TRUST DECANTING: A CRITICAL PERSPECTIVE

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INTRODUCTION

Poor people do not create trusts. But for people with money, the trust is a time-honored device for accomplishing a wide variety of unobjectionable, and even laudatory, goals. Trusts enable their settlors to provide for minor children or grandchildren, ensure competent management of wealth, and account for unanticipated changes in family circumstances. But many settlors use trusts to accomplish other goals—creditor protection and tax minimization—that come at a social cost: creditors do not get paid and other taxpayers pick up the fiscal slack.

None of this is new. Trusts owe their origin to medieval efforts to avoid taxation.[1] They have routinely been used as a creditor-protection device for more than a century.[2] In recent decades, however, trustees and trust lawyers have lobbied, with increasing success, for statutes that increase the ability of wealthy settlors to avoid taxes and creditors. To take one example, in response to the growth of offshore trusts,[3] a number of state legislatures have authorized "asset protection trusts" that enable settlors to shelter their own assets from creditors.[4] To take another, many states have abolished or modified the rule against perpetuities, in large measure to enable trust settlors to minimize estate tax burdens.[5]

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1 *See* J.M.W. BEAN, THE DECLINE OF ENGLISH FEUDALISM 1215–1540, at 132–33 (1968) (noting that uses, the predecessor of modern trusts, enabled landowners to evade feudal incidents); AMY MORRIS HESS, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 2 (rev. 2d and 3d ed. 2016) (same).

2 In the nineteenth century, American courts began recognizing "spendthrift trusts," which placed trust assets beyond the reach of the creditors of the trust beneficiary. *See, e.g.*, Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882) (enforcing spendthrift trusts, and concluding that the trust was not unfair to creditors because creditors are in a position to ascertain the nature of the beneficiary's interest, and therefore not to lend to a beneficiary whose resources are tied up in a spendthrift trust); *see also* Nichols v. Eaton, 91 U.S. 716, 726 (1875) (holding that spendthrift trusts are not unfair to creditors).

3 For discussion of the growth of offshore trusts in the 1990s, see James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 COM. L.J. 138, 140–43 (1997); Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11 (1994).

4 *See, e.g.*, DEL. CODE ANN. tit. 12, §§ 3570–3572 (West 2016); NEV. REV. STAT. ANN. § 166.040 (West 2013). *See generally* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

5 *See, e.g.*, ALASKA STAT. ANN. § 34.27.075 (West 2007) ("The common law rule against perpetuities does not apply in this state."); MO. ANN. STAT. § 456.025(1) (West 2007) (stating

The settlors of many older trusts (and their lawyers) did not always anticipate how much success the lobbyists would have in obtaining these benefits. As a result, the trusts they created cannot take full advantage of changes in the legal regime. Over the last twenty years or so, trustees and trust lawyers have hit upon a solution: trust decanting. Why not allow a trustee to "decant" trust assets from one vessel (the old trust) into a second vessel (a new trust that takes advantage of modern innovations), all in the name of better effectuating the presumed intent of the trust settlor? Frequently, of course, that presumed intent is avoiding taxes and creditor claims.

Decanting is not the only mechanism for modifying a trust to accomplish the settlor's objectives. In recent decades, courts have become far more willing to modify a trust's terms to ensure that a settlor's material purpose is effectuated or to adapt to circumstances not anticipated by the settlor. Decanting, however, shifts the power to modify from disinterested judges with an eye on the public interest to compensated trustees who, in some cases, stand to derive financial benefit from the decision to decant.

One state legislature after another has embraced the decanting concept,[6] although the statutory details are not always the same. The Uniform Law Commissioners have recently approved the Uniform Trust Decanting Act. That act emphasizes that a decanting statute "provides flexibility by statutorily expanding discretion already granted to the trustee to permit the trustee to modify the trust either directly or by distributing its assets to another trust."[7]

Trust decanting has some clear benefits. When the drafting lawyer has made a mess of the trust, decanting will sometimes enable the trustee to correct mistakes and to clarify ambiguities without the need for costly judicial proceedings. Decanting also enables trustees of some

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that the rule against perpetuities does not apply to interests in trust). *See generally* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005) ("The driving force behind the erosion of the Rule was not a careful reconsideration of the ancient common law policy against perpetuities, but rather a 1986 reform to the federal tax code."). The ALI has declared the perpetual trust movement ill-advised. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27, intro. note (AM. LAW INST. 2011); *see also* Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Research Paper Series No. 529, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975117.

[6] In 1992, New York was the first state to enact a decanting statute. *See* Act of July 24, 1992, ch. 591, 1992 N.Y. Laws 3520 (codified as amended at N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney 2002)). The New York statute has since been amended. Other states have enacted decanting statutes much more recently. *See, e.g.*, VA. CODE ANN. § 64.2-778.1 (West 2012) (subsequently repealed in favor of a version of the Uniform Trust Decanting Act, VA. CODE ANN. §§ 64.2-779.1–779.25 (2017))

[7] UNIF. TRUST DECANTING ACT prefatory note (UNIF. LAW COMM'N 2015).

older trusts to avoid investment inefficiencies that were not well-understood when their trusts were drafted. In emphasizing these benefits, the proponents of decanting have largely ignored two significant issues raised by the decanting movement.

The first issue is whether a statutory grant of decanting power, when the trust instrument does not authorize decanting, conflicts with basic principles of testamentary freedom. Although the justification for decanting rests on its potential to effectuate the settlor's purposes, it is not always easy for a trustee to determine the intent of a now-dead trust settlor when the settlor did not memorialize that intent in the trust instrument. The trustee, who may have been selected for reasons other than intimate knowledge of the settlor's wishes, will not always be in an optimal position to assess that intent. Moreover, the trustee's own interests may cloud its judgment about whether to decant.

The second issue, which is in some tension with the first, is whether decanting enables trustees to effectuate the settlor's intent when, as a matter of policy, there is no good reason for exalting the settlor's presumed intent. The legal system has long tolerated the distributional inequities generated by trusts in large measure because of the incentives the trust device provides to potential settlors: people with wealth and talent may engage in more productive activity, and may partake in less frivolous consumption, if they know they can provide for future generations without worrying about the debt collector or the tax collector. But even if we assume that these efficiency considerations outweigh distributional inequities, is there any reason to enable trust beneficiaries to extract newly available benefits that could not possibly have influenced the trust settlor?

This Article addresses these questions. After Part I's survey of trust law reforms that provided the impetus for the decanting movement, Part II explores the origins, justifications, and mechanics of trust decanting. Parts III and IV, the heart of the Article, establish that the extraordinary breadth of decanting statutes risks frustrating the intent of settlors and enables trustees to impose external costs without generating commensurate social benefits. Part V concludes with a discussion of the potential obstacles to reform.

I. The Origins and Evolution of Trust Law

A trust can be an efficient mechanism for accomplishing the trust settlor's objectives. At the same time, absent appropriate constraints, a trust can impose social costs on people who are not parties to the trust. Much of the history of trust law reflects the efforts of courts and legislatures to obtain the benefits trusts can create while minimizing the

external costs trusts impose. The trust is a direct descendant of the "use," a popular tax-and-creditor-avoidance device in feudal England.[8] Although statutes enacted in the fourteenth century made uses less attractive as creditor-avoidance devices,[9] uses remained popular for avoiding feudal incidents for an additional 150 years. But the spread of uses was costly to the English Crown and, in 1535, Parliament, at the urging of Henry VIII, enacted the Statute of Uses,[10] which reduced the value of uses as a tax-and-creditor-avoidance device.[11] The Statute of Uses, however, did not mark the end of trusts. First, the statute by its terms applied only to real property, leaving trusts of personalty untouched.[12] Second, common law courts construed the statute to be inapplicable to "active" trusts—those where the trustee had active duties rather than serving as a mere figurehead for the holder of beneficial title.[13]

The trust survived and thrived because it served purposes other than tax avoidance and creditor protection. First, it allowed a property owner to ensure that the family wealth would be managed by a person with some financial acumen.[14] Second, the trust provided an efficient mechanism for dividing ownership over time. The other alternative for dividing ownership over time—the legal life estate—was an inefficient vehicle for holding title to land because no one person would have authority to transfer the land even when transfer made sense for the

8 *See* BEAN, *supra* note 1, at 137 (noting that English landowners employed uses to keep their lands "out of the clutches of creditors"); *id.* at 132–33 (noting emergence of uses as a device to avoid feudal incidents). English common law obligated landowners to make a money payment, known as a "relief," to the lord of the land when land descended to an heir. HESS, BOGERT & BOGERT, *supra* note 1, § 2. This system encouraged landowners to avoid having land descend. The landowner could accomplish that result by conveying land to a feoffee to uses, the medieval equivalent to a trustee, and having the feoffee retain legal title for the benefit of the intended beneficiary (known as the *cestui que* use). *Id.* Hence, the use was a tax avoidance device. At the same time, the common law did not give creditors a remedy against the interest of a *cestui que* use. As a result, the use was also a creditor avoidance device. *Id.*

9 *See* 1 Rich. 2 c. 9 (1377) (Eng.) (invalidating enfeoffments made by landowners "to Lords and other great Men of the Realm" in order to dissuade adverse claimants from pursuing claims against the land); 50 Edw. 3 c. 6 (1376) (Eng.) (giving creditors the right to execute on land and chattels of debtors who "give their Tenements and Chattels to their Friends, by Collusion thereof to have the Profits at their Will"). *See generally* BEAN, *supra* note 1, at 125–26 (discussing regulation of uses by the English Parliament in the fourteenth century).

10 27 Hen. 8 c. 10 (1535) (Eng.).

