

SURVEY OF ILLINOIS LAW: TRUSTS AND ESTATES

SUSAN T. BART,* JENNIFER L. BUNKER,** AND SONIA D. COLEMAN⁺

- I. *Dehart v. Dehart*
 - A. Lack of Testamentary Capacity
 - B. Undue Influence
 - C. Fraudulent Inducement & Intentional Interference with Testamentary Expectancy
 - D. Contract to Adopt Plaintiff
 - E. Equitable Adoption
 - F. Motion to Compel Deposition
- II. *Bjork v. O'Meara*
- III. Decanting: Refining a Vintage Trust
 - A. Introduction
 - B. Decanting Authority
 - C. Restrictions
 - D. Procedure
 - E. Liability and Remedies
 - F. Conclusion
- IV. Transfer on Death Instruments and Pending Changes
 - A. Changes to TODI
 - B. Capacity of Owner and Agent's Authority
 - C. TODI Requirements
 - D. The Effect of the Transfer on Death Instrument at the Owner's Death
 - E. Notice of Death Affidavit
 - F. Conclusion

* Susan T. Bart is a partner in the Private Clients, Trusts & Estates Group of the Chicago office of Sidley Austin LLP. In 2013, she was named Reporter to the Uniform Law Commission Decanting Committee. She is a Fellow and Regent of The American College of Trust and Estate Counsel. Ms. Bart earned a J.D., *magna cum laude* (Order of the Coif), in 1985 from the University of Michigan Law School where she was Articles Editor of the Michigan Law Review.

** Jennifer L. Bunker is an attorney with Zukowski Law Offices in Peru, Illinois. She earned her J.D., *cum laude*, from Michigan State University College of Law. She is a member of the Illinois State Bar Association, the LaSalle County Bar Association, the Illinois Valley Estate Planning Council, and is actively involved in her local chapters of Toastmasters International and Zonta International. Ms. Bunker is a member of the ISBA Trusts & Estates Section Council and serves on the Newsletter Committee of the Section Council.

+ Sonia D. Coleman is the Principal and Founder of the Law Office of Sonia D. Coleman. She earned her Bachelor of Science degree in Psychology from Howard University and her J.D. from Loyola University of Chicago. Ms. Coleman is currently a member of the Illinois State Bar Association, the American Bar Association, the Black Women Lawyers' Association of Greater Chicago and the South Suburban Bar Association.

I. *DEHART V. DEHART*

In *Dehart v. Dehart*,¹ the Illinois Supreme Court adopted the legal doctrine of equitable adoption and clearly set forth the tests for other legal doctrines concerning will contests including: lack of testamentary capacity; undue influence; fraudulent inducement; and intentional interference with testamentary expectancy.² Thus, *DeHart* is useful not only for the new law set forth therein, but it is also useful as an explanation of more established doctrines and an example of how they are applied.

Decedent, Donald M. DeHart, held Plaintiff, James Thomas DeHart, out to individuals and institutions as his son for more than sixty years, including listing Plaintiff as his son when making arrangements for his own funeral in May 2003.³ In fact, Plaintiff, born in 1944, used a birth certificate listing the Decedent as his father throughout his lifetime until he was required in 2000 to obtain a certified copy of his birth certificate from the Cook County Office of Vital Statistics in order to obtain a passport.⁴ The certified birth certificate Plaintiff received did not list the Decedent's name as his father but instead listed his father as James Thomas Staley, Sr.⁵ It also listed the Plaintiff's name as James Thomas Staley, Jr.⁶

When Plaintiff confronted the Decedent about the names listed on the certified birth certificate, the Decedent explained to him that his mother had become pregnant out of wedlock and married the Plaintiff's biological father.⁷ His biological father abandoned Plaintiff and his mother when the Plaintiff was two years old and had no subsequent contact with the Plaintiff.⁸ Soon after, the Decedent married the Plaintiff's mother and hired an attorney to ensure that he legally adopted the Plaintiff (although no legal documentation of an adoption was contained in the court record).⁹

After Plaintiff's mother passed away in 2001, the Decedent married the Defendant, Blanca DeHart, in December 2005.¹⁰ At the time they were married, the Decedent was eighty years old and the defendant was fifty years old, and they had known each other for less than one year.¹¹ In December 2006, the Decedent executed the contested will in the office of attorney William J. Peters. The Defendant accompanied the Decedent to the law

1. *Dehart v. DeHart*, 2013 IL 114137.

2. *Id.*

3. *Id.* at ¶ 3.

4. *Id.* at ¶¶ 3-4.

5. *Id.* at ¶ 4.

6. *Id.*

7. *Id.* at ¶ 5.

8. *Id.* at ¶ 6.

9. *Id.* at ¶¶ 5-6.

10. *Id.* at ¶¶ 6, 8.

11. *Id.* at ¶ 8.

office of Attorney Peters.¹² The will stated, “I am married to Blanca DeHart. I have no children.”¹³ The Decedent had executed a prior will providing for bequests to the Plaintiff, the Plaintiff’s children, and the Decedent’s church.¹⁴ The Decedent passed away in February 2007.¹⁵

The Plaintiff’s complaint alleged that the Defendant had lied to the Decedent by telling him that the Plaintiff was not his son and not telling the Decedent that the Plaintiff and other family members had called and sent cards and letters.¹⁶ The complaint further alleged that the Defendant became joint tenants with the Decedent on real estate and accounts worth millions of dollars and became power of attorney to act on the Decedent’s behalf (which was used to sell the family farm).¹⁷

The Plaintiff’s complaint sought to set the 2006 will aside and included six counts in support of the relief sought: (1) lack of testamentary capacity; (2) undue influence; (3) fraudulent inducement; (4) intentional interference with testamentary expectancy; (5) contract to adopt Plaintiff; and (6) equitable adoption.¹⁸ Additionally, the Plaintiff sought to compel the deposition testimony of Attorney Peters, which the Defendant objected on the basis of attorney-client privilege.¹⁹

The Defendant moved to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure for failure to allege facts sufficient to state a cause of action.²⁰ The circuit court dismissed with prejudice all six counts and denied the Plaintiff’s motion to compel the deposition of Attorney Peters.

The appellate court reversed the dismissal of the six counts and the denial of the motion to compel the deposition testimony of Attorney Peters, remanding to the trial court to determine whether the attorney-client privilege prevented the deposition.²¹ The Illinois Supreme Court affirmed.²² The court’s findings concerning the Plaintiff’s six counts and his motion to compel the deposition of Attorney Peters are set forth below.

12. *Id.* at ¶ 32.

13. *Id.* at ¶ 9.

14. *Id.* at ¶ 7.

15. *Id.* at ¶ 12.

16. *Id.* at ¶ 11.

17. *Id.* at ¶ 10.

18. *Id.* at ¶ 12.

19. *Id.*

20. *Id.* at ¶ 13.

21. *Id.* at ¶¶ 14, 68.

22. *Id.* at ¶ 77.

A. Lack of Testamentary Capacity

The court explained that the test of testamentary capacity is that “the testator must be capable of knowing what his property is, who are the natural objects of his bounty, and also be able to understand the nature, consequence, and effect of the act of executing a will.”²³ The court found that the Plaintiff pled sufficient facts to establish he was the natural object of the Decedent’s bounty.²⁴ The court further found that the Plaintiff sufficiently pled that the Decedent was not of sound mind and memory at the time he executed the 2006 will, because the will specifically stated he had “no children” even though he held the Plaintiff out as his son for over sixty years.²⁵ The court found this specific statement within the will to be significant to its analysis and further found that even though the Decedent identified his wife and two sisters in the will as well as having two witnesses stating that the Decedent was of “sound mind,” such evidence (although it may be strong evidence of testamentary capacity) is not sufficient to prevent the case from proceeding forward through a section 2-615 motion.²⁶

B. Undue Influence

The court explained that the test of undue influence is whether the influence is “of such a nature as to destroy the testator’s freedom concerning the disposition of his estate and render his will that of another.”²⁷ The court found that the Plaintiff pled sufficient facts to survive a section 2-615 motion including those facts indicating the existence of a close father-son relationship and allegations of a series of misrepresentations to the Decedent by the Defendant concerning the Plaintiff’s character.²⁸

The court also held that the Plaintiff alleged sufficient facts to allege a *presumption* of undue influence.²⁹ The court explained that a presumption will arise if four requirements are met: (1) a fiduciary relationship exists between the testator and a person who receives a substantial benefit from the will; (2) the testator is the dependent and the beneficiary the dominant party; (3) the testator reposes trust and confidence in the beneficiary; and (4) the will is prepared by or its preparation procured by such beneficiary.³⁰ The court found that the power of attorney held by the Defendant gave rise to a

23. *Id.* at ¶ 20 (citing *Dowie v. Sutton*, 227 Ill. 183, 196, 81 N.E. 395, 400 (1907)).

24. *Id.* at ¶ 21.

25. *Id.* at ¶ 22.

26. *Id.* at ¶¶ 22-24.

