
Trusts—Trustee’s Decanting Power Derived from Irrevocable Trust Language—*Morse v. Kraft*, 992 N.E.2d 1021 (Mass. 2013)

A trustee’s discretion is generally constrained by statute, by the terms of the trust, and by the trustee’s fiduciary duty to act in the beneficiaries’ interests.¹ When a trustee, acting within the scope of that discretion, distributes trust property into a new trust, that distribution is called “decanting.”² In *Morse v. Kraft*,³ the Massachusetts Supreme Judicial Court (SJC) considered whether the broad discretion afforded to a trustee under the terms of an irrevocable trust included the power to decant.⁴ Holding that it did, the SJC nevertheless declined to adopt the Boston Bar Association’s (BBA’s) preferred position that such power is inherent in all trustees of irrevocable trusts.⁵

In 1982, the Kraft Irrevocable Family Trust (1982 Trust) was established for the benefit of Robert and Myra Kraft’s four sons.⁶ The 1982 Trust contained four subtrusts, each for the benefit of one of the four sons.⁷ Robert and Myra Kraft’s grandchildren were the contingent remainder beneficiaries of these subtrusts.⁸ The 1982 Trust prohibited the sons from serving as disinterested trustees and making decisions regarding distributions.⁹ The sons’ powers were so limited because in 1982 the sons were minors and “it was impossible to know whether they would develop the skills and judgment necessary to make

1. See MASS. GEN. LAWS ANN. ch. 203E, § 105(a) (West 2014) (introducing duties and powers of trustees); RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2007) (noting trustee’s fiduciary duty of loyalty to trust beneficiaries’ interests or charitable purpose). Massachusetts law identifies a handful of specific exceptions to the general rule that when the terms of a trust conflict with statutory law, the trust terms shall prevail. See ch. 203E, § 105(b).

2. See 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, 2 (2010) (defining decanting). “Decanting is the term generally used to describe the distribution of trust property to another trust pursuant to the trustee’s discretionary authority to make distributions to, or for the benefit of, one or more beneficiaries.” *Id.*

3. 992 N.E.2d 1021 (Mass. 2013).

4. See *id.* at 1026 (concluding trust terms authorize plaintiff to transfer subtrust property to new subtrusts without consent).

5. See *id.* at 1027 (rejecting inherent trustee power to distribute irrevocable trust property in further trust irrespective of trust language); Brief of the Boston Bar Ass’n, Amicus Curiae at 3, *Morse v. Kraft*, 992 N.E.2d 1021 (Mass. 2013) (SJC-11233), 2013 MA S. Ct. Briefs LEXIS 10, at 3 (supporting plaintiff’s position). “The BBA respectfully requests that this Court recognize that trustees have the inherent power to exercise their trust distribution authority by distributing trust property in further trust.” Brief of the Boston Bar Ass’n, Amicus Curiae, *supra*, at 3.

6. See 992 N.E.2d at 1022-23.

7. See *id.*

8. See *id.* at 1023.

9. See *id.*

distribution decisions concerning their respective subtrusts.”¹⁰

By 2012, the sons were adults and Robert Morse, who had served as Trustee for about thirty years, was approaching retirement.¹¹ Believing the sons were now well-qualified to manage the trust assets themselves, Morse determined that it would be in the beneficiaries’ best interests for all of the 1982 Trust assets to be transferred to a new trust under which the sons could exercise control over distributions from their subtrusts.¹² Morse was concerned, however, that such a transfer might trigger the application of a particular tax—the generation-skipping transfer (GST) tax—potentially resulting in substantial adverse tax consequences for the beneficiaries.¹³ As it stood, the GST did not apply to the 1982 Trust because the law contained a “grandfather” provision exempting trusts that were irrevocable as of September 25, 1985 and not subsequently altered.¹⁴ Whether this tax would apply to the proposed new trust depended on whether the 1982 Trust gave Morse the authority to make his proposed transfer without first obtaining consent from the court or the beneficiaries.¹⁵

On April 23, 2012, Morse filed an action for declaratory relief before a single justice of SJC seeking clarification as to whether the 1982 Trust permitted Morse to make the transfer he envisioned without the beneficiaries’ or the court’s consent.¹⁶ The single justice reserved Morse’s action, reporting it for the consideration of the full court.¹⁷ The SJC concluded that Morse did have the authority to make the proposed transfer.¹⁸

In 1992, New York became the first state to enact a statute expressly authorizing decanting.¹⁹ More than a half-century before the arrival of New York’s statute, however, the Supreme Court of Florida confronted the issue in *Phipps v. Palm Beach Trust Co.*,²⁰ holding that a trustee granted “sole and

10. 992 N.E.2d at 1023.