11 The statute wiped out the legal title of the feoffee to uses. The statute conferred legal title on the *cestui que* use, thus restoring the Crown's ability to collect feudal incidents. *See* BEAN, *supra* note 1, at 287–88; *see also* W.S. Holdsworth, *The Political Causes Which Shaped the Statute of Uses*, 26 HARV. L. REV. 108 (1912) (describing the politics surrounding the Statute of Uses).

12 *See* HESS, BOGERT & BOGERT, *supra* note 1, § 5.

13 *Id.*

14 *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 637–39 (1995).

original owner's intended beneficiaries.[15] Moreover, the legal life estate was near useless to a property owner whose assets consisted of intangibles rather than land.[16] Third, the trust proved to be an efficient mechanism for organizing business enterprises—both before and after the advent of the modern corporation.[17] In other words, in many circumstances, the use of the trust created efficiency gains; the settlor, the trustee, and often the beneficiaries were better off with the trust in place than if the settlor had tried to accomplish the same ends without using the trust.

Traditional trust law doctrine constrained the freedom of trust settlors in order to address some of the externalities and other inefficiencies trusts might generate. For instance, until 1997, no American state authorized self-settled asset protection trusts.[18] That is, a settlor could not create a trust, name herself as a trust beneficiary, and insulate the settlor's beneficial interest from the settlor's creditors.[19] The well-established rule precluded a settlor and a trustee from making an agreement that shifted risk from the settlor to the settlor's future contract and tort creditors—non-parties to the trust agreement.

The Rule Against Perpetuities acted as a check on the limited foresight of the settlor. Although the trust settlor might be in an ideal position to account for the proclivities and needs of her spouse and children, the settlor is much less likely to anticipate the needs and preferences of more remote descendants not yet born at the time the settlor creates the trust.[20] The Rule operated as a limit on the settlor's "dead hand control" of the financial interests of remote descendants.[21] At the same time, the Rule limited the ability of wealthy settlors to create

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15 *See generally* JESSE DUKEMINIER ET AL., PROPERTY 240–41 (8th ed. 2014).

16 *See id.* at 239–40 (noting statutory approaches for dealing with difficulty of life estate in personal property); *see also* 1 ANDREW JAMES CASNER, AMERICAN LAW OF PROPERTY § 2.27 (Andrew James Casner ed., 1952) (noting difficulties in creating legal life estates in personal property, concluding that the trust is ideally suited for present and future interests of real property, and indicating that even when the owner does not create a trust, "trust principles should be applied so far as possible").

17 *See generally* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997).

18 In 1997, Alaska and Delaware enacted the first American statutes enabling settlors to create self-settled asset protection trusts. *See* Sterk, *supra* note 4, at 1051–55.

19 RESTATEMENT (THIRD) OF TRUSTS § 58(2) (AM. LAW INST. 2003) (retaining the traditional rule that "[a] restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid").

20 *See generally* STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS 900–01 (5th ed. 2015).

21 *See* Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1771 (2014).

perpetual trusts that would avoid the once-a-generation incidence of the estate tax.[22]

Starting with the 1990s, a number of state legislatures, prompted largely by trust lawyers representing their clients—wealthy settlors and trustees—increased the freedom of trust settlors to include provisions that traditional doctrine prohibited. In many cases, these legislatures acted to attract trust business from other states, and it might not have been lost on legislators that the externalities they created would largely be felt by out-of-staters.[23]

Of course, not all trust "reform" legislation has imposed external costs on third parties. Some critical legislation has been designed to incorporate modern investment principles unfamiliar to common law courts. In an effort to guard against loss of trust principal, common law doctrine required trustees to avoid "risky" investments in general, and in some states the prohibition extended to all investment in common stock.[24] This approach, however, ignored the converse risk that inflation would erode trust principal if principal were invested only in bonds and mortgages.[25] Decades of inflation led more states to authorize trust investments in "high grade" common stock. The central insight of modern portfolio theory—that a prudent investor should not avoid risk altogether, but should instead minimize risk through diversification—ultimately became the centerpiece of the Uniform Prudent Investor Act, which imposes on trustees an obligation to diversify trust investments.[26] At the same time, the Uniform Act (adopted almost universally) takes the position that no investment is imprudent per se, so long as the

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[22] *See* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1312–13 (2003) (noting that until the advent of the generation-skipping transfer tax (GSTT), trusts could continue without estate taxation for the duration of the perpetuities period, but not longer; after enactment of the GSTT, the Rule Against Perpetuities limited the duration of trusts taking advantage of the GSTT exemption).

[23] *See* Sterk, *supra* note 4, at 1066–70 (noting that externalities created by asset protection trusts will be felt largely by out-of-state creditors).

[24] *See* RESTATEMENT (FIRST) OF TRUSTS § 227 cmt. l (AM. LAW INST.1935) ("In some States it has been held that an investment in shares of stock is not a proper investment, unless authorized by the terms of the trust."). A number of jurisdictions adopted "legal lists" of permitted trust investments, which typically focused on government bonds and first mortgages. *See* John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 643 (1996). The First Restatement itself did not go so far, instead embracing what was then known as the "prudent man" rule, authorizing "only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived." RESTATEMENT (FIRST) OF TRUSTS § 227(a).

[25] *See* Langbein, *supra* note 24, at 645.

[26] UNIF. PRUDENT INVESTOR ACT § 3 (UNIF. LAW COMM'N 1994). *See generally* Langbein, *supra* note 24, at 646–49.

trustee takes steps to diversify that investment, and to ensure that the trust portfolio appropriately accounts for market risk.[27]

II. Decanting in Theory and Practice: Common Law Origins, Statutory Development, and Prevalent Uses

Trusts created after the advent of trust law "reforms" and other change in law were, of course, in a position to take advantage of the doctrinal changes. What of pre-existing trusts, many of which were designed to last for decades, if not longer? Should the beneficiaries of those trusts be entitled to benefit from potentially favorable changes in law? Creative trust lawyers, acting on behalf of present and potential clients, sought means to permit existing trusts to escape from now-unfavorable provisions that had been crafted to conform to the limitations of prior law. Decanting, a recent innovation,[28] provided a potential escape route.

A. *Mechanics and Common Law Origins*

Consider first how decanting operates.[29] Suppose a mother created a trust in her 1990 will and provided that the trustee, quarterly, should distribute to her daughter as much of the income and principal of the trust as the trustee, in its sole discretion, deemed appropriate. The will further provided that at the daughter's death, the remaining trust principal should be distributed to the daughter's issue, per stirpes.

Decanting would permit the trustee, during the daughter's lifetime, to transfer the trust assets into a new trust, with different terms. For instance, the new trust could authorize the daughter to give her children unequal shares of the trust principal upon her death, or could even authorize the daughter to provide that the trust assets would pass to people other than her children.[30] The new trust could extend the

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27 UNIF. PRUDENT INVESTOR ACT § 2(e); *see also id.* § 2 cmt. ("Subsection 2(e) clarifies that no particular kind of property or type of investment is inherently imprudent.").

28 Jonathan Blattmachr, a New York practitioner, has been credited with drafting the original New York decanting statute based on forms he used in practice. *See* David Restrepo, Comment, *New York's Decanting Statute: Helping an Old Vintage Come to Life or Spoiling the Settlor's Fine Wine?*, 34 PACE L. REV. 479, 487 (2014).

29 For simplicity, citations in this Section will be limited to the New York statute and the Uniform Decanting Act. Other decanting statutes would generate similar results.

30 *See* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1)–(2) (McKinney 2002) (authorizing a trustee to grant a power of appointment to a current beneficiary, and to exclude as permissible appointees only the beneficiary, the creator, the creator's spouse, and any of their creditors or

duration of the original trust, postponing ultimate distribution until the daughter's children reached the age of majority, or even until the death of the last of the daughter's children.[31]

Decanting would also permit the trustee to divide the trust into separate trusts for each of the daughter's children.[32] It would permit the trustee to locate the new "decanted" trust in a different state that might have more advantageous tax rates.[33] The new trust could also ignore any investment restrictions the mother placed on the trustee in the terms of the original trust.[34]

What basis is there for permitting a trustee to make such dramatic changes in the nature of what the trust settlor intended to be an irrevocable trust? Proponents of decanting drew an analogy between the trustee and a familiar figure in trust law: the holder of a nongeneral power of appointment.[35] Suppose a trust settlor wants to provide for a spouse for life, and wants whatever remaining property divided among the couple's children at the spouse's death. The spouse might survive the settlor by many years, and in that intervening period, may accumulate more information about the needs of the respective children. If the settlor wants to take advantage of the surviving spouse's information

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estates); UNIF. TRUST DECANTING ACT § 11(e)–(f) (UNIF. LAW COMM'N 2015) (authorizing creation in a current beneficiary of a power of appointment that may be general or nongeneral).

31 *See* EST. POWERS & TRUSTS § 10-6.6(e) (providing that the appointed trust may have a term longer than that set forth in the original trust); *see also id.* § 10-6.6(p) (limiting permissible duration to the period of the Rule Against Perpetuities); UNIF. TRUST DECANTING ACT § 19 (providing that duration of the second trust may be longer than the first trust, but is subject to any perpetuities rules applicable under state law to the property of the first trust).

32 The New York statute achieves this result by providing that the trustee "may appoint part or all" of the trust principal to an appointed trust. EST. POWERS & TRUSTS § 10-6.6(b). If the trustee can appoint part of the original trust to an appointed trust, the trustee can then appoint another part to another appointed trust. *Id.* The Uniform Act's comments make it clear that the second trust may "divide a trust into more than one trust." UNIF. TRUST DECANTING ACT § 11 cmt.

33 The New York statute explicitly provides that "[a]n authorized trustee shall consider the tax implications of the exercise of the power under paragraph (b) or (c) of this section." EST. POWERS & TRUSTS § 10-6.6(o). The Uniform Act's comment provides that the new trust may "change the jurisdiction of the trust and the law governing the administration of the trust." UNIF. TRUST DECANTING ACT § 11 cmt.

