

Berwitz & DiTata LLP Wins First Case Under New NYS Decanting Law

What is “decanting” and why does this matter? Decanting is the legal term for transferring assets from one irrevocable trust to another irrevocable trust. Typically, when we think of irrevocable trusts, we think they cannot be changed - and that’s true. But, if an irrevocable trust is seriously flawed, decanting is the process that provides a solution in the *right* case.

In this case, the question brought on appeal concerned whether assets, decanted from the first irrevocable trust to a new irrevocable trust, could be payable to relatives after the trust beneficiary dies rather than to the State. The trust beneficiary was receiving governmental benefits. Ordinarily, we would recommend implementing a supplemental needs trust (“SNT”) for such a beneficiary. An SNT allows trust funds to be used to supplement government benefits without disqualifying the beneficiary from receiving needs-based benefits. Some SNTs require that, after the death of the beneficiary, Medicaid be reimbursed from the remaining trust assets. In our case, the original irrevocable trust did not contain an SNT. The new irrevocable trust contained SNT provisions but did not include a provision that Medicaid be paid back. The issue was first successfully litigated by Berwitz & DiTata LLP in the Surrogate’s Court. The Surrogate agreed with our position that the new irrevocable trust did not have to contain a “payback provision” to Medicaid after the trust beneficiary dies. The State appealed the Surrogate’s determination and we then litigated this question in the Appellate Division. We are happy to report that the Appellate Division affirmed the Surrogate’s determination, in other words, they, too, agreed with us.

The facts: In 1992, Moses R. created an irrevocable trust for his then infant grandson, 19-month old Daniel S. The original trust would have allowed Daniel to withdraw all of the trust assets when he reached 21 years of age. What grandfather Moses could not have known was that Daniel would later be diagnosed with epilepsy and bipolar disorder, in addition to obsessive compulsive disorder (OCD), attention-deficit disorder (ADD) and attention-deficit/hyperactivity disorder (ADHD). When Daniel turned 18, he qualified for Medicaid and Supplemental Security Income, both needs-based governmental benefits. Absent additional planning, he would have become ineligible to receive those benefits if he had received the trust assets at 21.

The law: Before 2011, NYS had a statute that permitted a Trustee to decant (transfer) the trust assets to another trust that was so restrictive that it would not have permitted the Trustee of Daniel’s trust to protect the assets. In 2011, New York liberalized the decanting statute. The amended statute allows a Trustee to decant a irrevocable trust that offers no protection for the beneficiary to a new irrevocable trust that contains an SNT that will protect the assets for the beneficiary who is receiving governmental benefits. But the statute did not address the terms of that new SNT.

The argument: The State unsuccessfully argued that the new trust should require that, after Daniel's death, the trust assets be first used to reimburse Medicaid for the benefits that Daniel had received during his lifetime on the theory that the trust was funded with *Daniel's assets*. In contrast, the Appellate Division agreed with our position that the 1992 trust, having been funded at the outset with *assets belonging to Moses*, the grandfather, could be decanted to a new irrevocable trust which deprived Medicaid of the right to be reimbursed after Daniel's death. Thus, any remaining trust assets will be distributed to Daniel's siblings.

The impact of the new statute is now clearer. There is now a mechanism for modifying an existing irrevocable trust where the trust provisions require adjustment because circumstances have changed. Timing can be critical. We, of course, are available to review and evaluate these trusts and to discuss the available options with the Trustee.