27. *Id.* at ¶ 27 (citing *In re Estate of Hoover*, 155 Ill.2d 402, 411, 615 N.E.2d 736, 740 (1993)).

28. *Id.* at ¶ 28.

29. *Id.* at ¶ 29.

30. *Id.* at ¶ 30.

fiduciary relationship.³¹ It further found that the complaint sufficiently alleged that the Decedent was the dependent party, that the Defendant was the dominant party and, that, the Decedent reposed trust and confidence in the Defendant because it alleged the Decedent had placed considerable assets in joint tenancy with the Defendant.³² Additionally, the Defendant exercised significant control over the Decedent's real estate including selling a farm, and the Defendant was twenty-nine years younger than the Decedent.³³ The court also found that the complaint sufficiently alleged that the will's preparation was procured by the Defendant, because it stated, among other things, the Defendant had accompanied the Decedent to the office of Attorney Peters.³⁴ Ultimately, the court clarified that the presumption of undue influence may be applied to a spouse in certain circumstances like the one at hand.³⁵

C. Fraudulent Inducement & Intentional Interference with Testamentary Expectancy

The court explained that the test of fraudulent inducement is whether the defendant made a false representation of material fact, knowing or believing it to be false and doing it for the purpose of inducing one to act and the misrepresentations must cause the testator to execute the contested will.³⁶ The court also explained that the test of intentional interference is whether there is an existence of the following five requirements: (1) expectancy; (2) defendant's intentional interference therewith; (3) tortious conduct such as undue influence, fraud or duress; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages.³⁷

The court grouped these two tort actions together explaining that the complaint adequately alleged the required elements of both counts.³⁸ It also explained that the appropriate remedy for such actions is not to set aside the will, but rather to enter a judgment against the defendant for monetary damages.³⁹ It further explained that if the Plaintiff succeeds on his claims contesting the will, the tort counts will be dismissed because the probate

31. *Id.* at ¶ 31.

32. *Id.*

33. *Id.*

34. *Id.* at ¶ 32.

35. *Id.* at ¶¶ 33-36.

36. *Id.* at ¶ 39.

37. *Id.*

38. *Id.* at ¶¶ 40-41.

39. *Id.* at ¶ 39.

relief (setting aside the will) will be adequate.⁴⁰ However, if Plaintiff fails in his will contest, he could then proceed on his tort claims.⁴¹

D. Contract to Adopt Plaintiff

The court found that the Plaintiff alleged sufficient facts to support his claim that his mother and the Decedent had entered into an agreement to adopt the Plaintiff, because the complaint alleges they had agreed to keep the adoption a secret for the good of the Plaintiff and the family.⁴²

E. Equitable Adoption

The court noted that no Illinois court has expressly recognized the concept of equitable adoption nor rejected it.⁴³ It discussed in detail opinions of the Supreme Court of West Virginia,⁴⁴ the California Supreme Court,⁴⁵ and the Eighth Circuit Court of Appeals,⁴⁶ and the standards used by these courts.⁴⁷ The court found that the Eighth Circuit Court of Appeals decision supports the position that in Illinois an equitable adoption theory should be recognized under the right circumstances even in the absence of a statutory adoption or a contract for adoption.⁴⁸

The court then adopted the holding of the California Supreme Court in *Estate of Ford v. Ford* concerning the circumstances in which an equitable adoption theory will be recognized.⁴⁹ The court held that a plaintiff bringing an equitable adoption claim must prove an intent to adopt and show that the Decedent acted consistently with that intent by forming with the plaintiff a close and enduring familial relationship.⁵⁰ The requisite intent “may be shown by an unperformed agreement or promise to adopt” or by “proof of other acts or statements directly showing that the Decedent intended the child to be, or to be treated as, a legally adopted child, such as an invalid or unconsummated attempt to adopt, the Decedent's statement of his or her intent to adopt, the child, or the Decedent's representation to the claimant or to the community at large that the claimant was the Decedent's natural or legally adopted child.”⁵¹

40. *Id.* at ¶ 41.

41. *Id.*

42. *Id.* at ¶ 47.

43. *Id.* at ¶ 55.

44. *Wheeling Dollar Savings & Trust Co. v. Singer*, 162 W.Va. 502, 250 S.E.2d 369 (1978).

45. *Estate of Ford v. Ford*, 32 Cal.4th 160, 8 Cal.Rptr.3d 541, 82 P.3d 747 (2004).

46. *Roberts v. Roberts*, 223 F. 775 (8th Cir. 1915).

47. *Dehart*, 2013 IL 114137, ¶¶ 53-58.

48. *Id.* at ¶ 58.

49. *Id.* at ¶ 59.

50. *Id.*

51. *Id.*

The court found that the Plaintiff's complaint sufficiently alleged facts to support a finding of equitable adoption.⁵² The court then went on to say that when determining whether equitable adoption exists, a clear and convincing standard will be used.⁵³ Furthermore, the "court will 'weigh the evidence scrupulously and with caution.'"⁵⁴ It also explained that "the evidence must be 'strong and compelling [and not] readily harmonizable with any other theory' such as with the mere intention to provide a good home as opposed to the intent to adopt."⁵⁵

F. Motion to Compel Deposition

Lastly, the court explained that when an attorney prepares a will for a client and witnesses the will, the attorney-client privilege only exists during the lifetime of the client.⁵⁶ The court found that in order for the Plaintiff to prove that the attorney-client privilege does not apply, he must make an initial evidentiary showing that he is an heir or next of kin or that he was a recipient under a prior will (making him an interested person).⁵⁷ The court indicated that if this initial showing is made, the Defendant has the opportunity to rebut the Plaintiff's prima facie case.⁵⁸ If the Plaintiff meets his burden and the Defendant is unable to rebut, then the trial court should compel the deposition of Attorney Peters.⁵⁹

II. *BJORK V. O'MEARA*

In *Bjork v. O'Meara*, the Illinois Supreme Court found that the applicable statute of limitations for testamentary expectancy claims, when there is no adequate remedy available through the probate proceeding, is the five-year general statute of limitations for claims to recover personal property or damages for its detention or conversion (735 ILCS 5/13-205) rather than the six-month statute of limitations for will contests (755 ILCS 5/8-1).⁶⁰

The Plaintiff, Colleen Bjork, became a friend of the Decedent, Frank Dama, while she was working as a hospice nurse for the Decedent's late wife.⁶¹ The Defendant, Frank O'Meara, was the Decedent's dentist.⁶² In

52. *Id.* at ¶ 60.

53. *Id.* at ¶ 65.

54. *Id.* at ¶ 63 (citing *Monahan v. Monahan*, 14 Ill.2d 449, 452 (1958)).

55. *Id.* at ¶ 63 (citing *Monahan*, 14 Ill.2d at 452-53).

56. *Id.* at ¶ 69.

57. *Id.* at ¶ 73.

58. *Id.*

59. *Id.*

60. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 31.

61. *Id.* at ¶ 3.

62. *Id.*

May 2005, the Decedent informed the Plaintiff that he wanted her to be the pay-on-death beneficiary of a bank account.⁶³ In furtherance of his intent, that year the Decedent and the Plaintiff signed documentation from the bank holding the account to list the Plaintiff as beneficiary.⁶⁴ Later, the Decedent appointed the Defendant as his power of attorney for property and executed a will in which the residuary of his estate was left to the Defendant and the Defendant's wife.⁶⁵

After the Decedent died in 2009, a representative of the bank informed the Plaintiff that she was no longer beneficiary of the bank account.⁶⁶ Counsel for the Plaintiff filed an appearance in the probate proceeding for the Decedent's estate.⁶⁷ The court granted Plaintiff's petition for a citation to the bank for discovery of information, but refused to allow her leave to depose the bank employee that provided her with paperwork to become beneficiary of the Decedent's account in 2005.⁶⁸ The court discharged the Defendant and closed the estate in 2010.⁶⁹

Later that year, the Plaintiff filed a complaint for intentional interference with testamentary expectancy.⁷⁰ The court granted the Defendant's motion to dismiss due to the action being time-barred pursuant to 755 ILCS 5/8-1, the six-month limitation period governing will contests.⁷¹ The appellate court affirmed.⁷² The Illinois Supreme Court reversed and remanded, holding that the applicable statute of limitations is the five-year general statute of limitations set forth in 735 ILCS 5/13-205.⁷³

The court explained that the object of a will contest is to set the will aside due to the document produced to the court not being the will of the testator.⁷⁴ The object of a tort claim for intentional interference with a testamentary expectancy is to obtain a judgment against the individual defendant.⁷⁵

The court further explained that pursuant to its decision in *Robinson v. First State Bank of Monticello*,⁷⁶ a tort action (such as intentional interference with testamentary expectancy) is not allowed where the "remedy of a will contest is available and would provide the injured party with adequate

63. *Id.* at ¶ 4.

64. *Id.* at ¶ 6.

65. *Id.* at ¶ 7.

66. *Id.* at ¶ 9.

67. *Id.* at ¶¶ 10-11.

68. *Id.* at ¶¶ 13-14.

69. *Id.* at ¶ 15.