34 Although the New York statute does not make this explicit, it nowhere limits the trustee's power to change investment provisions. The Uniform Act's comment provides that the new trust may "change the powers of the trustee" and "change administrative provisions of the trust." UNIF. TRUST DECANTING ACT § 11 cmt.

35 *See, e.g.*, Jonathan G. Blattmachr et al., *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141, 143–46 (2012). A general power of appointment is one that the donee of the power may exercise in favor of herself, her estate, or the creditors of either; a nongeneral power of appointment is one that is not general. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3 (AM. LAW INST. 2011). The "nongeneral" terminology originated in the Internal Revenue Code; earlier terminology distinguished between "general" and "special" powers. *Id.* cmt. b. Outside the tax context, the term "special power" continues to be used with some frequency.

advantage, while still assuring that the children receive the property, the settlor could give the spouse a nongeneral power to appoint the trust property, by will, among the couple's children. The nongeneral power creates flexibility that would not exist if the settlor were forced to specify, at the time of settlor's own death, how the property should ultimately be divided among the children.

It has long been established that the holder of a nongeneral power of appointment can exercise that power by creating a new trust.[36] For instance, if a settlor gives a spouse a special power to appoint property among the couple's issue, the spouse could exercise that power by creating a trust for the benefit of the couple's son for the son's lifetime, with a remainder to the son's children at the son's death.

Decanting statutes rest on the premise that a trustee with absolute discretion to invade principal is the functional equivalent of the holder of a nongeneral power. The argument runs as follows: The trustee, like the holder of a nongeneral power, can exclude beneficiaries altogether by exercising its invasion power to distribute all principal to a single beneficiary. This "greater" power to exclude a beneficiary altogether should carry with it the "lesser" power to reshape the beneficiary's interest in a new, decanted, trust.

The first problem with this argument (and with the underlying analogy) is that in many cases, when a trust instrument gives the trustee power to invade principal for the benefit of a single beneficiary, the trustee has the power to exclude other beneficiaries *in only one way: by distributing the principal to that single beneficiary*. A trust settlor does not ordinarily expect a corporate trustee to alter the settlor's dispositive scheme—even though the settlor has authorized the trustee to do that indirectly by transferring all of the trust principal to the life beneficiary. The instrument may not give the trustee roving power to pick and choose which other beneficiaries obtain the principal, and when. In this respect, the trustee with power to invade is quite unlike the holder of a nongeneral power; the settlor has given the holder explicit authority to choose among potential beneficiaries. By comparison, when the settlor grants a power of appointment to a family member, the settlor deliberately gives the family member the power to alter the settlor's distribution scheme.

Second, the analogy between the trustee with power to invade and the holder of a nongeneral power of appointment is particularly problematic when the trustee is a compensated professional rather than a close family member. When the settlor gives a spouse or other family

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[36] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14 ("[T]he donee of a nongeneral power is authorized to make an appointment in any form, including one in trust . . . .").

member a nongeneral power of appointment, the holder of the power typically receives no compensation for exercising it, and does not stand to benefit personally from exercising the power by creating a new trust. By contrast, trustees, who are typically compensated, do stand to gain financially by extending the duration of the trust—and, consequently, the duration of the stream of commissions.

Third, the trust settlor may not regard the role of the trustee, who is often chosen primarily for investment and management expertise, as equivalent to the role of a power of appointment holder selected primarily for knowledge of the needs and wants of family members.[37] When the trust settlor gives a family member a nongeneral power to appoint principal among various beneficiaries, the settlor expressly confers on that family member the power to select the ultimate beneficiaries of the trust and imposes no fiduciary obligations on the family member. By contrast, when the settlor selects a trustee, particularly a corporate trustee, the settlor imposes fiduciary duties on the trustee. This difference has led the Reporter for the Uniform Trust Decanting Act to prepare a memo contending that decanting authority should not be treated as a power of appointment.[38]

In light of these difficulties with the argument for decanting, it should not be surprising that in *Phipps v. Palm Beach Trust Co.*,[39] the case generally cited as the origin of the common law power to decant trusts,[40] the trustee happened to be the settlor's spouse, and the settlor had directly conferred on that trustee the power to make final disposition of the trust principal. In *Phipps*, the settlor appointed her husband and a trust company as co-trustees, and gave her husband, as an individual, the power, in his sole discretion, to decide how the trust income or principal should be divided among the couple's four children.[41] When the corporate trustee had doubts about whether the husband could exercise this power by creating a new trust, largely for the benefit of the same four children, the Florida Supreme Court upheld the husband's power to create the new trust.[42]

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37 *See* Dukeminier & Krier, *supra* note 22, at 1338 (noting that corporate trustees are sometimes selected to avoid the problem that trusted friends eventually die, but trustees do not, and noting that over time, the representatives of the corporate trustee may end up to be people quite different from the sort the trustee would have chosen).

38 *See* Memorandum from the Unif. Decanting Distributions Drafting Comm. on Decanting Issues 1 (Dec. 2013), http://www.uniformlaws.org/shared/docs/trustdecanting/2013dec_TDA_Issues%20Memo.pdf.

39 196 So. 299 (Fla. 1940).

40 *See* Blattmachr et al., *supra* note 35, at 146; Thomas E. Simmons, *Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. REV. 253, 256–57 (2010); Restrepo, *supra* note 28, at 481–83.

41 *Phipps*, 196 So. at 300.

42 *Id.* at 301.

Until the decanting movement hit state legislatures, only a single common law case had upheld the power of corporate trustees to use its discretion to distribute principal as a basis for creating an entirely new trust with different remainder beneficiaries. Seward Johnson, an heir to the Johnson & Johnson pharmaceutical fortune, created a trust in 1944 for the benefit of his son, giving trustees "absolute and uncontrolled discretion" to distribute trust principal to the son whenever the trustees determined that distribution would be in the son's best interests.[43] The trust instrument also gave the son a power to appoint any remaining trust property by will, and provided that if the son did not exercise the power, the trust property would be divided among the son's issue, per stirpes.[44] The trustees had not distributed any principal to the son, but they were willing to make distribution to a trust created by the son on terms that would eliminate the remainder interests of two of the son's children. In *Wiedenmayer v. Johnson*, the trustees sought approval of the arrangement, and a divided court gave its blessing, relying on the broad discretion Seward Johnson had conferred on the trustees.[45]

Recognizing that this single case represented a slender reed on which to fashion a power to decant trusts, proponents of decanting turned to state legislatures for assistance.

B. *Statutory Decanting*

1. New York Origins

Proponents of decanting won their first legislative victory in 1992, when the New York legislature enacted the country's first decanting statute.[46] Tax avoidance was the impetus for the New York statute. When Congress enacted a new generation-skipping transfer tax (GSTT) in 1986, it exempted from the tax's operation all trusts that had become irrevocable by September 25, 1985.[47] Enactment of the new tax made it advantageous to extend the duration of exempt "grandfathered" trusts. The New York legislature responded by authorizing a trustee with absolute discretion to invade principal for the benefit of one or more

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43 Wiedenmayer v. Johnson, 254 A.2d 534, 535 (N.J. Super. Ct. App. Div.), *aff'd sub nom.* Wiedenmayer v. Villanueva, 259 A.2d 465 (N.J. 1969) (per curiam).

44 *Id.* at 536 (Conford, J., dissenting in part).

45 *Id.* at 535–36 (majority opinion).

46 *See* Act of July 24, 1992, ch. 591, 1992 N.Y. Laws 3520 (codified as amended at N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney 2002)).

47 Tax Reform Act of 1986, Pub. L. 99-514, § 1433(b)(2)(A), 100 Stat. 2085, 2731.

income beneficiaries to create a new trust with a longer duration, so long as the new trust did not violate the Rule Against Perpetuities.[48]

Proponents of the New York statute, and ultimately the state legislature, justified the new statute as a "clarification" of the principle that "a trustee with an absolute power to invade principal is analogous to a donee of a special power of appointment."[49] As we have seen, by 1986, it had been established, both in New York and elsewhere, that the holder of a nongeneral power of appointment was entitled to exercise the power by creating a further trust instead of merely distributing the property outright to some or all of the designated beneficiaries.[50] The legislature relied on *Phipps* and one other out-of-state case for the proposition that a trustee with an unlimited power of invasion may appoint property in further trust.[51] The legislative history made no mention of *Wiedenmayer*, and ignored differences between the typical holder of a nongeneral power of appointment and the typical corporate trustee with power to invade principal.

The New York statute did impose significant limits on the power to decant. First, a trustee could decant to another trust only if the trust instrument conferred upon the trustee absolute discretion to invade the principal of the trust; a trustee could not decant if her power was limited to invasion for the health, education, maintenance, and support of the beneficiaries.[52] Second, the trustee could decant only with the consent of the beneficiaries or pursuant to a court order.[53] Third, the trust into which the trustee decanted had to comply with the Rule Against Perpetuities, as measured from the creation of the original trust.[54]

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48 EST. POWERS & TRUSTS § 10-6.6(b). The statute also required consent of all persons interested in the trust. For the statute's legislative history, see N.Y. State Legislative Annual, 1992, ch. 591, at 364–67.

49 N.Y. State Legislative Annual, 1992, ch. 591, at 365.

50 *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 19.3 cmt. a, illus. 2 (AM. LAW INST. 1986).

