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## **Berwitz & DiTata LLP Gets Favorable Decision in Court**

A Step Ahead is intended to provide our clients, friends and family with information that we believe is of interest to them concerning estate planning, retirement planning, Medicaid, guardianships, probate and estate administration and the practical considerations of caring for those who are aging, blind or disabled. However, Berwitz & DiTata LLP also represents many clients in litigated matters relating to estates and trusts. We are proud to report that we recently obtained a favorable decision from the Nassau County Surrogate's Court, in Matter of Schreiber, 2012-369907(Sept. 30), the first decision to interpret New York's "decanting statute," EPTL 10-6.6, which was liberalized by the state legislature in 2011.

"Decanting" is the ability of a trustee of an existing irrevocable trust to distribute all or part of the trust assets to another irrevocable trust - much the way one would pour wine from its original bottle to another. Decanting is desirable when there is a problematic provision in the existing trust. The goal is to eliminate the problem in the new trust. The Court in our case permitted the trustee of the existing trust, a trust which had been created in 1992 to benefit the infant grandchild of the creator, to "decant" or pour the trust assets to a new trust which contains special provisions to protect the assets for the grandchild who was later diagnosed as disabled.

In 1992, when the beneficiary/grandchild was 19 months old, his grandfather created and funded a trust which would have permitted the beneficiary to withdraw all of the trust assets when he reached 21 years of age, in May 2012. Years after the trust was created, the beneficiary was diagnosed with a variety of cognitive and learning disabilities. Prior to turning 21, the beneficiary qualified for Medicaid and SSI benefits. However, because the trust afforded him the right to withdraw trust assets at 21, irrespective of whether he took them, he would no longer have qualified for those benefits and the assets would have been at risk.

The problem was that the original irrevocable trust did not contain a "supplemental needs trust" for the benefit of the beneficiary. Such a provision would have permitted the assets in the trust for the life of the beneficiary to maintain the assets in the trust so that they could be utilized to enhance - or supplement - the beneficiary's quality of life without interfering with his governmental benefits. There are 2 types of supplemental needs trusts, first-party and third-party trusts. The difference lies in whose assets are used to fund the trust. A first-party trust is funded with the assets of the beneficiary and it is a condition of this type of trust that, at the death of the

beneficiary, governmental benefits received during the life of the beneficiary must be paid back from remaining trust assets. A third-party trust is funded with assets belonging to another, here the grandfather, thus remaining trust assets at the death of the beneficiary can be distributed to whomever the trust creator specifies.

What our trustee had hoped was to find some way to “fix” the trust, keep the beneficiary rather than distributing them, and protect them in a supplemental needs trust. In short, decanting to a new trust was the anticipated solution.

But the solution was not without its problems. The decanting statute requires the trustee to give notice to the beneficiary and others of the intended transfer to the new trust, and the transfer only becomes effective 30 days after that notice is given, although the parties can agree to a shorter time period. By the time the trustee retained Berwitz & DiTata LLP, there were less than 30 days remaining before the beneficiary was to turn 21. Our concern was that, once the beneficiary turned 21, the assets in the trust would be his and unprotected. While a first-party supplemental needs trust might then have been created with the beneficiary’s money that, would have negated his grandfather’s intent that at the beneficiary’s death remaining trust assets pass to future generations.

However, the existing trust allowed a parent, who is not also a trustee, to act on behalf of the beneficiary. On May 1, 2012, 6 days before his 21<sup>st</sup> birthday, notice was given to the beneficiary that the trustee intended to decant, pour, the trust assets to the new trust. On May 2, 2012, the beneficiary’s father signed an agreement on behalf of the beneficiary to eliminate the 30 day waiting period and make the transfer effective immediately.

Despite opposition by the Attorney General, who argued on behalf of the Department of Social Services which administers the Medicaid program, the Surrogate’s Court permitted the decanting of the existing trust to a new and improved trust which contains the third-party supplemental needs trust and protects all the assets from recovery by the government.

A complete copy of the text of the decision is available on our website at [www.berwitz-ditata.com](http://www.berwitz-ditata.com).