70. *Id.* at ¶ 17.

71. *Id.* at ¶ 19.

72. *Id.*

73. *Id.* at ¶¶ 31, 35-38.

74. *Id.* at ¶ 23.

75. *Id.* at ¶ 24.

76. *Robinson v. First State Bank of Monticello*, 97 Ill.2d 174, 454 N.E.2d 288 (1983).

relief.”⁷⁷ The *Robinson* court noted that it was concerned that allowing tort plaintiffs a “second bite at the apple” (referring to the ability to file a tort claim after an unsuccessful will contest) would defeat the exclusivity of a will contest.⁷⁸

The court in *Bjork* applied these principles to the facts at hand. It found that because the circuit court erroneously refused to allow the Plaintiff to depose the bank employee, the Plaintiff was refused a proper citation proceeding.⁷⁹ This refusal resulted in the Plaintiff not having an adequate remedy available to her.⁸⁰ The court also noted that the Plaintiff did not contest the will in any way and sought money damages as compensation.⁸¹ Furthermore, the Plaintiff’s tort claim did not “implicate the concerns expressed by this court regarding certainty in property rights created by a probated will, and efficient and timely estate administration.”⁸² Thus, the court found a remedy in tort to be appropriate.⁸³

III. DECANTING: REFINING A VINTAGE TRUST

A. Introduction

What is “decanting”? When wine is decanted, it is poured from a bottle into another vessel, usually called the “decanter,” to leave the sediment in the bottle while pouring off the pure liquid into the decanter. In addition to leaving the sediment behind, decanting also allows the wine to aerate. Decanting a trust is very similar. The assets of the old trust are poured into or transferred to a new trust that is free from the sediment of the old trust that prevents it from effectively and efficiently achieving its purposes. Decanting can modify administrative provisions, change the trustee and trustee provisions, and also change dispositive provisions of the trust, breathing new air into the trust. Wine is decanted to bring out the best nose and flavor the grape offers; trusts should be decanted only in furtherance of the purposes of the trust.

77. *Bjork*, 2013 IL 114044, ¶ 25 (citing *In re Estate of Hoover*, 160 Ill.App.3d 964, 513 N.E.2d 991 (1987)).

78. *Id.* at ¶ 29 (citing *Robinson*, 97 Ill.2d at 174, 454 N.E.2d at 288).

79. *Id.* at ¶ 31.

80. *Id.*

81. *Id.* at ¶ 32.

82. *Id.* at ¶ 33.

83. *Id.* at ¶ 31.

1. *Evolution of Decanting.*

Back in 1940, *Phipps v. Palm Beach Trust Co.*⁸⁴ provided a common law basis for decanting, at least in Florida. Several other states have cases supporting common law decanting.⁸⁵ Twenty-two states now have decanting statutes.⁸⁶ There is a new Uniform Law Commission project to draft a uniform decanting statute.

2. *Theory of Decanting*

What is the theory of decanting? One theory of decanting is that if a trustee has broad discretion under a trust to make distributions to the beneficiaries, that discretion should also include the ability to make distributions to trusts for the benefit of those beneficiaries. In other words, if the trustee could distribute the trust assets outright to one or more of the beneficiaries, why shouldn't the trustee be able to put those assets in a trust for one or more of the beneficiaries even if the new trust makes changes in beneficial interests? Another theory of decanting is that a trustee should be able to make administrative changes to trust documents to improve the

84. *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (Fla. 1940).

85. *Wiedenmayer v. Johnson*, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969); *In re Spencer Estate*, 232 N.W.2d 491 (Iowa 1975); *Morse v. Kraft*, SJC, 992 N.E. 2d 1021 (Mass. 2013).

86. *See*:

Alaska—ALASKA STAT. §§ 13.36.157-13.36.159 (2013).

Arizona—ARIZ. REV. STAT. § 14-10819 (2011).

Delaware—DEL CODE TIT. 12 § 3528 (2013).

Florida—FLA. STAT. § 736.04117 (West 2007).

Illinois—760 ILL. COMP. STAT. 5/16.4 (2013).

Indiana—IND. CODE § 30-4-3-36 (West 2013).

Kentucky—KY. REV. STAT. § 386.175 (West 2012).

Michigan—MICH. COMP. LAWS § 700.7820a; MICH. COMP. LAWS § 556.115a; Mich.

COMP. LAWS § 700.7103 (definitions) (West 2012).

Missouri—MO. REV. STAT. § 456.4-419 (West 2011).

Nevada—NEV. REV. STAT. 163.556 (West 2011).

New Hampshire—N.H. REV. STAT. § 564-B:4-418 (2008).

New York—N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)-(s) (McKinney 2013).

North Carolina—N.C. GEN. STAT. 36C-8-816.1 (West 2013).

Ohio—OHIO REV. CODE § 5808.18 (West 2013).

Rhode Island—R.I. GEN. LAWS § 18-4-31 (West 2013).

South Carolina—S.C. CODE § 62-7-816A (West 2014).

South Dakota—S.D. CODIFIED LAWS §§ 55-2-15 through 55-2-21 (West 2014).

Tennessee—TENN. CODE § 35-15-816(b)(27) (West 2013).

Texas—TEXAS TRUST CODE §§ 112.071-112.087 (West 2013).

Virginia—VA. CODE § 55-548.16:1 (original enactment); VA. CODE § 64.2-778.1

(renumbered as part of consolidation of trust and estate laws) (West 2012).

Wisconsin—WIS. STAT. § 701.0418 (West 2014).

Wyoming—WYO. STAT. § 4-10-816(a)(xxviii) (2013).

For summaries of the various state decanting statutes, *see* <http://www.sidley.com/state-decanting-statutes/>.

administration of the trust, so long as there are adequate restrictions and remedies to protect the purposes of the trust and the beneficiaries' interests.

3. *Grantor's Intent*

How does one reconcile decanting with respecting the grantor's intent? First, just like any fiduciary power, the power to decant should be exercised only to further the purposes of the trust, and some statutes explicitly say this. Decanting does not change a Bordeaux into a Chardonnay. Second, where the grantor gave the trustee unlimited discretion, the grantor is already trusting the trustee's judgment and decanting should permit changes to beneficial interest. Decanting is an exercise of the trustee's unlimited discretion, and permits the trustee to fine tune the beneficial provisions for the beneficiaries. Have faith in your sommelier and your trustee. Third, decanting to change administrative provisions recognizes that grantors generally want their trusts administered efficiently, and practically cannot anticipate, much less address in the trust instrument, all possible future circumstances. It may take years to know when a particular vintage should be decanted, or what vintages are spectacular.

4. *Illinois Statute*

The Illinois decanting statute is section 16.4 of the Trusts and Trustees Act and is titled "Distribution of Trust Principal in Further Trust."⁸⁷ The remaining sections of this article discuss the Illinois statute.

B. Decanting Authority

Under the Illinois statute, the term "first trust" refers to the original trust, and the trust into which the first trust is being decanted is referred to as the "second trust." Thus the first trust is akin to the original bottle of the wine, and the second trust is the decanter.

1. *What Trusts May Be Decanted?*

Illinois irrevocable trusts, whether in existence on the effective date of the decanting legislation or created on or after the effective date, may be decanted. Only irrevocable trusts may be decanted. The "first trust" may be an irrevocable inter vivos or testamentary trust.⁸⁸ The "second trust" must

87. 760 ILL. COMP. STAT. 5/16.4.

88. 760 ILL. COMP. STAT. 5/16.4(a).

be an irrevocable trust.⁸⁹ Although not expressly stated in the statute, the second trust may be either a trust already in existence or a trust created for the purpose of serving as the second trust for purposes of decanting. A trust may be decanted in whole or in part.⁹⁰ A trust may be decanted to more than one second trusts.⁹¹

However, a trust may expressly prohibit decanting or prohibit certain modifications through decanting.⁹² A spendthrift provision, provision prohibiting amendment, or provision stating that a trust is irrevocable will not be construed as prohibiting decanting.⁹³

2. *Who Can Decant?*

The Illinois statute permits an “authorized trustee” to decant.⁹⁴ An authorized trustee is defined in the statute as “an entity or individual, other than the settlor, who has authority under the terms of the first trust to distribute the principal of the trust for the benefit of one or more current beneficiaries.”⁹⁵ Note that the term “authorized trustee” could encompass a person such as a distribution director who is not literally the trustee of the trust, but who has authority to direct distributions of trust principal.⁹⁶ Further note that while a settlor acting as trustee would not be an authorized trustee,

89. *Id.*

90. 760 ILL. COMP. STAT. 5/16.4(c), (d).

91. *See* 760 ILL. COMP. STAT. 5/16.4(d).