51 N.Y. State Legislative Annual, 1992, ch. 591, at 366. Only one of the two cases, *Phipps v. Palm Beach Trust Co.*, 196 So. 299 (Fla. 1940), provided direct support for the legislature's proposition. In the other case, *Estate of Spencer*, 232 N.W.2d 491 (Iowa 1975), the settlor had explicitly given her husband a special power of appointment, and the court indicated that the holder of a special power is entitled to exercise the power by creating a further trust; the court did not focus on the power of a trustee with invasion power to create an entirely new trust. Moreover, the court ultimately invalidated the husband's exercise of the power as inconsistent with the wife's instructions.

52 *See* Act of July 24, 1992, ch. 591, § 1, 1992 N.Y. Laws 3520, 3521 (codified as amended at EST. POWERS & TRUSTS § 10-6.6(b)(1)).

53 *Id.* (codified as amended at EST. POWERS & TRUSTS § 10-6.6(b)(1)–(2)).

54 EST. POWERS & TRUSTS § 10-8.1 provides that for an estate created by an instrument exercising a power of appointment other than a presently exercisable general power, the Rule Against Perpetuities period runs from the time of the creation of the power. Because the New York decanting statute conceptualized exercise of the decanting power as exercise of a

These statutory provisions limited the value of decanting for many trustees. For tax and other reasons, many settlors constrain the trustee's discretion to invade principal, limiting the discretion to funds necessary for the "health, education, support, or maintenance" of the income beneficiary.[55] By the terms of the New York statute, the trustee of such a trust could not decant, because the trustee's discretion, while quite broad, was not "absolute." The statute's consent requirement proved problematic for trustees seeking to preserve the trust's GSTT exemption, because a treasury regulation exempted such trusts only if the trustee could make distributions without the consent of the beneficiaries.[56] The judicial approval requirement increased the cost of decanting. The perpetuities limitation made decanting less useful to trustees who sought to decant into "dynasty" trusts that would last for multiple generations—trusts prohibited by New York's restrictive Rule Against Perpetuities, but increasingly permitted elsewhere.[57]

2. Expansion to Other States

Other states gradually joined the decanting bandwagon, often with provisions substantially more liberal than those in the New York statute.[58] Nevada and South Dakota provide extreme examples. Both statutes confer broad decanting powers on trustees even when the trust instrument confers tightly constrained discretion on the trustee.[59] An

nongeneral power of appointment, the perpetuities period for the new trust would be determined in accordance with section 10-8.1.

55 26 U.S.C. § 2041(a)–(b) (2012) includes with a decedent's taxable estate all property over which decedent has a general power of appointment. Section 2041(b) then defines general powers of appointment to exclude powers "limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent." Especially when the trustee is also an object of the power of appointment, the settlor often seeks to avoid a general power that would subject the appointive property to taxation in the trustee-beneficiary's estate.

56 *See* EST. POWERS & TRUSTS § 10-6.6 (Practice Commentaries, Margaret Valentine Turano) (discussing the 2001 amendment enacted by Act of Aug. 20, 2001, ch. 204, 2001 N.Y. Laws 1482).

57 New York itself amended its statute to eliminate the beneficiary consent or judicial approval requirement. Act of Aug. 20, 2001, ch. 204, 2001 N.Y. Laws 1482 (subsequently amended 2011) (relating to the powers of an appointed trustee to invade principal of a trust). Later, the legislatures authorized decanting, subject to some limitations, even when the trustee does not have unlimited discretion. Act of Aug. 17, 2011, ch. 451, 2011 N.Y. Laws 1300 (adding the current section to EPTL section 10-6.6.).

58 For instance, the South Dakota statute authorizes decanting even when the trustee's discretion under the first trust was restricted by a standard, does not require notice to the trust beneficiaries, and does not protect mandatory income interests created in the first trust. *See* S.D. CODIFIED LAWS § 55-2-15 (2012).

59 *See* NEV. REV. STAT. ANN. § 163.556(1) (West 2013) (giving a trustee with discretion to distribute trust income or principal to a beneficiary the power to appoint the trust property subject to that discretion in favor of a second trust, without regard to the scope of the discretion

example illustrates the breadth of these statutes. Suppose the trust instrument gives the trustee limited discretion to distribute income and principal as needed for the health, education, maintenance, or support of the settlor's daughter, and directs the trustee, at the daughter's death, to distribute the trust principal to the daughter's issue, per stirpes. Under the terms of the trust instrument, the trustee would not be entitled to distribute the trust principal to the daughter unless the daughter needed that principal for the specified purposes. Yet under the Nevada and South Dakota statutes, the trustee would be entitled to decant the entire trust principal into a new trust that expanded the trustee's discretion to make principal payments to the daughter, or into a new trust that cut out one or more of the daughter's issue, or both.[60]

Moreover, neither the Nevada statute nor the South Dakota statute requires the trustee to provide notice to beneficiaries that the trustee has decided to decant the trust property.[61] Although elimination of a notice requirement is championed as a mechanism for maintaining privacy, without notice it becomes difficult for a beneficiary adversely affected by decanting to challenge the trustee's action.

Nevada and South Dakota remain at the vanguard of the decanting movement, but jurisdictional competition has already emerged. Lawyers have started ranking states for their friendliness to trust decanting.[62] About half of the states have now enacted decanting statutes.[63] The Supreme Judicial Court of Massachusetts has authorized decanting even without benefit of a statute.[64]

given to the trustee in the trust instrument); S.D. CODIFIED LAWS § 55-2-15 (including a similar provision).

60 NEV. REV. STAT. ANN. § 163.556(1); S.D. CODIFIED LAWS § 55-2-15. Under the South Dakota statute, the trustee must make a determination that the appointment to the second trust is "necessary or desirable after taking into account the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution." The flexibility of that language would appear to impose few constraints on the trustee.

61 NEV. REV. STAT. ANN. § 163.556(7) provides that "[b]efore appointing property . . . , a trustee *may* give notice of a proposed action." (emphasis added). S.D. CODIFIED LAWS § 55-2-18 provides that "[t]he trustee of the first trust *may* notify all beneficiaries of the first trust, in writing, at least twenty days prior to the effective date of the trustee's exercise of the power." (emphasis added).

62 *See, e.g.*, Steven Oshins, *4th Annual Trust Decanting State Rankings Chart*, LAW OFFICES OF OSHINS & ASSOCIATES, L.L.C. (Jan. 2017), https://media.wix.com/ugd/b211fb_5b23644c0bab488d9d06864ce66c845b.pdf.

63 *Id.*

64 Morse v. Kraft, 992 N.E.2d 1021 (Mass. 2013).

3. The Uniform Trust Decanting Act

Against a landscape of divergent decanting statutes, the Uniform Law Commissioners have recently promulgated the Uniform Decanting Act. Like most decanting statutes,[65] the Uniform Act authorizes decanting only when the trust confers discretion on the trustee.[66] If the trust simply requires the trustee to distribute all income to one or more life beneficiaries until their death, and then to distribute trust principal to designated remaindermen, the trustee may not decant; trustees and beneficiaries frustrated with the trust's terms are relegated to the two common law alternatives: live with the terms or seek judicial modification.

When the trust instrument does confer discretion on a trustee, the scope of the trustee's decanting power varies with the scope of that discretion. Many trust instruments confer on the trustee discretion constrained by an "ascertainable standard"—a term derived from tax law. For instance, a trust instrument might mandate that the trustee make payment for the "health, education, maintenance, and support" of the trust beneficiary, but give the trustee limited discretion to decide what is necessary for health, education, maintenance, and support. Recall that in this situation, the Nevada and South Dakota statutes authorize the trustee to decant into a new trust that substantially expands the trustee's discretion. The Uniform Act is more moderate. It treats the trustee as having "limited" discretion, and permits the trustee to decant only into a trust that preserves for the original trust beneficiaries' interests that are "substantially similar" to those they enjoyed under the original trust instrument.[67] This limited discretion is unlikely to interfere substantially with the settlor's intent.

By contrast, under the Uniform Act, the trustee's decanting power is at its broadest when the trust instrument confers on the trustee what the statute calls "expanded . . . discretion." A comment to the statute provides the rationale for the broad decanting power:

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65 Even the South Dakota statute, sometimes hailed as the most decanting-friendly statute, requires that the trustee have discretion to make a distribution of income or principal. S.D. CODIFIED LAW § 55-2-15. For a ranking concluding that South Dakota is the most decanting-friendly state, see Oshins, *supra* note 62.

66 Section 11 of the Uniform Act authorizes decanting when the trustee has "expanded . . . discretion," while section 12 authorizes decanting when the trustee has "limited . . . discretion." Section 2(11) defines "[e]xpanded . . . discretion" as "a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard." UNIF. TRUST DECANTING ACT (UNIF. LAW COMM'N 2015).

67 *Id.* § 12(c).

> When a trustee is granted expanded . . . discretion, that is an indication that the settlor intended to rely on the trustee's judgment and discretion in making distributions. The settlor's faith in the trustee's judgment supports the assumption that the settlor would trust the trustee's judgment in making modifications to the trust instrument in light of changed circumstances including the beneficiary's circumstances and changes in tax and other laws.[68]

What is the expanded discretion that signals such confidence in the trustee's judgment? The statutory definitions provide that "'[e]xpanded . . . discretion' means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard."[69] So, for instance, a trust instrument that authorizes the trustee to distribute to a beneficiary, during her lifetime, "as much of the income and principal of the trust as the trustee, in her discretion, deems appropriate" is a trust that confers expanded discretion on the trustee. The drafters of the statute apparently assume that a settlor who authorizes a trustee to determine how much trust principal a current beneficiary (often a spouse or a child) should receive during the beneficiary's lifetime also trusts the trustee to make significant changes in the beneficiaries of the trust, the trust's terms, and the trust's duration.