11. *See id.*

12. *See* Brief and Appendix for the Plaintiff at 7-8, *Morse v. Kraft*, 992 N.E.2d 1021 (Mass. 2013) (SJC-11233), 2012 MA S. Ct. Briefs LEXIS 183, at 8-9 (stating rationale for sons to serve as full trustees).

13. *See* Brief and Appendix for the Plaintiff, *supra* note 12, at 12-13 (explaining application of GST tax conflicts with potential benefits of placing property in further trust).

14. *See* Brief and Appendix for the Plaintiff, *supra* note 12, at 13 (explaining grandfather provision).

15. *See* Brief and Appendix for the Plaintiff, *supra* note 12, at 13-14 (stating desire to minimize federal tax imposition).

16. *See* Brief and Appendix for the Plaintiff, *supra* note 12, at 1-2 (detailing suit filed by Morse).

17. *See* 992 N.E.2d at 1022.

18. *See id.* at 1026 (basing holding on broad discretion granted to trustee in 1982 Trust terms).

19. *See* Act of July 24, 1992, ch. 591, 1992 N.Y. LAWS 3520 (enabling decanting where trustee has absolute discretion to invade principal); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b) (Consol. 2014) (providing current statutory authority for decanting in New York); *see also* Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 SUP. CT. ECON. REV. 21, 23 (2007) (noting purported value of common law’s “bottom up” approach); Joseph T. La Ferlita, *New York’s Newly Amended Decanting Statute Typifies Trend Toward Greater Flexibility*, PROB. & PROP., July-Aug. 2012, at 34, 35 (noting concern decanting power gives trustees “too much discretion”).

20. 196 So. 299 (Fla. 1940).

absolute” discretion to distribute trust assets to beneficiaries is also empowered to distribute those assets into a new trust.²¹ Cases in Iowa and New Jersey have yielded similar outcomes.²²

Of the twenty-plus states that have followed New York’s lead in enacting decanting statutes, fourteen have done so within the past five years.²³ These statutes vary in the degree of discretion they grant to trustees to decant various types of trusts.²⁴ The arrival of these statutes and a corresponding surge in the popularity of decanting has prompted the U.S. Internal Revenue Service to solicit comments regarding how various tax laws should be applied to these transfers.²⁵

21. See *Phipps v. Palm Beach Trust Co.*, 196 So. 299, 300-01 (Fla. 1940) (holding trustee power to create estate in fee includes power to create lesser estate); see also 992 N.E.2d at 1024 (identifying *Phipps* as first case to recognize trustee’s decanting power); Culp & Mellen, *supra* note 2, at 8-9 (distinguishing facts of *Phipps* from “garden-variety discretionary power to [distribute] trust property”). Culp and Mellen point out that the trustee in *Phipps* had “both a lifetime and a specific testamentary power to direct distributions of trust property to the trust beneficiaries,” distinguishing it from cases where a trustee’s authority is simply fiduciary. See Culp & Mellen, *supra* note 2, at 8-9.

22. See *In re Estate of Spencer*, 232 N.W.2d 491, 498 (Iowa 1975) (upholding validity of exercise of power of appointment to establish trust); *Wiedenmayer v. Johnson*, 254 A.2d 534, 535-36 (N.J. Super. Ct. App. Div.) (upholding decanting by trustees granted “absolute and uncontrolled discretion” to act in beneficiary’s best interests), *aff’d sub nom.* *Wiedenmayer v. Villanueva*, 259 A.2d 465 (N.J. 1969); see also Thomas E. Simmons, *Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. REV. 253, 255-62 (2010) (identifying common law cases recognizing decanting power).