92. The Illinois statute has two separate provisions on trust prohibitions on decanting, one of which requires express reference to the Illinois statute. 760 ILL. COMP. STAT. 5/16.4(m) states:

Express prohibition. A power authorized by subsection (c) or (d) may not be exercised if expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the first trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under subsection (c) or (d). *Id.*

760 ILL. COMP. STAT. 5/16.4(v) states in part:

Application. . . . This Section shall be construed as pertaining to the administration of a trust and shall be available to any trust that is administered in Illinois under Illinois law or that is governed by Illinois law with respect to the meaning and effect of its terms, including a trust whose governing law has been changed to the laws of this State, unless the governing instrument expressly prohibits use of this Section *by specific reference to this Section*. A provision in the governing instrument in the form: “Neither the provisions of Section 16.4 of the Trusts and Trustees Act nor any corresponding provision of future law may be used in the administration of this trust” or a similar provision demonstrating that intent is sufficient to preclude the use of this Section. *Id.* (Emphasis added).

Under subsection 16.4(v), a prohibition in a trust that generically prohibits the use of decanting under any state statute would not be sufficient because it would not specifically refer to the Illinois decanting statute. *Id.*

93. 760 ILL. COMP. STAT. 5/16.4(m).

94. For convenience, this article uses the term “trustee” instead of “authorized trustee.”

95. 760 ILL. COMP. STAT. 5/16.4(a).

96. *See id.*

there does not appear to be a restriction on a beneficiary who is acting as trustee from decanting.⁹⁷ Usually, this will not create any new tax issues because a trustee who does not have absolute discretion to distribute principal will not be able to change the beneficial interests in the trust by decanting. Typically trusts do not give an interested trustee absolute discretion over discretionary distributions because such discretion would create gift and estate tax issues.

3. Grantor's Intent and Trust Purposes

The Illinois statute explicitly states that the decanting power must be exercised "in furtherance of the purposes of the trust."⁹⁸ The power to decant is a fiduciary power, to be exercised in a fiduciary capacity. However, a trustee's actions with respect to decanting will not be found to violate the trustee's duty of impartiality unless the trustee acted in bad faith.⁹⁹

4. Is Beneficiary Consent Required?

The Illinois statute does not require that the beneficiary affirmatively consent to the decanting.¹⁰⁰ The trustee, however, must give prior notice of the decanting to all of the legally competent current beneficiaries and presumptive remainder beneficiaries, determined assuming the nonexercise of any power of appointment.¹⁰¹ If no beneficiary to whom notice was sent objects within sixty days, the trustee may decant without court approval.¹⁰² If any such beneficiary objects within the notice period, the trustee needs court approval in order to decant.¹⁰³ The impact of the beneficiary right to object on the gift, estate and generation-skipping transfer ("GST") tax consequences of decanting should be considered.¹⁰⁴

97. 760 ILL. COMP. STAT. 5/16.4(b) of the statute states that an "*independent trustee* who has discretion to make distributions to the beneficiaries shall exercise that discretion in the trustee's fiduciary capacity, whether the trustee's discretion is absolute or limited to ascertainable standards, in furtherance of the purposes of the trust." *Id.* (Emphasis added.) The use of the word "independent" in subsection (b) is inconsistent with the remainder of the statute.

98. 760 ILL. COMP. STAT. 5/16.4(b).

99. 760 ILL. COMP. STAT. 5/16.4(f)(3).

100. 760 ILL. COMP. STAT. 5/16.4(e).

101. *Id.* "Current beneficiaries" and "presumptive remainder beneficiaries" are defined in subsection 16.4(a).

102. 760 ILL. COMP. STAT. 5/16.4(e)(2).

103. 760 ILL. COMP. STAT. 5/16.4(e).

104. For a discussion of the tax issues of decanting, see William R. Culp, Jr. and Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1 (Spring 2010), and Jonathan G. Blattmachr, Jerold I. Horn and Diana S.C. Zeydel, *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141 (Spring 2012).

5. *Discretionary Distribution Authority*

In order to decant under the Illinois statute, the trustee must have the power to distribute the trust principal for the benefit of one or more current beneficiaries.¹⁰⁵ Note, the power to distribute must extend to the *principal* of the trust.¹⁰⁶ A trustee may decant even if there is no need for a current distribution.¹⁰⁷

Illinois permits decanting even if the trustee's discretion is limited by an ascertainable standard (e.g., health, support, and education).¹⁰⁸ Changes to beneficial interests, however, can only be made in Illinois if the trustee has absolute discretion¹⁰⁹ or is decanting to a supplemental needs trust.¹¹⁰

Under the Illinois statute, the extent to which the beneficial interests under a trust can be modified by decanting depends upon whether the authorized trustee has the absolute discretion to distribute the principal of the trust.¹¹¹ "Absolute discretion" means the right to distribute principal that is not limited or modified in any manner to, or for the benefit of, one or more beneficiaries of the trust, whether or not the term "absolute" is used.¹¹² "A power to distribute principal that includes purposes such as best interests, welfare, or happiness shall constitute absolute discretion."¹¹³

a. No Absolute Discretion

Under the Illinois statute, a trustee who has power to distribute the principal of a trust but does not have the absolute discretion to distribute the principal of the trust may distribute part or all of the principal of the first trust in favor of a trustee of the second trust, but cannot change the beneficial interests.¹¹⁴ If the trustee does not have absolute discretion, then the current beneficiaries of the second trust must be the same as the current beneficiaries of the first trust, and the successor and remainder beneficiaries of the second

105. See 760 ILL. COMP. STAT. 5/16.4(c), (d); see also 760 ILL. COMP. STAT. 5/16.4(a) (defining "authorized trustee").

106. 760 ILL. COMP. STAT. 5/16.4(c).

107. 760 ILL. COMP. STAT. 5/16.4(k).

108. See 760 ILL. COMP. STAT. 5/16.4(b), (d).

109. Compare 760 ILL. COMP. STAT. 5/16.4(c), with 760 ILL. COMP. STAT. 5/16.4(d).

110. 760 ILL. COMP. STAT. 5/16.4(d)(4).

111. 760 ILL. COMP. STAT. 5/16.4(c)-(d).

112. See 760 ILL. COMP. STAT. 5/16.4(a).

113. *Id.* (defining "absolute discretion"). Note that the purpose of "comfort" is not included among the terms that constitute absolute discretion.

114. Arguably, the trustee only needs the power to distribute principal and not discretion to distribute principal, to decant under subsection 16.4(d). If this construction is correct, the trustee of a mandatory unitrust interest that can be funded, if necessary, out of principal, could decant. See 760 ILL. COMP. STAT. 5/16.4(d). Note, however, that section 16.4(b) seems to assume that only trustees with discretion can decant. See 760 ILL. COMP. STAT. 5/16.4(b).

trust must be the same as the successor and remainder beneficiaries of the first trust.¹¹⁵

If the trustee does not have absolute discretion, then the second trust must “include the same language authorizing the trustee to distribute the income or principal of a trust as set forth in the first trust.”¹¹⁶ If the trustee does not have the absolute discretion to distribute principal, and if the first trust grants a power of appointment to a beneficiary of the trust, then the second trust must grant the same power of appointment in the second trust, and the class of permissible appointees must be the same as in the first trust.¹¹⁷

b. Supplemental Needs Trust

Even if the trustee does not have absolute discretion, the trustee may distribute a disabled beneficiary’s interest in the first trust in favor of a trustee of a second trust which is a supplemental needs trust if the trustee determines that to do so would be in the best interests of the disabled beneficiary.¹¹⁸ The best interests of the disabled beneficiary may take into consideration the financial impact to the disabled beneficiary’s family.¹¹⁹ A supplemental needs trust is defined as a trust that would allow the disabled beneficiary to receive a greater degree of governmental benefits than the disabled beneficiary would receive if no distribution is made.¹²⁰ The Illinois statute defines “disabled beneficiary” as a beneficiary who has a disability that substantially impairs the beneficiary’s ability to provide for his or her own care and custody and that constitutes a substantial handicap whether or not the beneficiary has been adjudicated a “disabled person.”¹²¹

c. Absolute Discretion

A trustee who has absolute discretion to distribute principal of the trust may distribute part or all of the principal of the trust in favor of a trustee of the second trust for the benefit of one, more than one, or all of the current

115. 760 ILL. COMP. STAT. 5/16.4(d).

116. 760 ILL. COMP. STAT. 5/16.4(d)(1).

117. 760 ILL. COMP. STAT. 5/16.4(d)(3).

118. 760 ILL. COMP. STAT. 5/16.4(d)(4)(i).

119. 760 ILL. COMP. STAT. 5/16.4(d)(4)(ii) (defining “best interests”).

120. *Id.* Significantly, the decanting statute not only authorizes decanting to a supplemental needs trust but also seems to directly protect any supplemental needs second trust from the claims of the State of Illinois. “A supplemental needs second trust shall not be liable to pay or reimburse the State or any public agency for financial aid or services to the disabled individual except as provided in the supplemental needs second trust.” 760 ILL. COMP. STAT. 5/16.4(d)(4)(iv).