The drafters were unwilling, however, to give the trustee carte blanche. In particular, the decanting statute limits the trustee's power to interfere with mandatory distributions of income or principal to a current beneficiary unless the trust instrument conferred on the trustee discretion to distribute trust principal to another beneficiary,[70] and prohibits the trustee from adding beneficiaries not named in the original trust instrument.[71]

Subject to that limitation, the statute confers on the trustee substantial authority to rewrite the terms of the trust. Suppose, for instance, a trust instrument provides that upon the current beneficiary's death, the remaining property should be distributed to the beneficiary's children in equal shares. The trustee could decant into a new trust that eliminated that remainder interest and instead gave the life beneficiary a power of appointment that would enable her to prefer some children over others, or even to cut out her children altogether. The rationale for giving the trustee this power is plausible enough: even under the original trust instrument, the trustee could have distributed all of the

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[68] *Id.* § 11 cmt.
[69] *Id.* § 2(11).
[70] *Id.* § 11(d).
[71] *Id.* § 11(c)(1)–(2).

trust principal to the current beneficiary outright, leaving her to redistribute that property as she sees fit.

The statutory decanting power also encompasses changes that the trustee could not easily have accomplished under the terms of the original instrument. Suppose a trust gives the trustee discretion to make payments of income and principal to a settlor's husband during the husband's lifetime, and gives the husband a general testamentary power of appointment (which would effectively permit the husband to direct how the principal should be distributed at his death). The decanting statute would authorize the trustee to decant the trust principal into a new trust that withdraws from the husband the power to choose successor beneficiaries, leaving the trust property to pass to "takers in default": the people the settlor designated as alternative beneficiaries in the event the husband never exercised his power.[72] The trustee could go even further, and give the settlor's son (who might not also be the husband's son) a power to direct how the trust principal should be distributed at the husband's death.[73] In these cases, the decanting statute gives the trustee broad discretion to change trust beneficiaries in ways not contemplated by the trust instrument—even though the statute precludes the trustee from adding new beneficiaries not included in the original trust instrument.[74] The Uniform Act (unlike the Nevada and South Dakota statutes) does require the trustee to provide notice to all qualified beneficiaries before decanting into a new trust,[75] but whether the notice requirement imposes an effective constraint on the trustee remains to be seen.

Although the statute generally safeguards the interests of current beneficiaries of the trust, it does permit the trustee to make substantial changes in the nature of those interests. First, if the trust instrument requires the trustee to make payments of income or principal to the beneficiary when the beneficiary reaches a certain age, the trustee can decant into a trust that eliminates those mandatory payments.[76] Second, even though the original trust instrument would have enabled the beneficiary to assign his interest and would make that interest available to the beneficiary's creditors, the trustee can convert the trust into a

[72] *Id.* § 11(d)(2).

[73] *Id.* § 11(d)(4) (allowing a trustee to create power of appointment in a presumptive remainder beneficiary); *see also id.* § 11 cmt. (indicating that a taker in default qualifies as a presumptive remainder beneficiary).

[74] *Id.* § 11(c).

[75] *Id.* § 7.

[76] The statute explicitly prohibits elimination of a right to a mandatory distribution if the distribution is a current right of the current beneficiary. *Id.* § 11 (d)(1)–(3). The comment makes clear, however, that the right is not a current right if the beneficiary has not yet reached the age at which the distribution becomes mandatory. *Id.* § 11 cmt.

"spendthrift" trust that precludes assignment and puts the assets beyond the reach of the beneficiary's creditors.[77] Conversely, if the settlor explicitly included a spendthrift provision in the original trust instrument, the trustee, through decanting, can eliminate the spendthrift protection the settlor provided for the beneficiary.[78]

The statute's comment includes a non-exhaustive list of other changes the trustee can make. Among the most significant are the power to extend the duration of the trust beyond the termination date specified by the settlor, and the power to change the jurisdiction of the trust and the law governing the trust's administration.[79]

4. The Role of Fiduciary Duty

The Uniform Act's primary bulwark against inappropriate use of the decanting power is section 4's command that "[i]n exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust."[80] That is, a trust beneficiary who believes the trustee has modified the trust in a manner inconsistent with the settlor's purposes may bring an action against the trustee for breach of fiduciary duty. In this respect, the Uniform Act resembles a number of other state statutes.[81] By contrast, statutes in the most decanting-friendly states do not even include language imposing an express fiduciary constraint on exercise of the decanting power.[82]

Even in jurisdictions that impose a fiduciary duty constraint on the trustee, substantive and process issues cast doubt on the constraint's potential effectiveness in deterring or remedying trustee abuse of the decanting power. As a matter of substance, the vagueness of the fiduciary duty standard is likely to result in excessive judicial deference to questionable trustee decisions. Section 4 itself provides little guidance about when a decision to decant would breach the trustee's fiduciary duty.[83] Because the Uniform Act (and any other decanting statute)

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77 *Id.* § 11 cmt.

78 *Id.*

79 *Id.*

80 *Id.* § 4(a).

81 *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(h) (McKinney 2002).

82 *See* NEV. REV. STAT. ANN. § 163.556 (West 2013) (containing no fiduciary language); S.D. CODIFIED LAWS § 55-2-15 (2012) (requiring a trustee to determine whether exercise "is necessary or desirable after taking into account the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution," but imposing no express obligation that the trustee act as a fiduciary).

83 Section 4(a) requires that the trustee "act in accordance with the purposes of the first trust," but the comment notes that

confers on trustees the power to decant, and imposes express limits on the exercise of that power, courts are prone to conclude—incorrectly—that so long as the trustee does not exceed statutory power, the trustee has not breached its fiduciary duty. The tendency to conclude that exercise of an express power relieves a trustee of breach of duty claims is all too familiar in other areas of trust law.[84]

As a matter of process, litigation cost acts as a deterrent for beneficiaries shortchanged by exercise of the decanting power. Especially if the shortchanged beneficiary is entitled only to a modest share of trust proceeds, the cost of litigation may exceed any potential benefit, and there is no assurance that the beneficiary will be entitled to recover those costs even if the litigation proves successful.[85]

Finally, when the issue is whether decanting violates public policy, fiduciary duty acts as no constraint at all; the trust beneficiaries may be complicit with the trustee in seeking decanting. In that instance, third parties harmed by decanting would not have standing to sue for breach of fiduciary duty.

C. *Uses of Decanting*

The growth in decanting calls for explanation: why are lawyers and legislators so enamored of the concept? Empirical data on how trustees and their lawyers are using the decanting power is not readily available. First, decanting is a relatively novel phenomenon. Second, a primary objective of modern decanting is to bypass the need for judicial approval of trust modification, so that judicial opinions would not provide a ready source of information about how lawyers use the decanting

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> [t]he exercise of the decanting power need not be in accord with the literal terms of the first-trust instrument because decanting by definition is a modification of the terms of the first trust. Therefore subsection 4(c) provides that the terms of the first trust shall be deemed to include the decanting power for purposes of determining the fiduciary duties of the authorized fiduciary.

UNIF. TRUST DECANTING ACT § 4 cmt. (UNIF. LAW COMM'N 2015). In other words, in determining whether decanting breached a fiduciary duty, a court should assume (often contrary to fact) that the settlor authorized the trustee to decant.

84 For instance, when a trust instrument confers on a trustee the power to retain assets held by the settlor at the time the trust is created "if in their discretion they shall deem it prudent . . . so to do," courts tend to absolve the trustee of liability for breach of fiduciary duty even if the trustee's decision was objectively imprudent. *See In re* Wege Trust, No. 274217, 2008 WL 2439904, at *5 (Mich. Ct. App. June 17, 2008) (per curiam).

85 Moreover, even when successful beneficiaries do recover attorneys' fees, courts may direct that the fees come from the trust assets—reducing the pie from which the beneficiary may receive future benefits. *See, e.g.*, Capaldi v. Richards, 870 A.2d 493, 498 (Del. 2005) (concluding that the court below abused its discretion by rejecting a claim by the beneficiaries to recover fees from trust assets).

power. Nevertheless, much of the practitioner literature discussing decanting catalogues the uses authorized by New York courts during the period in which the New York statute required judicial approval of decanting.

The catalogue, however, is unlikely to provide a representative picture of decanting usage. First, relatively few cases reached the courts during that period. Second, the need for judicial approval created a selection bias: only those cases where decanting would have generated significant financial benefits—those large enough to warrant the cost of a legal proceeding—would make it to court and elicit judicial opinions. Moreover, the decided cases would tend to reveal only those cases where the trustee or its lawyers concluded that the reasons for decanting would be appealing to a judge. Once legislatures began authorizing decanting without judicial approval, one might reasonably expect a shift in usage patterns.

Nevertheless, multiple discussions[86] of decanting start by identifying the following uses[87] of decanting the New York courts have supposedly[88] authorized:

1. protecting the tax treatment of a trust;
2. granting a beneficiary a power of appointment, presently exercisable or otherwise;
3. reducing administrative costs;
4. altering trusteeship provisions such as the identity or manner of appointing fiduciaries;
5. extending the termination date of a trust;
6. converting a nongrantor trust to a grantor trust or the reverse;
7. changing a trust's governing law;
8. dividing trust property to create separate trusts;
9. reducing potential liability;

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86 These identical lists appear in a letter from Louis Mezzullo, American College of Trust and Estate Counsel (ACTEC) to the Internal Revenue Service commenting on potential tax treatment of decanting and in *An Analysis of the Tax Effects of Decanting*. Letter from Louis A. Mezzullo, President, Am. Coll. of Tr. & Estate Counsel, to Internal Revenue Serv. 5–6 (Apr. 2, 2012) [hereinafter ACTEC Letter], http://www.actec.org/assets/1/6/Mezzullo_Comments_04_02_12.pdf (including an identical list in a letter commenting on potential tax treatment of decanting); Blattmachr et al., *supra* note 35, at 148–49.

