.org/commentletter/irs101.pdf.

167. Rev. Proc. 2013-3, 2013-1 I.R.B. 5 [hereinafter IRS Bulletin 2013-1].

168. *Id.*

regarding the potential tax treatment of decanting a trust. The United States Constitution gives Congress the broad "[p]ower to lay and collect [t]axes" and does not limit this power to any particular circumstance.[169] Knowing this, by advising clients to utilize decanting, there is a level of uncertainty as to how this action will be treated in a tax sense. The bulletin itself acknowledges that the IRS is withholding judgment for the moment on issues such as whether "a change in beneficial interest is a gift,"[170] or whether "a change in beneficial interest [should result] i[n] the loss of GST exempt status or constitutes a taxable termination or taxable distribution."[171] However, this should not be understood to mean that the IRS has lost interest in decanting. Catherine Hughes, Attorney Adviser for the Treasury of Tax Legislative Counsel, stated that the IRS will focus on decanting "in a big way" and the comments that have been submitted are being reviewed.[172] She also stated that "[t]he project was omitted from the plan because the IRS didn't think it would be able to publish the rules by the end of this plan year."[173]

It is possible that "by understanding the risks and taking the proper precautions, a trustee may decant the assets of an irrevocable trust to a new trust with minimal tax consequences."[174] However, it still must be noted that "without due consideration of all relevant factors, the decanting could result in unintended tax consequences."[175] But even this thought presents a problem moving forward for a trustee. The landscape of decanting is riddled with uncertainty as to the tax ramifications. Even with "due consideration" there is no accurate predictor of how the IRS might treat these issues, as evidenced by the Service's reluctance to accept the comments and issue a ruling. The IRS bulletin at least acknowledges that the Service is at least considering whether or not these

169. U.S. CONST. art. I, § 8, cl. 1.

170. IRS Bulletin 2013-1, *supra* note 167, at § 5, ¶ 23.

171. *Id.* at § 5, ¶ 24.

172. Marie Sapirie, *ABA Meeting: Trust Decanting Rules Still Getting IRS Attention*, TAX NOTES TODAY, May 13, 2013, *available at* Lexis 2013 TNT 92-28.

173. *Id.*

174. Aghdami & Chadwick, *supra* note 10, at 4.

175. *Id.* at 9.

transfers result in gifts, taxable terminations or distributions.[176] But as Catherine Hughes has noted, the IRS has not forgotten about decanting.[177] Whether this is good news or bad news is yet to be seen. Yet, as of the moment, trustees continue to freely utilize the decanting power, essentially stepping into the abyss of tax uncertainty.

B. *Frustrating Settlor Intent*

The *Wiedenmayer* dissent sets the premise of this subpart by acknowledging "the potential controversy of trust decanting as well as its true breadth and power."[178] Section 10-6.6 of the NY EPTL allows the modification of a trust if the trustee can demonstrate that the settlor would likely have made the change.[179] Generally speaking, trust law in the United States has historically recognized "the settlor's intent []as the defining force in trust law — the 'polestar' which guided all aspects of trust administration."[180] There were few exceptions to the general rule "limited to cases where a trust provision encouraged illegal activity, fostered immorality, or otherwise violated public policy."[181] Beyond the rare exception, the settlor made the decision on what provisions and terms would best

176. *See supra* notes 170-71 and accompanying text.

177. *See* Sapirie, *supra* note 172.

178. Simmons, *supra* note 8, at 261.

179. *See* Turano, *Supplementary Practice Commentaries*, *supra* note 81.

180. Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, The Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1171 (2008) (citing *In re* Sherman Trust, 179 N.W. 109, 112 (Iowa 1920)).