121. 760 ILL. COMP. STAT. 5/16.4(d)(4)(ii).

beneficiaries of the first trust and for the benefit of one, more than one, or all of the successor and remainder beneficiaries of the first trust.¹²²

Under the Illinois statute, if the trustee has absolute discretion to distribute principal, then the beneficiaries of the second trust do not have to be the same as the beneficiaries of the first trust.¹²³ The beneficiaries of the second trust can be one or more of the current beneficiaries of the first trust and one or more of the successor and remainder beneficiaries of the first trust.¹²⁴ The second trust cannot include as a beneficiary anyone who was not a beneficiary of the first trust.¹²⁵

The second trust can eliminate one or more of the current beneficiaries, so long as at least one of the current beneficiaries of the first trust is a beneficiary of the second trust.¹²⁶ The second trust can eliminate one or more of the successor and remainder beneficiaries, so long as at least one of the successor and remainder beneficiaries of the first trust is a beneficiary of the second trust.¹²⁷

It would appear that a successor or remainder beneficiary could become a current beneficiary. If so, it may have income tax implications under the grantor trust rules.¹²⁸ In addition, it would appear that (1) a current beneficiary could become a remainder beneficiary and (2) a contingent remainder beneficiary could become a presumptive remainder beneficiary.

C. Restrictions

1. *Mandatory Distribution Rights*

Under the Illinois statute, an authorized trustee may not decant in a way that would reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount provided that such mandatory right has come into effect with respect to the beneficiary, except with respect

122. 760 ILL. COMP. STAT. 5/16.4(c). Note that while the terms "current beneficiary" and "successor beneficiary" are defined in the statute, the term "remainder beneficiary" is not defined. Presumably, the term is shorthand for "presumptive remainder beneficiary," which is defined. *See* 760 ILL. COMP. STAT. 5/16.4(a).

123. 760 ILL. COMP. STAT. 5/16.4(c).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. The mere existence of a power to accelerate a remainder beneficiary's interest arguably could cause a trust to be a grantor trust. Several of the exceptions to the grantor trust rules do not apply if the trustee has the ability to add a beneficiary. *See, e.g.*, I.R.C. § 674(b)(5), (b)(6), (b)(7) (2014); I.R.C. § 674(c); I.R.C. § 674(d). Under the grantor trust rules, the power to add a beneficiary includes the power to make a remainder beneficiary a current beneficiary. *See* Treas. Reg. § 1.674(d)-(2)(b).

to a second trust which is a supplemental needs trust.¹²⁹ Thus, if a beneficiary currently has a right to income or an annuity or unitrust payment, the trustee cannot eliminate that right. On the other hand, if a beneficiary has a right to withdraw a certain portion of the trust at age twenty-five and has not yet reached that age, and the authorized trustee has the absolute discretion to distribute principal, the trustee could decant to a second trust that does not grant a right of withdrawal at age twenty-five.

2. *Tax Savings Provisions*

The Illinois decanting statute provides certain tax limitations to make certain that important tax benefits, such as the marital deduction, the charitable deduction, and the gift tax annual exclusion, will not be denied merely because a trustee has a decanting power.¹³⁰ Subsection 16.4(p) provides:

If any contribution to the first trust qualified for the annual exclusion under Section 2503(b) of the Code, the marital deduction under 2056(a) or 2523(a) of the Code, or the charitable deduction under Section 170(a), 642(c), 2055(a) or 2522(a) of the Code, is a direct skip qualifying for treatment under Section 2642(c) of the Code, or qualified for any other specific tax benefit that would be lost by the existence of the authorized trustee's authority under subsection (c) or (d) for income, gift, estate, or generation-skipping transfer tax purposes under the Code, then the authorized trustee shall not have the power to distribute the principal of a trust pursuant to subsection (c) or (d) in a manner that would prevent the contribution to the first trust from qualifying for or would reduce the exclusion, deduction, or other tax benefit that was originally claimed with respect to that contribution.¹³¹

a. *Gift Tax Annual Exclusion*

Internal Revenue Code ("Code") section 2503(b) grants a gift tax annual exclusion for gifts of a "present interest."¹³² Present interests are often created in trusts by granting the beneficiary a Crummey right of withdrawal over contributions to the trust. If a trustee could decant in a manner that prematurely terminated a beneficiary's existing Crummey right of withdrawal over a prior contribution to the trust so that it would not qualify as a "present interest," then the contribution would not qualify for the gift tax

129. 760 ILL. COMP. STAT. 5/16.4(n)(1).

130. 760 ILL. COMP. STAT. 5/16.4(p).

131. *Id.*

132. I.R.C. § 2503(b) (2014).

annual exclusion.¹³³ Under subsection 16.4(p), if a contribution to a trust qualified as a gift of a present interest because the trust granted a beneficiary a right of withdrawal over contributions, the trustee cannot modify the right of withdrawal in a way that would affect the qualification for the gift tax annual exclusion.¹³⁴

b. Marital Deduction

Code section 2056(a) refers to the estate tax marital deduction, and Code section 2523(a) refers to the gift tax marital deduction.¹³⁵ A trust might not qualify for the marital deduction if state law permitted the trustee to alter the required provisions for qualifying for the marital deduction. For example, a trust qualifying as a general power of appointment marital trust must grant the surviving spouse a general power of appointment. If a trustee could decant and deprive the spouse of her general power of appointment, a marital deduction would not be permitted for such trust. Under the Illinois statute, if a trust qualified for the marital deduction by reason of granting the spouse a general power of appointment, the authorized trustee could not decant in a manner that would deprive the spouse of the general power of appointment.¹³⁶ Alternatively, if a trust qualified as a QTIP, the authorized trustee could not decant in a way that deprived the spouse of the income interest necessary to qualify for QTIP treatment.¹³⁷

c. Charitable Deduction

Code section 170(a) refers to the income tax charitable deduction.¹³⁸ Code section 642(c) refers to the income tax deduction for amounts paid or permanently set aside for a charitable purpose.¹³⁹ Code section 2055(a) refers to the estate tax charitable deduction.¹⁴⁰ Code section 2522(a) refers to the gift tax charitable deduction.¹⁴¹ The restriction on decanting in a way that would disqualify the trust for a charitable deduction or reduce the amount of the deduction is important to ensure that charitable lead trusts, charitable remainder trusts and other charitable trusts cannot be modified in a way that arguably would prevent them from qualifying for the charitable deduction or

133. *Id.*

134. 760 ILL. COMP. STAT. 5/16.4(n)(1) prohibits the elimination of an existing right of withdrawal, thus also protecting qualification for the annual exclusion resulting from a *Crummey* right of withdrawal.

135. I.R.C. § 2504 (2014).

136. 760 ILL. COMP. STAT. 5/16.4.

137. *Id.*

138. I.R.C. § 170 (2014).

139. I.R.C. § 642 (2014).

140. I.R.C. § 2033 (2014).

141. I.R.C. § 2522 (2014).

that would reduce the amount of that deduction, as could be the case if the trustee could decant in a way that reduced the charitable interest in a split-interest trust.

d. GST Annual Exclusion

Code section 2642(c) refers to the GST annual exclusion and the GST tax exclusion for the direct payment of tuition and medical care expenses.¹⁴² Code section 2642(c) grants a GST annual exclusion to gifts that qualify for the gift tax annual exclusion, but imposes two additional requirements for gifts to trusts.¹⁴³ First, the trust must be only for a single individual and, second, if the individual dies before the termination of the trust, the assets of the trust must be included in the gross estate of such individual.¹⁴⁴ Thus, while gifts to trusts for multiple beneficiaries could qualify for the gift tax annual exclusion through the use of Crummey withdrawal rights, such gifts would not qualify for the GST annual exclusion. Given that the decanting statutes generally do not permit a trust to be decanted to add a beneficiary, it seems unlikely that the Code section 2642(c) restriction requiring a trust be for a single individual could be violated through decanting. However, the requirement the trust be included in the gross estate of the individual could perhaps be violated by decanting to a trust that was not includible in the beneficiary's gross estate.

e. S Corporations

If the first trust owns subchapter S Corporation stock, an authorized trustee may not decant to distribute S Corporation stock to a second trust that is not a permitted shareholder under Code section 1361(c)(2).¹⁴⁵

f. Retirement Benefits Subject to Minimum Distribution Rules

Complicated rules determine when the life expectancy of a trust beneficiary can be considered in determining the required minimum

142. I.R.C. § 2642 (2014).

143. *Id.*

144. *Id.*

145. This provision, as currently drafted, does not explicitly address an issue that arises with respect to a qualified subchapter S trust ("QSST"). In order for a trust to qualify as a QSST, (a) the terms of the trust must require that during the life of the current income beneficiary there shall be only one income beneficiary and (b) all of the income must be distributed to such beneficiary. I.R.C. § 1361(d)(3). Thus, it may be important that a trust intended to qualify as a QSST not be permitted to be decanted into a trust that would not qualify as a QSST. Subsection 16.4(p), however, may impose such a restriction if one considers qualifying as an S corporation shareholder a "tax benefit." Alternatively, the requirement in the Illinois statute that the decanting be in furtherance of the purposes of the trust may implicitly impose a restriction on converting a QSST to a non-QSST.

