

Update on Trust Decanting and Pretermitted Heirs in New Hampshire

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Pleadings bank

Court orders

Law summaries

Commentary

Decanting Overview

Statutory Authority to Decant – RSA 564-B:4-418

- a) Administrative matter of the trust
- b) Permitted to change standard for distribution
- c) Permitted to make the trust terms longer
- d) Permitted to eliminate beneficiaries, but not add beneficiaries

Decanting Overview

Limitation on Ability to Decant

- a) Must be consistent with the material purposes of the original trust, and be consistent with the settlor's intent
- b) May not reduce or eliminate a vested interest of a beneficiary
- c) May not decant into a new trust that would jeopardize a deduction, credit, exclusion, or exemption, that the first trust qualified for, or jeopardize a beneficiary's benefits
- d) Specific rules apply if the trustee is also a beneficiary

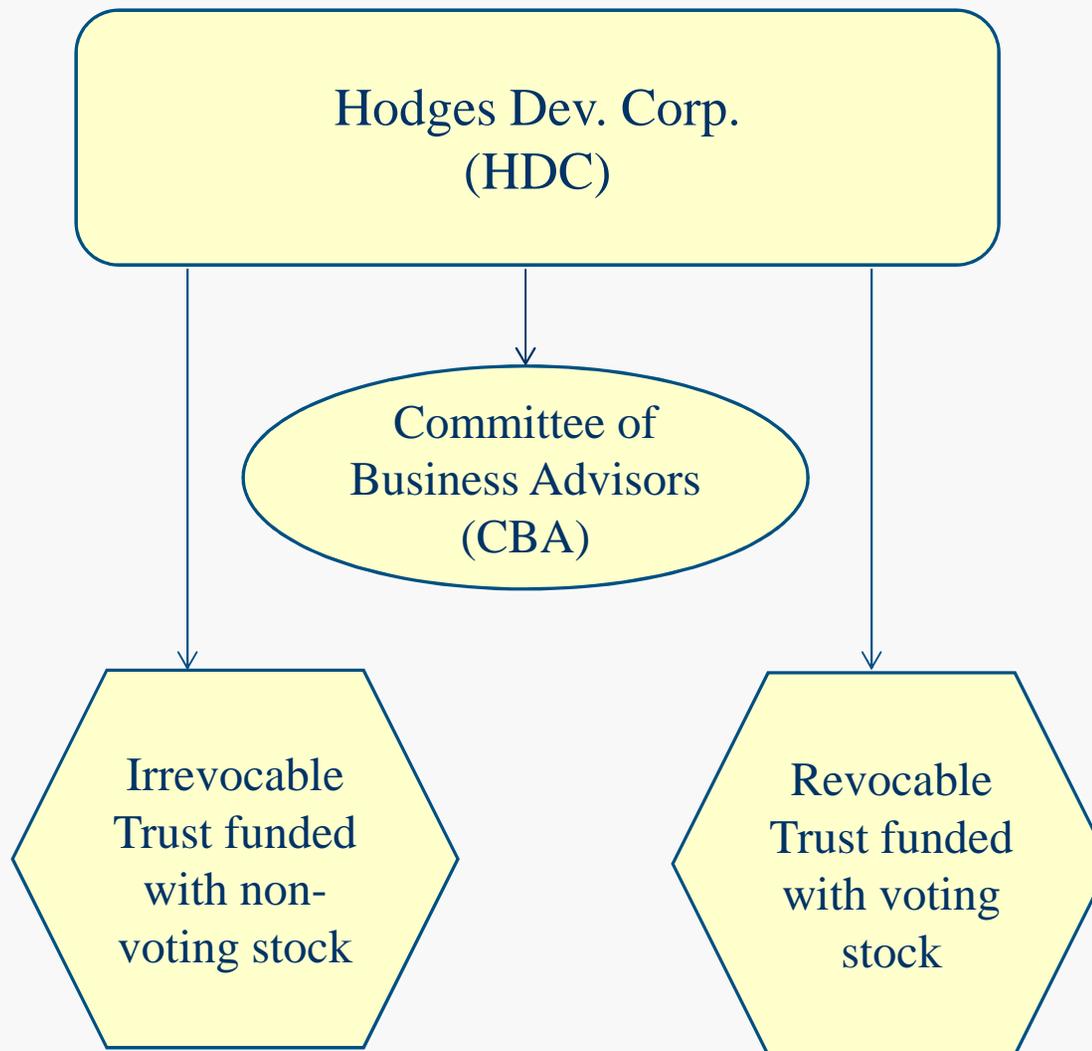
Decanting Overview

Mechanics of the Decanting

- a) If all of the first's trust's property is decanted, the first trust terminates.
- b) Real property and contractual rights are vested in the second trust.
- c) Liabilities of the first trust become liabilities of the second trust.