181. *Id.* The author cites to several cases for each exception to the general rule. For an example of an unenforceable settlor intention to promote illegal activity, see *In re* Estate of Sage, 412 N.Y.S.2d 764, 769 (Sur. Ct. Albany County 1979) ("A trust is a legal device which provides for the use of one's funds for others in a specified manner. As a legal device, it comes within the ambit of our legal system. As such, it cannot become a vehicle for illegal conduct or activity."). For an example of an unenforceable trust provision fostering of immorality, see Kingsley v. Broward, 19 Fla. 722, 745 (1883) ("A trust for illegitimate children to be thereafter begotten will not be enforced, as being against good morals."). And lastly, for an unenforceable settlor intent that violated public policy, see Girard Trust Co. v. Schmitz, 20 A.2d 21, 27-37 (N.J. Ch. 1941) (voiding provisions in a trust that obstructed the relationships of the settlor's siblings).

serve the beneficiaries.[182]

New York courts have made various decisions that indicate the settlor's intent is always paramount in interpreting trust construction.[183] For example, in 1929 the court in *Holbert v. Jackson*[184] interpreted an instrument purporting to revoke a trust.[185] The settlor wrote to a trustee expressing a desire to revoke a prior deed of a trust, but did not sign a formal revocation of the trust.[186] The court found that there was clear evidence that the settlor "*intended* to revoke the [initial] trust," which was fully revocable by the settlor.[187] Furthermore, the settlor executed a different trust distributing shares of a company to different persons, and when the court was asked to again interpret the provisions of a trust and the discretion afforded a trustee it again acknowledged that "[t]he important consideration in construing the deed of trust is wherever possible to give effect to the intention and purpose of the settlor."[188]

In the case of *In re Marine Midland Bank-Western*,[189] the Appellate Division stated that "[t]he settlor's intention as expressed in the agreement is, of course, the most important consideration."[190] The court was analyzing provisions in the trust that called for distribution of the principal to the settlor's seven different children.[191] The controversy in the case dealt with whether or not the provisions in the trust established that the interests of grandchildren vest conditionally upon their survival to the termination of the trust or immediately upon the death of their parent.[192] The court decided that the trust vested immediately upon the death of the parent, crafting its holding around the "settlor's paramount concern" which was

182. Cooper, *supra* note 180, at 1171-72.
183. *See infra* notes 184-97 and accompanying text.
184. 235 N.Y.S. 642 (Sup. Ct. 1929).
185. *Id.* at 643-45.
186. *Id.* at 643-44.
187. *Id.* at 644.
188. *Id.* at 645.
189. 389 N.Y.S.2d 705 (App. Div. 1976).
190. *Id.* at 707 (citation omitted).
191. *Id.* at 706.
192. *Id.* at 707.

"the encouragement of his bloodline."[193]

Various other cases involving trust construction demonstrate that historically the court has made the settlor's intent the absolute most important factor in the interpretation of trust provisions.[194] The notion is not limited to a historical context either, as courts still maintain this ideology in recent cases.[195] Additionally, the protection of settlor/testator intent is not limited to trust construction, as it remains the most important factor in determining will provisions,[196] and the creation of easements.[197] Despite the evidence of New York courts' deference to the settlor's intent in these various proceedings, section 10-6.6 of the NY EPTL opens the door for a

193. *See id.* at 706-08.

194. *See In re* Hooker's Trust, 233 N.Y.S.2d 947, 949 (Sup. Ct. 1962) (stating that "[t]he paramount rule in the construction of inter vivos as well as testamentary trusts is to ascertain and effectuate the intent of the trust settlor or testator" in determining the proper beneficiaries); *In re* Glorney's Trust, 109 N.Y.S.2d 898, 908 (Sup. Ct. 1951) (pointing out that the fundamental problem in a trust construction was "ascertaining the intent of the creator of the estate" in determining if the settlor had created "a remainder interest in his heirs or reserved a reversion for himself."); *In re* Estate of Petty, 357 N.Y.S.2d 592, 595-97 (Sur. Ct. N.Y. County 1974) (following the reasoning that "the intention of the grantor [is] paramount" in determining that the settlor did not intend on including adopted children as beneficiaries).

195. *See In re* Myers, 845 N.Y.S.2d 510, 513 (App. Div. 2007) (acknowledging the grantor's intent as the most important consideration when determining that the respondent could not be compelled to transfer property immediately); *In re* Rivas, No. 2000 LT 00007/B., 2011 WL 32792, at *4 (N.Y. Sur. Monroe County Jan 5. 2011) (stating that the "the efforts of the court should always be directed toward the discovery of the intent of the settlor as it is expressed in the instrument" when determining whether an advisory committee could act without the permission of a trustee) (citation omitted); *In re* Kline Revocable Trust U/A Dated September 9, 1971, 763 N.Y.S.2d 721, 726-27 (Sur. Ct. Fulton County 2003) (ascertaining the settlor's intention through surrounding circumstances to determine which trust document best reflected the settlor's wishes in regards to differing payment provisions).