distribution rules when a trust is the beneficiary of a qualified retirement plan or IRA. Under these rules, only trusts with certain provisions and restrictions permit the life expectancy of the beneficiary to be used to determine required minimum distributions. If a trustee could decant to a trust that would not meet these requirements, then arguably the old trust would not qualify from the inception to use the life expectancy of the beneficiary. The decanting statute provides that if the first trust owns an interest in property subject to the minimum distribution rules of Code section 401(a)(9), a trustee may not exercise the power to decant to distribute part or all of the interest in such property to a second trust that would result in the shortening of the minimum distribution period to which the property is subject in the first trust.¹⁴⁶

g. Conversion of Grantor Trust to Non-Grantor Trust

One exception to the general rule that decanting cannot be exercised in a manner that would eliminate a tax benefit is with respect to the grantor trust rules. The statute specifically permits the authorized trustee to decant from a grantor trust to a non-grantor trust.¹⁴⁷ A trustee may decant a trust in a manner that converts a grantor trust to a non-grantor trust either as an incidental result of changing the terms of such trust (for example, to eliminate the interest of a spouse as a beneficiary) or as a primary purpose of the decanting.¹⁴⁸

h. Conversion of Non-Grantor Trust to Grantor Trust

The Illinois statute explicitly states that the trustee is not prohibited from decanting into a grantor trust.¹⁴⁹ Permitting such conversion allows a trustee to impose on the grantor of the trust a tax liability that the grantor did not voluntarily accept and that the grantor may not have the ability to eliminate. It can, however, allow the second trust to grow more effectively by imposing the income tax liability on the grantor.

3. Trustee Mischief

The Illinois decanting statute contains a number of restrictions that prevent a trustee from decanting for the purpose of benefiting itself as

146. 760 ILL. COMP. STAT. 5/16.4(p)(3).

147. 760 ILL. COMP. STAT. 5/16.4(p)(1).

148. *Id.*

149. 760 ILL. COMP. STAT. 5/16.4(p)(1).

trustee.¹⁵⁰ These include restrictions on changing provisions regarding trustee fees, trustee liability and trustee removal.¹⁵¹

a. Trustee Liability

The Illinois decanting statute prohibits a trustee from decanting to a trust that increases a trustee's protection from liability except to the extent the second trust reallocates fiduciary responsibilities from the trustee to another party by adding distribution advisors, investment advisors, trust protectors or other parties.¹⁵² Subsection 16.4(n)(2) prohibits an authorized trustee from exercising the decanting power:

(2) to decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence; except to indemnify or exonerate one party from liability for actions of another party with respect to distribution that unbundles the governance structure of a trust to divide and separate fiduciary and nonfiduciary responsibilities among several parties, including without limitation one or more trustees, distribution advisors, investment advisors, trust protectors, or other parties, provided however that such modified governance structure may reallocate fiduciary responsibilities from one party to another but may not reduce them.¹⁵³

Thus, one could decant a trust to take advantage of the new Illinois directed trust statute,¹⁵⁴ which permits the allocation of powers to an investment trust advisor, distribution trust advisor or trust protector.¹⁵⁵

b. Trustee Fees

The Illinois decanting statute has a number of provisions regarding trustee fees.¹⁵⁶

i. Changing Provisions Regarding Trustee Compensation

Subsection 16.4(q)(1) prohibits a trustee from decanting solely to change the provisions regarding the compensation of the trustee. However,

150. 760 ILL. COMP. STAT. 5/16.4(n)(2)-(3), (q).

151. *Id.*

152. 760 ILL. COMP. STAT. 5/16.4(n)(2).

153. *Id.*

154. 760 ILL. COMP. STAT. 5/16.3.

155. Note, however, that 760 ILL. COMP. STAT. 5/16.3(f)(3) does not relieve the trustee from liability for the acts of a directing party if the trustee "appoints" the directing party.

156. 760 ILL. COMP. STAT. 5/16.4(q).

if a trust is being decanted for “other valid and reasonable purposes,” the second trust may alter the provisions regarding the compensation of the trustee to “bring the trustee’s compensation into accord with reasonable limits in accord with Illinois law in effect at the time of the exercise.”¹⁵⁷

ii. Trustee Compensation Under Second Trust

Subsection 16.4(q)(2) provides that the “compensation payable to the trustee or trustees of the first trust may continue to be paid to the trustees of the second trust during the terms of the second trust and may be determined in the same manner as otherwise would have applied in the first trust”¹⁵⁸ Thus, whatever compensation arrangement applied with respect to the first trust, absent any valid change to the terms of trustee compensation in the second trust, may continue after the decanting.¹⁵⁹

iii. No Special Trustee Fees for Decanting

Subsection 16.4(q)(2) also provides that “no trustee shall receive any commission or other compensation imposed upon assets distributed due to the distribution of property from the first trust to a second trust pursuant to subsection (c) or (d).”¹⁶⁰ Thus, if a trustee has been charging a fee on distribution of principal, such fee would not apply to any distribution of principal resulting from the decanting.

c. Trustee Removal

The Illinois decanting statute also prohibits a trustee from decanting to eliminate a trustee remover.¹⁶¹ Subsection 16.4(n)(3) provides that an authorized trustee may not exercise the decanting power:

(3) to eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under subsection (c) or (d); provided, however, such person’s right to remove or replace the authorized trustee may be eliminated if a separate independent, non-subservient individual or entity,¹⁶² such as a trust protector, acting in a

157. 760 ILL. COMP. STAT. 5/16.4(q)(1).

158. 760 ILL. COMP. STAT. 5/16.4(q)(2).

159. *Id.*

160. *Id.*

161. 760 ILL. COMP. STAT. 5/16.4(n)(3).

162. It is not clear what is the definition of an “independent, non-subservient individual or entity.” One might refer to section 672 of the Internal Revenue Code, which presumes that a “related or subordinate party” is subservient unless such party is shown not to be subservient by a preponderance of the evidence. Code section 672(c) defines a “related or subordinate party” to include the grantor’s spouse if living with the grantor; the grantor’s father, mother, issue, brother

nonfiduciary capacity has the right to remove or replace the authorized trustee.¹⁶³

4. Rule Against Perpetuities

An exercise of a decanting power could inadvertently violate a rule against perpetuities period applicable to the old trust if the new trust does not comply with the same rule against perpetuities period. Two different provisions of the Illinois decanting statute address the rule against perpetuities.¹⁶⁴ Generally, the same rule against perpetuities period that applied to the first trust must apply to the second trust.¹⁶⁵

a. Measuring Lives

While subsection 16.4(g) could be read as permitting the second trust to use a broader class of measuring lives than the first trust, so long as all such lives were in being at the time the first trust became irrevocable, subsection 16.4(n)(4) does not appear to permit the change in the class of measuring lives unless the first trust expressly permits the trustee to do so.

b. Reducing the Rule Against Perpetuities Period

Subsection 16.4(n)(4) states that the new trust may not “reduce, limit or modify” the rule against perpetuities period.¹⁶⁶ Thus, in Illinois, apparently the new trust could not adopt a shorter rule against perpetuities period. This restricts the ability to use the decanting statute to merge two trusts, one of which has a shorter rule against perpetuities period.

or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; and a subordinate employee of a corporation in which the grantor is an executive. The decanting statute, however, is interested in whether the trustee remover is independent and not subservient to the trustee, whereas Code section 672 is interested in whether an individual is subservient to the grantor.

163. 760 ILL. COMP. STAT. 5/16.4(n)(3).

164. 765 ILL. COMP. STAT. 5/16.4(g), (n)(4).

165. 760 ILL. COMP. STAT. 5/16.4(g) provides as follows:

Term of the second trust. The second trust to which an authorized trustee distributes the assets of the first trust may have a term that is longer than the term set forth in the first trust, including, but not limited to, a term measured by the lifetime of a current beneficiary; provided, however, that the second trust shall be limited to the same permissible period of the rule against perpetuities that applied to the first trust, unless the first trust expressly permits the trustee to extend or lengthen its perpetuities period. *Id.*

In addition, subsection 16.4(n)(4) provides that an authorized trustee may not exercise a decanting power “to reduce, limit or modify the perpetuities provision specified in the first trust in the second trust, unless the first trust expressly permits the trustee to do so.” *Id.*

166. 760 ILL. COMP. STAT. 5/16.4(n)(4).

c. Qualified Perpetual Trusts

If the first trust is a qualified perpetual trust under the Illinois Statute Concerning Perpetuities, then the rule against perpetuities does not apply.¹⁶⁷ In such a case, it would appear that a second trust would not be required to be subject to a rule against perpetuities and may also be a qualified perpetual trust. However, a GST-exempt trust (especially a grandfathered trust), might lose its exempt status if the new trust does not comply with the federal rule against perpetuities.