23. See generally Susan T. Bart, *Summaries of State Decanting Statutes*, AM. C. TR. & EST. COUNS. (Aug. 22, 2014), <http://www.actec.org/public/Documents/Studies/Bart-State-Decanting-Statutes-08-22-14.pdf> (identifying and characterizing twenty-three decanting statutes); see also Elizabeth C. Briand & Sarah C. Moskowitz, *Special Needs Planning and New York’s Amended Decanting Statute*, ELDER & SPECIAL NEEDS L.J., Spring 2013, at 20, 22, available at <http://www.sjlawpc.com/pdf/Special%20Needs%20Planning%20and%20NY's%20Amended%20Decanting%20Statute%20Article.pdf> (noting power “evokes images of beneficiaries being robbed of trust assets”); Diane Freda, *Irrevocable Trusts Not So Irrevocable Under New State Decanting Statutes*, BLOOMBERG BNA DAILY TAX REP. (Dec. 12, 2012), available at <http://www.cwbpa.com/resources/freda-decanting-238-DTR-J-1.pdf> (pointing out IRS concerns regarding protection of beneficiaries).

24. See GEORGE GLEASON BOGERT ET AL., *BOGERT’S TRUSTS AND TRUSTEES* § 567 (2014); Bart, *supra* note 23 (describing variations in decanting statutes); Darla Mercado, *Secrets for Successfully Decanting Trusts*, INVESTMENT NEWS (Jan. 14, 2014, 4:35 PM), <http://www.investmentnews.com/article/20140114/FREE/140119945> (reviewing chart ranking statutes by permissiveness); Tatiana Serafin, *How to Bust a Trust*, BARRON’S (March 2, 2013), available at http://online.barrons.com/article/SB50001424052748704103204578315990055294954.html#articleTabs_article%3D1 (noting apparent potential for abuse inherent in decanting); *Steve Oshins Releases Decanting State Rankings Chart*, PREMIER TR. (Jan 13, 2014), <http://premiertrust.com/steve-oshins-releases-decanting-state-rankings-chart/> (explaining purpose and means of ranking system). Some decanting statutes allow decanting only where the trustee’s power to distribute is absolute; others allow decanting where a trustee has merely the discretion or authority to distribute. See Bart, *supra* note 23. Some states allow decanting of trust principal only, while others allow decanting of both principal and income. See *id.*

25. See I.R.S. Notice 2011-101, 2011-52 I.R.B. 932 (Dec. 27, 2011) (soliciting comments on proposed guidelines concerning decanting); Darla Mercado, *10 Reasons to Consider Decanting an Irrevocable Trust*, INVESTMENT NEWS, <http://www.investmentnews.com/gallery/20131202/FREE/120209999/PH> (last visited Sept. 27, 2014) (identifying decanting’s potential uses); see also Letter from Michael P. Smith, President, N.Y. Bankers Ass’n to the Honorable Andrew Cuomo, Governor, State of N.Y. (July 11, 2011), in Bill Jacket, L. 2011, ch. 451 (containing letters in support of amendment to decanting statute).

In 1986, the United States Congress enacted the current version of the GST, which imposes a tax on transfers of wealth that skip a generation.²⁶ The GST's purpose was to close a loophole that enabled a taxpayer to avoid paying estate and gift taxes by placing his or her assets in trust.²⁷ The effect of doing so was to allow a donor's children to benefit from the trust assets during their lifetimes without paying any transfer taxes; ownership would then pass to the remainder beneficiaries—the donor's grandchildren, for example—after the children's deaths.²⁸ The GST closed this loophole by taxing transfers that “skip” a generation.²⁹

In *Morse v. Kraft*, the SJC acknowledged that a power to decant is effectively a power to amend an irrevocable trust.³⁰ In assessing whether decanting was proper in this instance, the SJC interpreted the language of the 1982 Trust granting the trustee broad, “almost unlimited discretion” to distribute property for the beneficiaries' benefit.³¹ The SJC held that the grantor intended to empower the trustee to distribute trust property into further trust for those same beneficiaries.³² As the 1982 Trust excluded beneficiaries from participating in distribution decisions while also empowering the trustee to decant, the SJC concluded that the trustee could proceed with the proposed decanting without obtaining approval of either the court or the beneficiaries.³³

An amicus brief submitted by the BBA urged the SJC to seize this opportunity to hold that trustees inherently possess the authority to decant.³⁴ Noting that a number of states have enacted decanting statutes, the SJC opted not to adopt the BBA's position, suggesting it might be better for the Massachusetts legislature to consider its own statute.³⁵ The SJC also left open the possibility that, in interpreting future trusts, it might eventually view the absence of a provision expressly authorizing decanting as evidence that the

26. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 1433(b)(2)(A), 100 Stat. 2085, 2731 (codified at 26 U.S.C. § 2601 (2012)) (enacting generation-skipping transfer tax); see also Nina R. Bohan, Note, *Proposed Regulations Applying Generation-Skipping Transfer Tax to Nonresident Aliens Go Too Far*, 19 SUFFOLK TRANSNAT'L L. REV. 473, 488-89 (1996) (explaining origins and purpose of tax).