87 *See* Blattmachr et al., *supra* note 35, at 148–49; ACTEC Letter, *supra* note 86.

88 In fact, the authority cited for two of the items on the list—granting a beneficiary a power of appointment and converting a nongrantor trust to a grantor trust or the reverse—does not include any New York court decision, but instead focuses, respectively, on a Florida court decision and a memorandum by the Chief Counsel of the Internal Revenue Service. *See* Blattmachr et al., *supra* note 35, at 148 nn.30 & 34; ACTEC Letter, *supra* note 86, at 5 nn.14 & 18.

10. converting a trust into a supplemental needs trust to permit a beneficiary to qualify for certain governmental benefits; and
11. making trust instruments spendthrift or the reverse.

Of the eleven potential uses, four (protecting tax treatment, extending trust duration, converting trusts from grantor trusts to nongrantor trusts or the reverse, and changing governing law) are largely or exclusively tax-driven. Another three (reducing liability, converting into a special needs trust, and making the trust spendthrift) are designed to shift costs from the trust beneficiaries to third parties—either creditors or taxpayers. Only four could plausibly be regarded as benefiting trust beneficiaries without shifting costs to others—and even some of those can be used to reduce taxes or avoid creditor claims.[89]

The same literature identifies three other supposedly common uses of decanting:

1. addressing changed circumstances, such as changes in applicable fiduciary law or changes in family circumstances or dynamics;
2. modifying administrative provisions, such as restrictions on investment powers or on authority to create a "directed trust"; or
3. correcting a drafting error without going to court.[90]

These uses might or might not shift costs to third parties, depending on what the changes in fiduciary law might be, and what "drafting errors" decanting would correct; for instance, many of the drafting errors parties seek to correct through judicial action (rather than trust

[89] For instance, by decanting into a trust that gives a life beneficiary a general power of appointment, the trustee could insure that the ultimate trust beneficiaries obtain the benefit of a stepped-up income tax basis at the death of a life beneficiary, a benefit that is particularly important when the life beneficiary's estate is too small to incur federal estate tax liability. *See* Peter J. Melcher, Robert S. Keebler & Steven J. Oshins, *A Guide to Trust Decanting*, TR. & EST., May 2015, at 15, 15–16, https://media.wix.com/ugd/b211fb_20f9fb5acf1545bd9dbc01fce29119b2.pdf .

[90] Blattmachr et al., *supra* note 35, at 149; ACTEC Letter, *supra* note 86, at 6. Another catalogue of objectives that decanting can achieve includes: eliminating mandatory distributions to beneficiaries, eliminating some beneficiaries altogether, and altering beneficiaries' rights to information about the trust. *See* Kimberly E. Cohen, Partner, Ropes & Gray, ALI CLE Presentation: Decanting: Facts, Fallacies, and Fantasies (May 1, 2015). These objectives may not impose external costs, but they do raise questions about whether the trust settlor intended to confer on the trustee such significant deviations from the terms of the original trust.

decanting) are errors that would generate adverse tax consequences for the beneficiaries.[91]

Although one strand of the practitioner literature emphasizes decanting's wide range of benefits, another strand—more concerned with marketing the use of decanting—focuses heavily on the tax and asset protection benefits associated with decanting.[92] The emphasis on tax savings should not be surprising. The thorough empirical study by Professors Schanzenbach and Sitkoff establishes that much of the transfer of trust assets to states abolishing the Rule Against Perpetuities has been driven by the desire of trust settlors to minimize taxation.[93] It would be surprising if trustees and beneficiaries would not also respond to the opportunity to minimize taxation through decanting.

III. DECANTING AS A DEVICE FOR EFFECTUATING SETTLOR INTENT

In light of the growing support for trust decanting, two questions merit more attention than they have so far received. Part IV deals with one of those questions: When, if at all, should public policy limit the availability of trust decanting? This Part deals with an equally significant question: When does decanting operate to promote the intent of the trust settlor—the person who created the trust and signed the document whose terms the trustees now seek to avoid?

Typically, the effect of a donative document—including a trust—is determined by the intent of the donor.[94] Trusts, however, can endure for a number of years, and no settlor can foresee all of the events that might

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91 *See, e.g.*, *In re* Paul F. Suhr Trust, 222 P.3d 506 (Kan. 2010) (authorizing trust modification to permit an estate to pass tax free); UNIF. TRUST CODE § 416 (UNIF. LAW COMM'N 2010) (authorizing modification of trusts to achieve settlor's tax objectives).

92 *See, e.g.*, Matthew D. Blattmachr, *Alaska Takes Already Top-Tier Trust Code up Another Notch*, TR. ADVISOR (July 14, 2013), http://thetrustadvisor.com/tag/top-trust-friendly-states (emphasizing that the Alaska statute "specifically allows for the ability to extend the duration of a trust, the ability to grant a lifetime power of appointment to a beneficiary and the ability to decant for purposes of protecting public assistance benefits"); Steven J. Oshins & Brian J. Simmons, *Decanting an Irrevocable Trust: The "Do-Over" Trust*, PREMIER TR., http://info.premiertrust.com/rs/fmapremieretrust/images/Decanting%20an%20Irrevocable%20Trust%20%20The%20Do-Over%20Trust.pdf (last visited Feb. 3, 2017) (four of the first five reasons for decanting emphasize either tax or asset protection concerns).

93 Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2497 (2006); Sitkoff & Schanzenbach, *supra* note 5, at 359–61.

94 *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("Unless disallowed by law, the donor's intention not only determines the meaning but also the effect of a donative document."); *see also* RESTATEMENT (THIRD) OF TRUSTS § 4 (AM. LAW INST. 2003) ("The phrase 'terms of the trust' means the manifestation of intention of the settlor with respect to the trust provisions expressed in a manner that admits of its proof in judicial proceedings.").

occur over the life of the trust.[95] As a result, the language of the trust can serve only as an imperfect indicator of what a settlor would have wanted had the settlor possessed full information about post-death events. The problem is not new, but a number of relatively recent trends have exacerbated the difficulty. First, the modification or abolition of the Rule Against Perpetuities in many states has made it possible for settlors to create trusts of longer duration,[96] while the generation-skipping transfer tax exemption has created financial incentives for settlors to establish perpetual, or near perpetual, trusts.[97] Trust language is unlikely to account for future events the settlor could not foresee, and the longer the trust lasts, the more likely it is that unforeseen events actually occur. Second, trust law itself has been more volatile over the last two decades than it had been for much of its history: the advent of the prudent investor rule,[98] the principal and income act,[99] and the growth of asset protection trusts,[100] to take a few examples, are events that the typical settlor—and the settlor's lawyers—might not have foreseen.

A. *Alternatives to Decanting: Traditional Mechanisms for Adapting to Changed Circumstances*

Trust law has long recognized the need to account for changes that arise after the trust's creation. First, doctrine has long recognized the right of trust beneficiaries to terminate a trust by consent, so long as termination would not frustrate a material purpose of the settlor.[101]

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[95] *See generally* Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2766–67 (2006). For a discussion of other problems generated by the imperfect foresight that afflict settlors who create trusts of long duration, see Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 87–88 (2005).

[96] *See* Dukeminier & Krier, *supra* note 22, at 1327–28 (noting that the problem of limited foresight is exacerbated with the advent of perpetual trusts).

[97] The exemption from the GSTT is now set at an amount equal to the basic exclusion amount from the estate tax. 26 U.S.C. § 2631(c) (2012). In 2010, that amount was set at $5,000,000, adjusted for inflation. *Id.* § 2010(c)(3). With the current estate tax rate set at forty percent, wealthy people have significant incentives to create perpetual trusts that avoid estate taxation at each generation. *See id.* § 2001(c).

[98] *See supra* notes 26–27 and accompanying text.

[99] The Uniform Principal and Income Act, now enacted in almost every state, authorizes trustees to depart from traditional conceptions of income and principal in order to enable trustees to make investment decisions that accord with the insights behind the prudent investor rule. *See* UNIF. PRINCIPAL & INCOME ACT, Prefatory Note (UNIF. LAW COMM'N 2008).

[100] *See supra* notes 18, 23 and accompanying text.

[101] *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 337 (AM. LAW INST. 1959); RESTATEMENT (FIRST) OF TRUSTS § 337 (AM. LAW INST. 1935).

American National Bank of Cheyenne v. Miller[102] illustrates the doctrine. The Wyoming Supreme Court authorized the trust beneficiaries to terminate a trust while the settlor's son-in-law was still alive even though, by the terms of the trust instrument, the trust was to endure until the son-in-law's death. The settlor had created the trust in 1967, authorizing the trustee to support the settlor during her own lifetime, and then to make monthly payments to the daughter-in-law and son for their lives, while also authorizing payments to the couple to assist with the educational expenses of the settlor's grandchildren.[103] Only at the death of the couple was the trustee to distribute the trust property to the ultimate beneficiaries—the settlor's grandchildren and a scholarship fund at a university.[104] Twenty-five years after the trust was created, after the death of the settlor and her daughter, the son-in-law waived any further right to trust income and he, together with the remainder beneficiaries, sought termination of the trust.[105] In ordering termination (over the objection of the trustee), the court emphasized that no material purpose of the settlor remained to be accomplished.[106]

Although the "black letter" of the first two Trusts Restatements explicitly authorized trust beneficiaries to consent to termination, they were silent about the power of beneficiaries to modify a trust.[107] The most recent Restatement of Trusts, however, explicitly authorizes both modification and termination upon consent of the beneficiaries.[108]

Even if the beneficiaries do not consent,[109] traditional doctrine also permits the trustee to deviate from a term of the trust if, owing to circumstances not known to or anticipated by the settlor, compliance with the term "would defeat or substantially impair the accomplishment of the purposes of the trust."[110] *In re Pulitzer's Estate*[111] represents the most famous application of the doctrine. Journalist Joseph Pulitzer had established a trust whose assets included stock in a company that

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102 899 P.2d 1337 (Wyo. 1995).