Hodges v. Johnson,

177 A.3d 86 (N.H. 2017)



Cast of Characters

- a) Settlor and Founder of HDC
- b) Five children
- c) Settlor's spouse
- d) AJ – Executive of HDC, Trustee, & on CBA
- e) WS – Counsel to HDC, Trustee, & on CBA
- f) JM – Estate planning counsel to David Sr., Temporary Decanting Trustee, and Temporary Distributee Trust Trustee

2004 Exempt and Non-Exempt Trusts of the Irrevocable Trust

- a) Hold most shares of HDC (non-voting)
- b) WS and AJ are Co-Trustees
- c) Irrevocable (decanted from prior trusts)
- d) During life of Settlor, spouse and children have:
 - i. Rights of withdrawal upon contributions to Trusts; and
 - ii. Rights to distributions of P/I in Trustee's discretion
- e) Upon death of Settlor, spouse if surviving is primary beneficiary and children have discretionary interests only
- f) Upon death Settlor and spouse, shares allocated into trusts for Settlor's descendants

Important Trust Provisions

- Express power to distribute to “designee trusts” for benefit of one or more beneficiaries
- “It is my desire, but not direction, that Business Interests not be distributed to any beneficiary, but rather remain in trust, so that they may be managed by the Committee of Business Advisors....”
- “It has been my experience that retaining cash and other liquid assets in the Corporation and my other businesses is necessary and desirable for the long-term success and viability of each such business. Accordingly, it is my strong desire and intent that each business retain, and not distribute to its shareholders and owners, cash and other liquid assets, so as not to endanger the viability of such businesses.”
- No contest provisions

The Family / Business Discord

- a) One child believed that he had been promised he would take over HDC and learned that AJ would be appointed President leading to family discord and ultimately termination of child's employment
- b) Discord between Settlor and another child over HDC work and other issues
- c) Settlor and spouse divorced

The Decanting Rationale

Continued involvement of dissident family members as beneficiaries is undesirable because may interfere with operations of HDC

Law Relied On By the Trustees

- a) Distribution subject to discretion “is neither a property interest nor an enforceable right, but a mere expectancy,” NHTC 814(b)
- b) If distributions can be made among a class of beneficiaries “without a standard to guide the trustee..., then the trustee may make” unequal distributions “and may make distributions entirely to one beneficiary to the exclusion of the other beneficiaries,” NHTC 814(c)
- c) A trustee with discretion to make distributions may appoint property to another trust “for the benefit of one or more of the beneficiaries,” NHTC 418(a)

The Contested Decantings

- a) 2010 – Decanted assets* to Distributee Trusts that reduced beneficial interests of 2 children
- b) 2012 – Superseded 2010 decanting and decanted assets* to Distributee Trusts that eliminated beneficial interests of 3 children
- c) 2013 – Superseded 2012 decanting and decanted assets* to Distributee Trusts that eliminated beneficial interests of 3 children and spouse

*Transfer of assets to occur immediately on Settlor's death

The Decanting Process

- a) Settlor approached his lawyer JM re concerns about family/business discord and JM approached Trustees
- b) Trustees decided to decant
- c) AJ resigned and Settlor appointed JM Trustee
- d) WS as Trustee delegated decanting power to JM as Trustee
- e) JM signed decanting instruments as Decanting Trustee and Distributee Trust Trustee
- f) JM resigned and Settlor reappointed AJ as Trustee

NH Probate Court Voids All Three Decantings

- a) Trustees failed to give “due consideration to the rights and expectancies of the beneficiaries as they are delineated in the trust” as required by NHTC 801
- b) Very critical about the lack of documentation of any deliberative process
- c) Characterized Settlor as the “driving force” for the changes
- d) Skeptical of the Trustees’ rationale given: CBA’s control over the business; the directives in the Trust for management of the business; the non-voting nature of the stock held by the Trust; and fact that no-contest clause should disincentive bad behavior

NH Supreme Court Affirms

- a) “Trial court mistakenly construed the phrase ‘interests of the beneficiaries [under NHTC 801] to impose the same duty upon a trustee as the statutory and common law duty of impartiality”
- b) Affirmed on grounds that this was in fact a breach of the duty of impartiality
- c) Classification of beneficiaries interests as “neither a property interest nor an enforceable right, but a mere expectancy” does not eliminate the duty of impartiality

Options for Trustees in Decanting

a) Notice to Beneficiaries

The right of any beneficiary to object to a proposed decanting terminates if the beneficiary does not notify the trustee of an objection within 60 days after the proposal was sent to the beneficiary but only if the proposal informed the beneficiary of the right to object and the time allowed for objection.

b) Court Approval

A trustee or any other interested person may ask the court to approve a decanting.