27. See Robert Kazior, Note, *Tax Law—Having Your Cake and Eating It Too: Section 1433(B)(2)(A) of the Tax Reform Act of 1986: Effecting an Exception Where One Does Not Exist*, 32 W. NEW ENG. L. REV. 515, 522-23 (2010) (explaining public policy considerations underlying GST).

28. See Kazior, *supra* note 27, at 522-23 (defining “generation-skipping transfer”).

29. See *Estate of Gerson v. Comm’r*, 127 T.C. 139, 142-43 (2006) (explaining purpose of GST), *aff’d*, 507 F.3d 435 (6th Cir. 2007).

30. See 992 N.E.2d at 1024 (“In effect, a trustee with decanting power has the authority to amend an unamendable trust . . .”).

31. See *id.* at 1026 (interpreting trust language as evidence of grantor's intent).

32. See *id.* (noting affidavit of original draftsman stating trust intended to grant decanting power).

33. See *id.*

34. See Brief of the Boston Bar Ass'n, Amicus Curiae, *supra* note 5, at 3 (arguing decanting power enables trustees to serve beneficiaries' interests).

35. See 992 N.E.2d at 1027 (quoting commentator's suggested preference for legislation); see also Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 363 (2006) (describing minimalist approach to judicial decision-making).

grantor did not intend to grant such authority.³⁶

As more states enact decanting statutes, some practitioners and commentators have voiced concerns about potential abuse.³⁷ So far, however, there appears to be few actual cases where trustees have abused the power to decant.³⁸ Supporters of decanting identify a myriad of scenarios where it can replace a broken, ambiguous, or outdated trust with one that more effectively serves the beneficiary.³⁹ Meanwhile, the wealth management industry has lobbied state legislatures to enact less restrictive decanting statutes in order to make their states more appealing as a trust situs.⁴⁰ Though decanting appears to be a source of solutions rather than problems, it remains to be seen whether this competition for trusts will eventually cause states to enact statutes that are overly permissive, depriving beneficiaries of the security inherent in an irrevocable trust.⁴¹

36. See 992 N.E.2d at 1027 (noting increasing awareness and practice of decanting); see also 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, 1215 (2008) (discussing competing theories of trust construction); Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 613 (1988) (criticizing focus on individual's subjective intent in constructing donative transfer).

37. See Briand & Moskowitz, *supra* note 23, at 22 (noting decanting power induces images of trust assets being raided); Freda, *supra* note 23 (highlighting IRS worry trust beneficiaries being cut out). One attorney voiced concern that beneficiaries of a trust might "bully a trustee into cutting out a sibling or another family member." Freda, *supra* note 23.

38. See Serafin, *supra* note 24. Serafin writes, "[t]he redo that decanting allows sounds like the process could be rife with abuse, but according to our sources, so far there have been no glaring cases of egregious misuse." *Id.*

39. See Briand & Moskowitz, *supra* note 23, at 20 (noting benefits of decanting for elderly experiencing catastrophic illness or medical condition); Mercado, *supra* note 25 (identifying decanting's potential uses). Mercado identifies ten reasons to decant, including extending the trust's term to avoid taxation; converting a support trust to a discretionary trust to make trust assets unavailable to creditors; correcting drafting errors or clarifying terms; bringing the trust to a state featuring more advantageous trust law; modifying powers of appointment; changing trustee provisions regarding successor trustees; combining multiple trusts; separating trusts; drafting a special-needs trust; and qualifying the trust for ownership of stock in an S corporation. See Mercado, *supra* note 25 (follow "Next" hyperlink to access reasons). Briand and Moskowitz note that decanting can assist elderly beneficiaries who might otherwise be required to spend all trust assets in becoming eligible for government benefits. See Briand & Moskowitz, *supra* note 23, at 21.