D. Procedure

1. Notice

Under the Illinois decanting statute, if an authorized trustee wishes to decant without court involvement, the authorized trustee must provide written notice to the legally competent current beneficiaries and presumptive remainder beneficiaries at least sixty days prior to the decanting.¹⁶⁸ No notice is required to be given to any representative of a minor or incompetent beneficiary.¹⁶⁹ If there are no legally competent current beneficiaries, or if there are no legally competent presumptive remainder beneficiaries, then the authorized trustee cannot decant without court approval.¹⁷⁰ The written notice must specify the manner in which the trustee intends to exercise the power.¹⁷¹

A trustee is prohibited from decanting without court approval if any legally competent current beneficiary or legally competent presumptive remainder beneficiary objects in writing during the sixty day notice period.¹⁷² An objection made on behalf of a beneficiary who is not legally competent and to whom no notice was sent, for example, an objection by a parent of a minor beneficiary, would not prevent the trustee from decanting without court approval.

If a charity is a current beneficiary or a presumptive remainder beneficiary, notice must also be provided to the Attorney General's Charitable Trust Bureau.¹⁷³ Presumably, an objection by the Attorney

167. 765 ILL. COMP. STAT. 305/4(a)(8).

168. 760 ILL. COMP. STAT. 5/16.4(e). Under the Illinois statute, a trustee is not required to provide notice to a beneficiary who is known to the trustee but who cannot be located by the trustee after reasonable diligence or who is not known to the trustee. *Id.*

169. 760 ILL. COMP. STAT. 5/16.4(e)(2).

170. *See* 760 ILL. COMP. STAT. 5/16.4(e)(1).

171. *Id.*

172. 760 ILL. COMP. STAT. 5/16.4(e).

173. *Id.*

General's Charitable Trust Bureau would prevent the trustee from decanting without court approval.

2. *Written Instrument*

The actual act of decanting is accomplished by a written instrument signed and acknowledged by the trustee and filed with the records of the first trust and the second trust.¹⁷⁴ Presumably, this instrument would identify the first trust and the second trust, would specify whether all of the principal of the first trust or certain assets of the first trust are being decanted and would state the effective date of the decanting.

3. *Application to Court*

In order to decant, a trustee must obtain court approval if a beneficiary objects within the notice period, or if there is no legally competent current beneficiary or if there is no legally competent presumptive remainder beneficiary.¹⁷⁵ The trustee may seek court approval if the trustee wants the comfort of a court order.¹⁷⁶

a. *Beneficiary May Petition*

If the trustee receives an objection within the notice period, either the trustee or the beneficiary “may petition the court to approve, modify, or deny the exercise of the trustee’s powers.”¹⁷⁷

b. *Burden of Proof*

The burden of proof is on the trustee to prove that “the proposed exercise of the power furthers the purposes of the trust.”¹⁷⁸

174. 760 ILL. COMP. STAT. 5/16.4(r).

175. 760 ILL. COMP. STAT. 5/16.4(e)(1).

176. 760 ILL. COMP. STAT. 5/16.4(f)(1). The trustee is not liable to any person interested in the trust for seeking a court order so long as the trustee acts reasonably and in good faith. 760 ILL. COMP. STAT. 5/16.4(u). The trustee is presumed to act reasonably and in good faith unless the court finds the trustee abused its discretion.

177. 760 ILL. COMP. STAT. 5/16.4(f)(2).

178. *Id.*

c. Duty of Impartiality

The statute provides that the trustee does not violate its duty of impartiality by arguing in favor of decanting unless the court finds that the trustee acted in bad faith.¹⁷⁹ Subsection 16.4(f)(3) would appear to protect the trustee from a claim by a beneficiary that the trustee violated its duty of impartiality if the trustee is seeking to modify or eliminate the beneficiary's rights under the trust.¹⁸⁰

4. Coordination with Virtual Representation

The Illinois decanting statute makes clear that it does not limit any rights to decant that a trustee may have under the express terms of the trust.¹⁸¹ Nor does the decanting statute limit the ability of a trustee and beneficiaries of the first trust to modify the trust under the Illinois virtual representation statute.¹⁸² As the Illinois virtual representation statute explicitly permits a nonjudicial settlement agreement to address the exercise or nonexercise of any power by a trustee, where possible the trustee who is decanting to a second trust may wish to obtain such an agreement to provide the trustee with protection from liability for decanting beyond that provided by the decanting statute alone. As discussed below, the Illinois decanting statute gives a beneficiary a two-year period (or longer in the case of a beneficiary under a legal disability) to challenge the decanting. If, however, the decanting is approved by a nonjudicial settlement agreement under the Illinois virtual representation statute, it is "final and binding on the trustee and all beneficiaries of the trust, both current and future, as if ordered by a court with competent jurisdiction over all parties in interest."¹⁸³

E. Liability and Remedies

The Illinois decanting statute protects a trustee who reasonably and in good faith decants.¹⁸⁴ It also protects a trustee who in good faith does not decant.¹⁸⁵ In addition, it establishes a statute of limitations for bringing claims against a trustee for decanting or failing to decant.¹⁸⁶

179. 760 ILL. COMP. STAT. 5/16.4(f)(3).

180. *See id.*

181. 760 ILL. COMP. STAT. 5/16.4(j).

182. *Id.*

183. 760 ILL. COMP. STAT. 5/16.1(d)(6).

184. 760 ILL. COMP. STAT. 5/16.4(u).

185. 760 ILL. COMP. STAT. 5/16.4(l).

186. 760 ILL. COMP. STAT. 5/16.4(u).

1. *Liability*

A trustee has no duty to decant, and “no inference of impropriety shall be made as a result of an authorized trustee not exercising the power” to decant.¹⁸⁷ Further, the trustee has no duty to inform the beneficiaries about the availability of decanting or to review the trust to determine if decanting would be advisable.¹⁸⁸

Subsection 16.4(u) protects the trustee if the trustee acts in good faith and creates a presumption that the trustee has acted reasonably and in good faith unless a court determines there has been an abuse of discretion.¹⁸⁹

2. *Remedies*

The Illinois decanting statute provides that a person’s exclusive remedy is to obtain an order of the court directing the decanting:

If a trustee reasonably and in good faith takes or omits to take any action under this Section and a person interested in the trust opposes the act or omission, the person’s exclusive remedy is to obtain an order of the court directing the trustee to exercise authority in accordance with this Section in such manner as the court determines necessary or helpful for the proper functioning of the trust, including without limitation prospectively to modify or reverse a prior exercise of such authority.¹⁹⁰

3. *Statute of Limitations*

The Illinois decanting statute generally provides a two-year statute of limitations except in the case of a beneficiary under a legal disability.¹⁹¹

187. 760 ILL. COMP. STAT. 5/16.4(l).

188. *Id.*

189. 760 ILL. COMP. STAT. 5/16.4(u).

190. *Id.*

191. 760 ILL. COMP. STAT. 5/16.4(u) provides in part:

Any claim by any person interested in the trust that an act or omission by a trustee under this Section was an abuse of discretion is barred if not asserted in a proceeding commenced by or on behalf of the person within 2 years after the trustee has sent to the person or the person’s personal representative a notice or report in writing sufficiently disclosing facts fundamental to the claim such that the person knew or reasonably should have known of the claim. Except for a distribution of trust principal from a first trust to a second trust made by agreement in accordance with Section 16.1 of this Act, the preceding sentence shall not apply to a person who was under a legal disability at the time the notice or report was sent and who then had no personal representative. For purposes of this subsection (u), a personal representative refers to a court appointed guardian or conservator of the estate of a person. *Id.*

a. Beneficiary Who Received Notice

Although a trustee may decant if notice has been provided to all current beneficiaries and presumptive remainder beneficiaries who are not under any legal disability and none of them have objected within the sixty-day notice period, a beneficiary receiving notice appears to still have a two-year period from the date of notice within which to bring a court action to undo the decanting.¹⁹² Thus, in cases where the changes made by the decanting do not raise any potential tax implications, the trustee may prefer to obtain the consent of such beneficiaries to the decanting.

b. Beneficiaries Under a Legal Disability

The statute does not require the trustee to provide notice of the proposed decanting to beneficiaries who are under a legal disability or their legal representatives.¹⁹³ Such beneficiaries may bring a court action to reverse the decanting at any time until two years have passed from the time they receive notice of the decanting.¹⁹⁴ Thus, the trustee may wish to provide notice, either prior to or immediately after decanting, to beneficiaries under a legal disability who have a court appointed guardian or conservator of the estate even though such notice is not required. Further, where a beneficiary is under a legal disability at the time of decanting but subsequently gains legal capacity, the trustee may wish to provide notice at the time legal capacity is acquired so that the statute of limitations will begin to run. Alternatively, the trustee may wish to obtain court approval of the decanting which, while it would not appear to prevent a beneficiary who was under a legal disability from subsequently bringing a claim, would make it unlikely that the court would find that the prior court-approved decanting was an abuse of discretion that should be reversed.

192. See 760 ILL. COMP. STAT. 5/16.4(e)(2), (u).

193. 760 ILL. COMP. STAT. 5/16.4(u).