103 *Id.* at 1339.

104 *Id.*

105 *Id.*

106 *Id.* at 1340.

107 A comment, however, authorized partial termination when complete termination would interfere with a settlor's material purpose. RESTATEMENT (SECOND) OF TRUSTS § 337 cmt. p (AM. LAW INST. 1959) (permitting partial termination of a trust).

108 RESTATEMENT (THIRD) OF TRUSTS § 65 (AM. LAW INST. 2003). The Third Restatement also contracts the material purpose exception in the earlier Restatements by providing that the inclusion of a spendthrift clause, or of language conferring discretion on a trustee, is not by itself sufficient to establish that termination or modification would conflict with a material purpose of the settlor. *Id.* cmt. e.

109 Sometimes, obtaining the consent of all beneficiaries may be impossible because some beneficiaries may be unborn.

110 RESTATEMENT (SECOND) OF TRUSTS § 167 (providing for a change of circumstances).

111 249 N.Y.S. 87 (Sur. Ct. 1931), *aff'd*, 237 A.D. 808 (N.Y. App. Div. 1932).

published *The World* newspaper. The trust's terms prohibited the sale or disposition of company stock and enjoined upon the trustees "the duty of preserving, perfecting and perpetuating 'The World' newspaper."[112] When the newspaper incurred financial losses year after year—both before and after the 1929 stock market crash—the trustees sought to sell the newspaper company stock, and the court authorized the sale, emphasizing that Pulitzer "could not have intended that from mere vanity, the publication of the newspapers . . . should be persisted in until the entire trust asset was destroyed or wrecked by bankruptcy or dissolution."[113]

Again, the most recent Restatements of Trusts and Property expand the availability of judicial modification. While earlier Restatements authorized modification of administrative provisions,[114] the Third Restatement of Trusts explicitly authorizes modification of "administrative or distributive" provisions because of circumstances not anticipated by the settlor.[115] The Uniform Trust Code and the Third Restatement of Property both provide broad authority to modify trust instruments to achieve the settlor's tax objectives.[116]

Although trust modification provides a mechanism for adapting to circumstances the settlor could not have anticipated, modification has one critical drawback: cost. Unless all trust beneficiaries consent, modification requires a judicial proceeding.[117] Although a trustee might be entitled to modify or terminate a trust without judicial approval if all beneficiaries consent,[118] two factors make it unlikely that many trustees will modify without a judicial imprimatur. First, in any trust of considerable duration, some of the trust beneficiaries are likely to be

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112 *Id.* at 92.

113 *Id.* at 95.

114 *See* RESTATEMENT (THIRD) OF TRUSTS § 66, Reporter's Notes cmt. a (AM. LAW INST. 2003) (indicating that commentary on provisions of the Restatement (Second) and its illustrations "indicate that the rule of 'equitable deviation' applies only to *administrative* provisions").

115 *Id.* § 66(1). *See generally* Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 90–91 (2015) (discussing liberalization of trust modification rules).

116 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.2 (AM. LAW INST. 2003) ("A donative document may be modified, in a manner that does not violate the donor's probable intention, to achieve the donor's tax objectives."); UNIF. TRUST CODE § 416 (UNIF. LAW COMM'N 2000).

117 RESTATEMENT (THIRD) OF TRUSTS § 66 explicitly requires judicial approval when the trustee does not obtain the consent of the beneficiaries; even without such an explicit provision, no sensible trustee would unilaterally modify a trust over the objection of trust beneficiaries who could then sue for breach of fiduciary duty.

118 RESTATEMENT (THIRD) OF TRUSTS § 65 does not explicitly require judicial approval when the beneficiaries of a trust all consent to termination; indeed, a comment to the section provides that "[i]f the beneficiaries can compel termination or modification of a trust under this Section, it is not necessary that they obtain a court decree directing or authorizing termination or establishing the modification." *Id.* cmt. a.

unborn or under the age of majority—making consent impossible or impractical.[119] Second, because the trust beneficiaries can terminate by consent only when termination would not impair a material purpose of the settlor, conservative trustees might seek judicial approval to preclude any subsequent breach of fiduciary duty action by a beneficiary who might later claim that modification impaired one of the settlor's material purposes.[120]

B. *Decanting and the Risk of Trustee Error*

Decanting emerged as an alternative to the two options available to the trustee and beneficiaries at common law: adhere to potentially obsolete trust language, or seek judicial modification with its attendant costs. Decanting statutes attempt to capture the probable intent of the settlor in three ways. First, decanting statutes place the decision to decant in the hands of the trustee—the party the trust settlor "trusted" to act in the interest of the trust beneficiaries. Second, decanting statutes cabin the trustee's authority to reduce the risk that the trustee will stray from the settlor's intent. Third, in most, but probably not all jurisdictions, the decanting power is subject to scrutiny for breach of fiduciary duty.

Nevertheless, even with these protections in place, the risk remains that exercise of the decanting power will frustrate rather than effectuate the intent of the settlor. Although the risks are greatest with the more extreme statutes like those enacted in Nevada and South Dakota, the risks are significant even under the Uniform Act.

If a trust settlor expressly confers decanting power or its equivalent on the trustee, the settlor has made her intent clear, and if the only issue were intent effectuation, courts should give effect to the decanting provision. But the Uniform Act—like other decanting statutes[121]—

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[119] A trustee could seek appointment of a guardian to represent the interests of beneficiaries, but that itself adds cost to the modification process, without assuring that the guardian would in any event consent to the modification. *See generally id.* cmt. b (noting that as a practical matter, guardians, who are fiduciaries, may be reluctant to consent on behalf of their wards "whenever more is involved than mutually beneficial modification of administrative provisions").

[120] The Restatement would protect trustees from such actions by treating beneficiary consent as an effective waiver of all future claims. *See id.* cmt. a ("[If it] turns out that the action was contrary to a material purpose of the trust . . . , the *consenting* beneficiaries may not hold the trustee liable for damages resulting from action taken by the trustee before becoming aware of the impropriety."). A trustee might not, however, be willing to rely on the language, especially because the Restatement comment would recognize an exception when the trustee's action "was not taken reasonably and in good faith." *Id.*

[121] *See, e.g.*, S.D. CODIFIED LAW § 55-2-15 (2012), which grants decanting power "[u]nless the terms of the governing instrument expressly provide otherwise." The statute also provides,

presumes that the settlor would have wanted the trustee to have decanting power even when the instrument itself is silent on the issue.[122] Why make decanting the default rule when a settlor could easily have opted into a decanting regime? The only plausible answer is that, until recently, the decanting alternative had not occurred to most lawyers who drafted trust instruments. That answer is not entirely satisfactory, because trust lawyers have historically found countless ways to confer discretion on trustees to take a variety of out-of-the-ordinary actions. But even if one accepts the proposition that trust lawyers should not have been expected to consider express language authorizing decanting, the question remains: Why conclude that the trustee's judgment about settlor's intention is superior to the instructions settlor expressed in the trust instrument?

The answer must rest on the settlor's limited foresight. The number of future events that might affect the settlor's preferences is large, especially if the trust is to endure for a substantial period of time. Accounting for all of them in the trust instrument would require first, imagination to contemplate all of those potential events and second, a commitment of resources to reduce each of the contingencies, and the settlor's preferred consequences, to writing.[123] When the risk that a particular event will occur is sufficiently small, it will not be worth the settlor's while to consider and specify the consequences that should flow

however, that the exercise of the decanting power "is not prohibited . . . by a provision in the governing instrument that prohibits amendment or revocation of the trust." *Id.* § 55-2-15(8). In other words, a settlor would have to explicitly prohibit decanting in order to make the statute inapplicable—even though the settlor might have established the trust when decanting was uncommon or even unknown.

122 The statute provides that "[e]xcept as otherwise provided in a first-trust instrument, . . . the terms of the first trust are deemed to include the decanting power." UNIF. TRUST DECANTING ACT § 4(c) (UNIF. LAW COMM'N 2015). The statute goes on to provide that a trustee may not exercise the decanting power when the original trust instrument expressly prohibits the exercise of the decanting power. *Id.* § 15. Like the South Dakota statute, the Uniform Act provides that "[a] general prohibition of the amendment or revocation" of the initial trust does not preclude exercise of the decanting power. *Id.*

123 These difficulties are not unique to trusts. The contracts literature has long recognized that these difficulties lead parties to write incomplete contracts. *See, e.g.*, Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1582 (2005) ("[P]erfect foresight is infinitely costly, so that, as the economic literature on contract interpretation emphasizes, the costs of foreseeing and providing for every possible contingency that may affect the costs of performance to either party over the life of the contract are prohibitive."); Steven Shavell, *On the Writing and the Interpretation of Contracts*, 22 J.L. ECON. & ORG. 289, 289 (2006). For recognition that the same difficulties afflict the drafting of trust instruments, see Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1179 (2013) (noting that it would be impossible for most donors to anticipate every potential contingency that might arise over the lifetime of a trust).

from that event. Specification costs will be too high relative to the benefits of specification.[124]

When parties to a contract face high specification costs, the optimal solution for both parties will often be to leave open terms with the expectation that courts will fill in those terms in the process of interpretation.[125] Judicial interpretation entails costs: the cost of litigation, and the possibility that courts will fail to capture the terms the parties would have made explicit if they had specified terms more completely.[126] Parties will incur these costs when the cost of specification is greater than the probable cost of committing the issue to judicial interpretation. To adapt a formula from Judge Posner, let x be the cost of negotiating and drafting a provision to deal with a particular issue, let p be the probability that the issue will arise, let y be the litigation or other dispute resolution cost to the parties, and let e be the expected costs associated with decision-maker "error" in interpreting the contract.[127] Contract parties will avoid specification when

$$x > p\,(y + e)$$

When the settlor of a trust faces high specification costs, the settlor's options are somewhat different. Because the trust does not involve a "meeting of the minds" between two parties,[128] the settlor need not rely on a potentially adversarial dispute resolution process to resolve low probability events. Instead, the settlor can confer discretion about how to deal with these events on a person of her choosing—either a trustee or a third party to whom the settlor might give a power of appointment. To borrow again from the contract formula, one would expect the settlor to delegate decisions when

$$x > pe$$

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124 *See* Daniel B. Kelly, *Trust Term Extension: An Economic Analysis*, 67 FLA. L. REV. F. 85, 94 (2015).