40. See Letter from Michael P. Smith, President, N.Y. Bankers Ass'n to the Honorable Andrew Cuomo, Governor, State of N.Y. (July 11, 2011), in Bill Jacket, L. 2011, ch. 451 (containing letters in support of amendment to decanting statute). Michael P. Smith, President of the New York Bankers Association, wrote:

In recent years, New York's status as the leading situs for trusts in the United States has been lost, as the trust law in other states has provided grantors, trustees and beneficiaries with greater flexibility, more authority, additional earnings opportunities and more modern administrative techniques. This legislation would begin to modernize New York trust law by updating the power of appointment and power to invade principal which the State pioneered many years ago

The New York Bankers Association believes that this legislation would begin to restore the competitiveness of New York trustees, allowing them to actively seek out areas of trust business which they currently cannot offer.

Id.

41. See Mercado, *supra* note 24 (reviewing rankings chart). In 2014, attorney Steve Oshins released a

The SJC was wise to reject the BBA's call for a rule that trustees of irrevocable trusts inherently possess the power to decant.⁴² The BBA argument's chief strength—that a categorical rule would resolve doubts as to when decanting is proper—is also its chief weakness.⁴³ While many grantors would probably regard decanting as within the scope of a trustee's authority to invade principal, it does not seem plausible that all such grantors would.⁴⁴ The

document entitled, "1st Annual Trust Decanting State Rankings Chart," which ranks states based on the flexibility of their decanting statutes. *See id.* As one trust management company noted, "[t]he states are ranked based on the ease of use and amount of flexibility provided by their statutes, not based on the public policy issues that may exist based on one's opinion that the statutes give the trustee too much flexibility." *Steve Oshins Releases Decanting State Rankings Chart*, *supra* note 24; *see also* Simmons, *supra* note 22, at 254 (noting "irrevocable" does not mean "immutable"). Simmons writes, "[i]n South Dakota in particular, the relative ease with which changes can be undertaken to an irrevocable trust is quite surprising, perhaps even alarming." Simmons, *supra* note 22, at 254.

42. *See* 992 N.E.2d at 1027 (rejecting BBA's request); Brief of the Boston Bar Ass'n, Amicus Curiae, *supra* note 5, at 3.

43. *See* Brief of the Boston Bar Ass'n, Amicus Curiae, *supra* note 5, at 25-26 (urging SJC issue definite ruling). The BBA argued:

[A] ruling that absent contrary language in a trust instrument, a trustee who has the power to distribute trust property to a beneficiary also has an implied power to distribute trust property in further trust, subject to the trustee's fiduciary obligations to the beneficiaries, will be easily understood and followed by both fiduciaries and the members of the bar who advise them.

Id. at 27. The BBA further argued, "if the Court were to issue a ruling limited solely to the facts of the [*Kraft*] case, or limited only to a specific factual scenario, significant doubt as to the trustees' power in this regard could remain, leading to undesirable uncertainty and potential litigation." *Id.* (footnote omitted).

44. *Cf.* *Wiedenmayer v. Johnson*, 254 A.2d 534, 536-37 (N.J. Super. Ct. App. Div.) (affirming propriety of decanting under particular facts), *aff'd sub nom.* *Wiedenmayer v. Villanueva*, 259 A.2d 465 (N.J. 1969); *Fellows*, *supra* note 36, at 613 (arguing focus should not be on settlor's subjective intent). "Imputing to property owners an intent to prefer family is likely to achieve most property owners' donative wishes. Undoubtedly, the state's preference for family places at risk nontraditional distribution schemes that exclude some family members in favor of other family or nonfamily members." *Fellows*, *supra* note 36, at 613. *Wiedenmayer* concerned a trust that authorized the trustees, in their "absolute and uncontrolled discretion," to distribute any or all of the trust property to the beneficiary. *Wiedenmayer v. Johnson*, 254 A.2d 534, 535-36 (N.J. Super. Ct. App. Div.), *aff'd sub nom.* *Wiedenmayer v. Villanueva*, 259 A.2d 465 (N.J. 1969). The trust named the primary beneficiary's siblings as contingent remainder beneficiaries. *Id.* at 536. On behalf of the siblings, a guardian ad litem challenged the proposed decanting, arguing that the siblings would lose their contingent remainder interests as a result. *Id.* In holding that decanting to the new trust was permitted, the court reasoned that since the trustees had the authority to distribute the entirety of the trust property to the primary beneficiary—thereby depriving the siblings of any benefit as contingent remainder beneficiaries—the trustees should likewise have the authority to place that same property in further trust. *Id.* at 535-36. The dissent noted that the trustees had refused requests by the primary beneficiary for distributions of trust principal, as the trustees were satisfied that distribution of net income would satisfy the primary beneficiary's needs. *Id.* at 536-37 (Conford, S.J.A.D., dissenting). The dissent labeled the decanting a "charade," believing that the trustees and majority's characterization of it as a distribution was incorrect, and was uncomfortable with the primary beneficiary "walk[ing] out of the closing transaction with not one iota of greater beneficial interest . . . in the principal of the trust estate, than when he walked into the closing to play his part." *Id.* at 537. The majority reasoned that the grantor's "basic intention"—that the trustees should act in the primary beneficiary's best interests—would be served by decanting; the court did not confront the possibility that decanting would nevertheless frustrate the grantor's secondary intention to provide for his other children as well. *See id.* at 536 (majority opinion); *see also* La Ferlita, *supra* note 19, at 35 (noting concern decanting