194. *Id.*

c. Consent

Presumably, a beneficiary who has legal capacity could consent to the trustee's exercise of the decanting power and waive the right to bring a subsequent claim that such exercise was an abuse of discretion. Consenting to decanting may (but probably should not) have tax consequences depending upon the nature of the decanting and how the tax rules develop.

d. Virtual Representation

The risk that a beneficiary could in the future bring a court action to reverse the decanting can be eliminated if the trust modification can be made pursuant to a private settlement agreement under the Illinois virtual representation statute. However, the virtual representation statute will generally permit only modifications arising out of a settlement of a dispute or that are administrative in nature.¹⁹⁵

F. Conclusion

Decanting under the Illinois decanting statute can further the purposes of the trust by permitting the trustee to:

1. make changes to administrative provisions;
2. change the governing law of a trust;
3. change the trustee or the trustee succession provisions;
4. provide for advisors, trust protectors or directed trustees;
5. divide a trust;
6. consolidate trusts;
7. correct scrivener's errors or resolve ambiguities;
8. add or remove spendthrift provisions;
9. convert a non-grantor trust to a grantor trust, or vice-versa;
10. limit a beneficiary's rights;

195. 760 ILL. COMP. STAT. 5/16.1.

11. grant, expand or limit a power of appointment;
12. create a supplemental needs trust.

Trustees, however, should exercise caution in decanting to ensure that they comply with the terms of the statute, that the decanting does not result in unintended tax consequences and that the decanting is a judicious exercise of the trustee's fiduciary powers and is in furtherance of the purposes of the trust. Don't spill the wine when decanting!

IV. TRANSFER ON DEATH INSTRUMENTS AND PENDING CHANGES

On January 1, 2012, Illinois created the Transfer on Death Instrument Act ("TODI").¹⁹⁶ The Act was drafted by the Illinois State Bar Association Trusts and Estates Section Council with the Illinois State Bar Association Real Estate Section Council and the Elder Law Section Council. This law provides owners of real estate a method of transferring ownership to beneficiaries upon the owner's death without going through probate.¹⁹⁷ Currently, the 98th General Assembly for the State of Illinois has proposed amendments to the Transfer on Death Instrument Act.¹⁹⁸ This section will outline the proposed amendments to TODI and provide details as to what the law provides in the absence of the proposed amendments.

The proposed amendments provide as follows:

1. Changing the definition of "residential real estate" by removing from the definition "units in residential cooperatives," and by including the definition of residential condominium units any parking unit or other amenity used with and owned by the owner of the condominium unit.
2. Providing that an agent under a durable power of attorney or other instrument creating an agency cannot create or revoke a transfer on death instrument on behalf of the owner, but such restriction will not be construed to prohibit the agent from selling, transferring, or encumbering the residential real estate under the terms of the agency.
3. Providing that a transfer on death instrument is effective if it is executed, witnessed and acknowledge in substantial compliance with the provisions of the Act.

196. 755 ILL. COMP. STAT. 27/1 et seq.

197. *Id.*

198. H.B. 169, 98th Gen. Assembly (Ill. 2013).

4. Replacing the provisions of the Section concerning the notice of death affidavit with a provision which makes the filing of a notice of death affidavit optional.
5. Providing that a purchaser or mortgage for value and without notice before the recordation of a *lis pendens* for an action to set aside or contest the transfer on death instrument for any reason shall take free and clear of any such action or contest.
6. Repealing the Section concerning the statutory form for the notice of death affidavit and acceptance.¹⁹⁹

A. Changes to TODI

The proposed amendments to the Illinois Residential Real Property Transfer on Death Instrument involves changing Sections 5, 35, 40, 50, 65, 75, and 90.²⁰⁰

Under 755 ILCS 27/5 the definition of residential real estate may be amended to include “any parking units.”²⁰¹ Currently, the definition of “residential real estate” under section 755 ILCS 27/5 is defined as follows:

“[R]eal property improved with not less than one or more than four residential dwelling units, units in residential cooperatives; or, condominium units, including the limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit; or a single tract of agriculture real estate consisting of 40 acres or less which is improved with a single family residence.”²⁰²

The words (units in residential cooperative; or, condominium units) are proposed to be deleted and replaced. The proposed revised definition of residential real estate is as follows:

“Residential real estate” means real property improved with not less than one nor more than 4 residential dwelling units; a residential condominium unit, including but not limited to the common elements allocated to the exclusive use thereof that form an integral part of the condominium unit and any parking unit or other amenity used with and owned by the owner of the residential condominium unit; or a single tract of agriculture real estate

199. *Id.*

200. *Id.*

201. *Id.*

202. 755 ILL. COMP. STAT. 27/35

consisting of 40 acres or less which is improved with a single family residence.”²⁰³

B. Capacity of Owner and Agent’s Authority

Under Section 35 the capacity may be revised.²⁰⁴ Currently, the aforementioned Section states:

“The capacity required to make or revoke a transfer on death instrument is the same as the capacity required to make a will. Unless expressly authorized by the owner under a power of attorney or similar instrument creating an agency, an agent for an owner does not have the authority to create or revoke a transfer on death instrument.”²⁰⁵

The words “unless expressly authorized by the owner” are proposed to be deleted.²⁰⁶ The section currently provides that the agent did not have the authority to revoke or amend a revocable trust on behalf of a principal without specific authority.²⁰⁷ The proposed amendment provides that “an agent under a durable power of attorney or other instrument creating an agency does not have the authority to create or revoke a transfer on death instrument on behalf of the owner.”²⁰⁸ Further, the proposed amendment states: “the Section shall not be construed to prohibit the agent from selling, transferring, or encumbering the residential real estate under the terms of the agency.”²⁰⁹

C. TODI Requirements

There are three requirements for TODIs which are set forth under 755 ILCS 27/40.²¹⁰ First, a TODI must contain the essential elements of a properly recordable inter vivos deed. The TODI must be executed, witnessed, and acknowledged.²¹¹ Second, the TODI must state that the transfer to the designated beneficiary occurs upon the death of the owner.²¹² Third, the TODI must be recorded prior to the owner’s death in the public records of the county recorder of the county or counties in which any part of the residential real estate is located.²¹³

203. H.B. 169, 98th Gen. Assembly (Ill. 2013).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. 755 ILL. COMP. STAT. 27/35 (2012).

210. 755 ILL. COMP. STAT. 27/40.

211. 755 ILL. COMP. STAT. 27/40(a)(1).

212. 755 ILL. COMP. STAT. 27/40(a)(2).

213. 755 ILL. COMP. STAT. 27/40(a)(3).

The failure to comply with any of the requirements of subsection (a) will render the transfer on death instrument void and ineffective to transfer the title to the residential real estate at the owner's death.²¹⁴ The Act under section 10 only applied to any TODI made before or after January 1, 2012.²¹⁵ Under section 50, notice, delivery, acceptance or consideration is not required, because the TODI is not a deed instrument. Currently, the Act requires the beneficiaries' acceptance to make the instrument effective.²¹⁶ Under the proposed amendment, acceptance would no longer be required.²¹⁷

D. The Effect of the Transfer on Death Instrument at the Owner's Death

The effect of the TODI is that it is not effective until the owner's death. The beneficiary has a right to disclaim the transfer and the interest in the residential real estate is transferred to the beneficiary in accordance with the instrument. If the beneficiary dies before the owner, the residential real estate passes to the owner's estate. If the designated beneficiary is part of a class and member of the class dies before the owner, the members surviving equal shares of deceased member. If a deceased member is descendant of owner, the deceased's descendants shall take equal shares of the deceased member.

E. Notice of Death Affidavit

Section 75 currently provides that the transfer of title was effective at the owner's death after the filing of a death affidavit and acceptance by the beneficiaries. The acceptance took place in the office of the County recorder for the counties where the residential the real estate was located. The proposed revision of section 75 states: "The acceptance requirement is no longer a part of the Illinois statute."²¹⁸ Further, the filing of the notice affidavit would no longer be required.²¹⁹

There is currently a proposal to revise 755 ILCS 27/90.²²⁰ Currently, section 90 provides a limitation period of two years after the owner's death or six months from the date that the letters of office are issued.²²¹ The proposed revision provides that, "a purchaser or mortgagee for value and without notice before recordation of a *lis pendens* for an action to set aside or

214. 755 ILL. COMP. STAT. 27/40(b).

215. 755 ILL. COMP. STAT. 27/10.

216. 755 ILL. COMP. STAT. 27/50.

217. H.B. 169, 98th Gen. Assembly (Ill. 2013).

218. *Id.*

219. *Id.*

220. H.B. 169, 98th Gen. Assembly (Ill. 2013).

221. 755 ILL. COMP. STAT. 27/90.

contest the transfer on death instrument for any reason shall take free and clear of any such action or contest.”²²²

F. Conclusion

The TODI legislation provides attorneys and their clients an alternative to transfer to a living trust or a land transfer to their beneficiaries in the absence of a will. It is important to advise clients to ensure that the TODI is consistent with the other provisions of a client’s estate plan. Further, it is imperative that attorneys stay abreast of the aforementioned amendments and any future amendments of TODI in order to ensure that they are creating effective TODIs.

222. H.B. 169, 98th Gen. Assembly (Ill. 2013).