Options for Trustees in Decanting

c) Change Distribution Standard or Add Power of Appointment

- Change from an ascertainable standard to uncontrolled discretion by the trustee
- Change from separate shares to a common pool trust
- Change from distributions at a specific age to holding for the lifetime of the beneficiary
- Give one or more of the current beneficiaries a power of appointment

Other Options for Modifying a Trust

a) Trustee's Power of Modification – RSA 564-B:4-419

A trustee unilaterally modifies a trust to further a settlor's intent or material purpose, preserve favorable tax treatment, enhance efficient administration, or minimize the cost of administration.

b) Nonjudicial Settlement Agreements – RSA 564-B:1-111

The interested persons enter into an agreement, which can among other things, terminate or modify the terms of a trust.

Pretermitted Heirs

Pretermitted Heirs

- RSA 551:10:

Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate.

Pretermitted Heirs

- RSA 564-B:1-112:

The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property. For the purposes of this section, RSA 551:10 is not a rule of construction. RSA 551:10 shall not apply to any trust.

Pretermitted Heirs

Requirements for Application:

1. Child is born after decease of the testator; or
2. Child is not named in Will;
3. Child is not referred to in Will; and
4. Child is not a legatee under the Will

Pretermitted Heir Scenarios

Will does not name or reference Claimant, but references Claimant's child (grandchild of testator)

Gage v. Gage, 29 N.H. 533 (1854)

Pretermitted Heir Scenarios

Claimant is named in Will as husband of a legatee

Boucher v. Lizotte, 85 N.H. 514 (1932)

Pretermitted Heir Scenarios

Claimant child is not mentioned in the Will but it refers to “children”

Smith v. Smith, 72 N.H. 168 (1903)

Pretermitted Heir Scenarios

Claimant relative is not mentioned in the Will, but it refers to “heirs” or “next of kin”

In re Estate of MacKay, 121 N.H. 682 (1981); In re Estate of Robbins, 756 A.2d 602 (2000)

Pretermitted Heir Scenarios

Claimant child is not named in most recent codicil,
but is named in Will provision revoked the codicil

In re Estate of Osgood, 122 N.H. 961 (1982)

Pretermitted Heir Scenarios

Claimant child is named in prior Will, but not in later Will revoking prior Will

In the Matter of Jackson, 117 N.H. 898
(1977)

Pretermitted Heir Scenarios

Claimant child is not named or referenced in Will, but is named in trust that Will says is excluded from the estate

In re Estate of Came, 129 N.H. 544 (1987)

Pretermitted Heir Scenarios

Claimant child is not named or referenced in pour-over Will, but is named in trust beneficiary of the Will

In re Teresa Craig Living Trust,
2017-0532

Case addressed the question of whether RSA 551:10, the New Hampshire pretermitted heir statute, applies to trusts through the New Hampshire Trust Code, prior to revisions to RSA 564-B:1-112.

In re Teresa Craig Living Trust, 2017-0532

- Teresa Craig had two children: Michael and Sebastian.
- Michael predeceased Teresa in 2007 leaving two children, Teresa's grandchildren.
- The beneficiary of Teresa's will was her trust. Her will included the standard language that she intentionally made no provision for any child or the issue of any child.
- The trust left everything to Sebastian and his descendants.
- Michael's two children brought the case seeking a determination that they were pretermitted heirs under the trust and arguing that the pretermitted heir statute applies to trusts as a rule of construction under RSA 564-B:1-112.

In re Teresa Craig Living Trust,
2017-0532

The Court concluded that the pretermitted heir statute is not a rule of construction but a rule of law and does not apply to trusts under RSA 564-B:1-112.

Pretermitted Heir – Possible Changes

Possibility of adopting something more like the Uniform Probate Code provisions.

Pretermitted heirs are essentially limited to children born or adopted after the execution of the will and not foreseen at the time, and those rare case where a testator omits one of his or her children because of the mistaken belief that the child is dead.

Thank You