BBA argued that a narrow ruling, limited to the facts of the case or to a particular factual scenario, would lead to uncertainty and litigation; but a broader ruling might also promote litigation in cases where trustees rely on a broad rule despite evidence that the grantor did not intend to authorize decanting.⁴⁵

If enactment of these statutes across the country results in a wave of decanting, it may be decades before any disputes or controversies arising from this wave come to light.⁴⁶ If the SJC's reluctance to announce a broad rule leads to litigation, the judgments that subsequently emerge will clarify the common-law approach to decanting authority based on the facts presented by those cases.⁴⁷ This gradual evolution of a common-law jurisprudence is preferable to the introduction of a categorical rule, whether such rule appears in a statute or in an unnecessarily broad judicial holding.⁴⁸

In *Morse v. Kraft*, the SJC addressed the issue of whether a trustee granted broad discretion to distribute trust principal also possesses the authority to decant. While holding that such authority existed on the facts presented, the SJC declined to issue a broad ruling that trustees of irrevocable trusts possessing authority to invade principal may also decant. The SJC wisely passed on the opportunity to declare a broad rule, reserving the ability of future

power gives trustees "too much discretion"). "The concern is that decanting creates a tension between the notions of promoting greater efficiency and flexibility in trust administration, on the one hand, and of fulfilling the settlor's intent, on the other." La Ferlita, *supra* note 19, at 35.

45. See, e.g., *U.S. Nat'l Bank v. Brunton*, 150 P.2d 297, 301 (Colo. 1944) (excluding testimony regarding donor's intent in case where trust language unambiguous); *In re Estate of Grblny*, 22 N.W.2d 488, 495-96 (Neb. 1946) (excluding testimony of trustee regarding conversations with deceased testator explaining will provisions) *overruled on unrelated issue by Anoka-Butte Lumber Co. v. Malerbi*, 142 N.W.2d 314 (Neb. 1966); *Champagne v. Fortin*, 30 A.2d 838, 840 (R.I. 1943) (holding will unambiguous, thus excluding evidence of testatrix's intent).

46. See Cooper, *supra* note 36, at 1215. Cooper writes:

As the law waits for changed circumstances to reveal themselves, it may react too slowly and too deferentially to fully maximize the beneficiaries' utility. However, from a trust settlor's standpoint, such imperfections may be the doctrine's greatest strengths, leading those settlors to embrace trust law as a legal regime which will err on the side of honoring their intent.

Id.; see also Simmons, *supra* note 22, at 283 (noting decanting power "now firmly in play"). Simmons wrote, "[s]ome practitioners—the author included—have reservations about the scope and startling reach of this newly enacted trustee power, whether or not the power may have already existed in some form under common law." Simmons, *supra* note 22, at 283; see also La Ferlita, *supra* note 19, at 39 ("It remains to be seen how the courts will resolve [decanting] issues.").

47. See Cross, *supra* note 19, at 23. Cross summarized the theory that rulemaking based on actual cases is preferable to a "top down" approach, writing, "[i]n addition to producing better rules, with the benefit of information from individual circumstances, such a system would produce the most necessary rules, as it would be driven by the actual controversies that arose in the real world." *Id.* at 25; see also BOGERT ET AL., *supra* note 24, § 567. "To date, these decanting statutes have been the subject of few, if any, judicial decisions. Thus, little interpretative guidance is available." BOGERT ET AL., *supra* note 24, § 567.

48. See Sunstein, *supra* note 35, at 363. "Minimalists fear that wide rulings will produce errors that are at once serious and difficult to reverse—a particular problem when the stakes are high." *Id.*

courts to consider the propriety of decanting as new cases arise and as the benefits and costs of recently enacted decanting statutes become clear.

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