196. *See In re* Estate of Singer, 920 N.E.2d 943, 946 (N.Y. 2009) (stating that "[t]he paramount consideration in will construction proceedings is the testator's intent" when determining whether or not to enforce a clause in the testator's will) (citation omitted).

197. *See* Busch v. Harrington, 880 N.Y.S.2d 774, 776 (App. Div. 2009) (stating that the determination of whether an easement was created was determined based on the intention of the parties and identifying the important indicators of a grantor's intent).

trustee to interpret this intent with little obstruction.[198] As in the circumstance of the siblings who are in unequal financial position, who is to say the settlor intended to provide for them based on the financial situation at the time of distribution? In fairness, the settlor could have held the belief that both should receive an equal amount regardless of financial situation. Conceivably, the financial situation of the beneficiaries could change after the distribution of the principal. Is the trustee's judgment to modify the trust reversible, or is the sibling who had the misfortune of a change in financial circumstance post-distribution left with no remedy?

This argument finds its basis in the idea that a trustee is operating with unlimited discretion, as even though the amendment affords those with limited discretion the right to decant, the beneficiaries cannot change.[199] Even in the situation where unlimited discretion is afforded to the trustee to invade the principal, this power affords the trustee power to modify the beneficiaries initially set by the settlor.[200] Proponents of decanting might argue that this ideal is similar to following the grantor's intent in a trust construction. However, the difference is that the construction involves interpretation of existing terms, while decanting involves a *modification* or *change* in the existing terms based on the idea that the settlor would take the same course of action. Furthermore, decanting is especially alarming because of the legislature's removal of direct judicial oversight of the use of this power.[201] The idea that a settlor would modify a trust to avoid potential tax consequences or to take advantage of tax

198. This is evidenced by different objectives that decanting has been used to accomplish. Specifically, the scenario that modifies the interests of different beneficiaries is concerning in the context of honoring a settlor's intent. For a more complete discussion of different modifications to trusts accomplished through decanting see *supra* Part III.C. Additionally, as previously mentioned, section 10-6.6(j) of the NY EPTL allows this modification without judicial, beneficiary or settlor oversight. *See* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(j)(1) (McKinney 2002 & Supp. 2014); *see also supra* note 116 and accompanying text.

199. Katherine E. Cauley & Britta L. McKenna, *Broadening New York's Decanting Statute; 'Unlimited Discretion' Makes a Principal Difference*, 246 N.Y. L.J. S1, S1 (2011).

200. *Id.*

201. EST. POWERS & TRUSTS § 10-6.6 (j)(1).

benefits is a simple concept to grasp. But to modify the interests of beneficiaries and the amount of beneficiaries under the premise that the settlor, who can no longer answer for himself, would choose to make the same change is drastically adverse to the idea of protecting their intent.

Conclusion

The power to decant owes its creation to common law roots,[202] but the New York legislature has opened up its power to an unimaginable level. A trustee with unlimited discretion in the trust is theoretically operating within the scope of the settlor's intent because of the amount of power initially bestowed upon them. But is a trustee with "unlimited discretion" truly operating within the settlor's intent when he modifies the beneficiaries that the settlor, presumably chose carefully at the time of the trust's creation? The statute itself creates a situation where settlor intent is merely passed over to effectuate what the trustee believes should be done. Because there is no judicial oversight of the process, it essentially feels as if the court has abandoned its historical protection of the settlor's intent.

With the many benefits borne through the use of decanting, it appears to be here to stay. But does the statute allow a trustee too much power to essentially dispel the settlor's original intentions? A solution would be to simply limit the use of trust decanting to a more certain use that is undoubtedly in line with the settlor's intent, to avoid taxes or to capitalize on tax benefits. But even this use should leave the trustee weary in light of the uncertainty left by the IRS's recent comments and action (or inaction). The obvious risk surrounding this uncertainty should lead the trustee, or attorney who advises the use of this action, to wonder if their actions might lead to the enjoyment of an exquisite vintage, or the disappointment of sipping vinegar.

202. *See supra* Part I.