125 *See* Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 823 (2006) ("[T]he parties should continue to invest in contracting costs until the marginal cost of further investment exceeds the marginal benefit in incentive gains.").

126 *Id.* at 825–34.

127 *See* Posner, *supra* note 123, at 1583–84. Judge Posner considers the social costs of interpretation, which include the costs to the judiciary of interpreting the contract. The parties themselves, however, would include only private costs, not the costs borne by the public at large in the form of judicial salaries.

128 Of course the trust is, at bottom, a contract between the settlor and the trustee and therefore does require a meeting of minds between the settlor and the trustee. *See* Langbein, *supra* note 14, at 650–60. However, the trustee is not likely to object to the terms the settlor creates, so long as the trustee is adequately compensated.

Because delegation to a trustee or other third party does not typically entail litigation costs, and because the settlor can choose the decision-maker (so long as the decision-maker is willing to accept responsibility), one might expect delegation to be an attractive option in almost any case where specification costs are high. Practice bears out that expectation: trust settlors commonly create discretionary trusts of various stripes and powers of appointment.

Decanting, however, operates outside the realm in which the settlor conferred discretion on the trustee. Decanting statutes—including the Uniform Act—authorize the trustee to depart from the settlor's terms even when the limited delegation in the trust instrument does not authorize the departure.[129] But in those cases where the settlor chose not to delegate, one might reasonably conclude that the settlor has made the determination that

$$x < pe$$

In other words, one might conclude that the decision not to delegate reflects a preference that the settlor's express terms be honored.

The most plausible response is that the settlor's failure to delegate more broadly reflects not a conscious decision, but the failure of the settlor (and the settlor's lawyers) to understand the available options. Assume those are the facts. The response leads to no inference at all. Now the trust instrument itself sheds no light on whether the settlor would have wanted the trustee to be able to alter the terms of the trust by decanting into another trust. Decanting statutes nevertheless operate on the assumption that any settlor who conferred one form of discretion on the trustee would have wanted the trustee to have broader discretion. For that to be true, we must make one of two assumptions. The first alternative is that the settlor has concluded that $x > pe$ for every potential situation that might arise. The second alternative is that the settlor has given no thought to specification, but the trustee's post hoc judgment always reflects a better approximation of the settlor's intent than the language the settlor included in the trust instrument.

Both of these assumptions ultimately rest on the premise that the risk of trustee error in ascertaining the settlor's intent is small.[130] Agency

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[129] As indicated above, section 14 of the statute withholds the decanting power only when the trust instrument expressly excludes the power to decant. UNIF. TRUST DECANTING ACT § 14 (UNIF. LAW COMM'N 2015).

[130] The assumption that x is always large is implausible in light of the broad range of changes a trustee can make through an exercise of the decanting power. Decanting statutes explicitly authorize decanting in situations where a reasonable settlor (aided by a competent lawyer) could have anticipated a contingency and drafted for it. For instance, the Uniform Act authorizes the trustee to change trustee succession provisions, or to divide a trust into separate

costs, however, cast doubt on that premise. First, even if we assume that the trustee acts as the settlor's agent, the trustee is not ultimately answerable to the settlor, who will often be dead at the time the trustee decides whether to decant.[131] The trustee is answerable instead to the current and future beneficiaries, whose interests may or may not align with the settlor's preferences. As a result, the trustee's economic interests may lie with satisfying the beneficiaries rather than effectuating settlor intent. Second, some decisions the trustee might make—particularly the decision to extend the duration of the trust, or to change its administrative provisions, or to add trust protectors or advisors—have the potential to increase the trustee's fees or reduce the trustee's risk of liability.[132] These agency costs may lead the trustee to depart from outcomes the settlor would have preferred.

Nevertheless, if evaluated exclusively from the standpoint of settlor intent, some circumstances present a strong case for decanting. Consider in particular changes in law—especially tax law—that have the potential to reduce the tax bill for all of the trust beneficiaries. Changes in law are difficult to anticipate and provide for, so specification costs are typically high. At the same time, Robert Sitkoff and Max Schanzenbach have demonstrated that tax minimization is a prime concern for most wealthy trust settlors.[133] As a result, there appears to be little risk of error in a trustee's decision to take advantage of a change in tax law that benefits all of the trust beneficiaries.[134] An example might be moving the trust's situs to a state that had reduced or eliminated state income taxes on trust income.[135]

The prospect of frustrating the settlor's intent is somewhat greater when decanting generates tax savings, but only by sacrificing the interest

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trusts. *See id.* § 11 cmt. When a trust is to endure for any period of time, a competently drafted trust instrument makes provisions for trustee succession, and provisions for division of a trust into separate trusts is a common feature in many trusts.

[131] RESTATEMENT (THIRD) OF TRUSTS § 94(1) (AM. LAW INST. 2012) provides that only a beneficiary, a co-trustee, a successor trustee, or a person acting on behalf of a beneficiary may enforce the terms of the trust. The settlor generally lacks standing to enforce. *See id.* § 94 cmt. d(2). For criticism of the rule, see Langbein, *supra* note 14, at 664; Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 666–70 (2004).

[132] *See* Weisbord, *supra* note 115, at 87–88.

[133] *See* Sitkoff & Schanzenbach, *supra* note 5, at 419 (establishing that empirical study is consistent with the proposition that "people undertake significant measures to avoid" wealth transfer taxes); Schanzenbach & Sitkoff, *supra* note 93, at 2497 (concluding that tax considerations drive the structure of donative transfers).

[134] Of course, the settlor could have expressly conferred power on the trustee to make changes in response to tax law changes, but the assumption here is that the settlor and/or her lawyer were not aware of that alternative.

[135] The Uniform Act enables the trustee to change the jurisdiction of the trust and the law governing its administration. UNIF. TRUST DECANTING ACT § 11 cmt. (UNIF. LAW COMM'N 2015).

of some trust beneficiaries. For instance, suppose a trust instrument calls for distribution of trust principal to remaindermen at the death of a life beneficiary. The jurisdiction has abolished or modified the Rule Against Perpetuities in a way that would permit extension of the trust for another generation, potentially avoiding estate and/or generation skipping transfer taxes. Extension, however, would reduce the ability of the named remaindermen to consume the trust principal.[136] Perhaps the trustee could reasonably conclude that the settlor would prefer tax savings to preserving the interest of the remaindermen, but the trustee's judgment might be clouded by agency costs: the trustee would generate additional fees by maintaining the property in trust for another generation.[137]

The case for decanting is even weaker when the trustee's changes would not produce aggregate savings for the trust beneficiaries. For instance, suppose the trust instrument requires the trustee to make partial distributions of principal to a beneficiary when the beneficiary reaches specified ages. The decanting statute authorizes the trustee to postpone or eliminate those distributions, retaining the property in trust for a longer period.[138] Ostensibly, the trustee who decants makes the judgment that the settlor would not have believed the beneficiary was ready for the distribution, or that the settlor would not have wanted the beneficiary's creditors to reach trust assets. Of course, the settlor could not have foreseen all of the beneficiary's proclivities and difficulties, but the settlor could certainly have provided for discretionary payments if the settlor had wanted to repose decision-making in the trustee. Indeed, the settlor might well have provided for discretionary determinations until the beneficiary reached the specified age. To allow the trustee to eliminate a provision for a mandatory distribution exalts the trustee's judgment about what the settlor would have wanted over the settlor's own explicit instructions, and does so when the trustee has financial incentives to extend the trust's duration. By contrast, the traditional regime, which permits judicial modification, leaves the modification issue in the hands of judges who have no financial stake in the modification.

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136 For concerns about extending the terms of a trust to reduce the interests of named beneficiaries, see Weisbord, *supra* note 115, at 99–100.

137 In some states, trustees are explicitly entitled, during each year of the trust's duration, to a commission based on the value of the trust corpus. *See, e.g.*, N.J. STAT. ANN. § 3B:18-25 (West 1983). In most states, the trustee is entitled to reasonable compensation. *See, e.g.*, UNIF. TRUST CODE § 708 (UNIF. LAW COMM'N 2000). Reasonableness generally entitles the trustee to a commission for each year of trust management.

138 UNIF. TRUST DECANTING ACT § 11 cmt.; *id.* § 19 (imposing limits on duration measured by the applicable perpetuities period of state law governing the original trust).

The Uniform Act, like other decanting statutes, does not distinguish between circumstances in which there are strong indicators that the settlor would have preferred modification and circumstances where the evidence is more equivocal. The statute's drafters could have limited decanting to circumstances presenting low risk of trustee error, but opted instead to rely on fiduciary duty as the primary device for disciplining trustees.[139] As already noted,[140] the problem with that approach is that it relies on litigation by beneficiaries to enforce those fiduciary duties, and litigation costs might deter those actions. The absence of articulated standards for evaluating the trustee's decision to decant exacerbates the problem; courts may be reluctant to hold a trustee liable for conduct the statute appears to authorize.

In sum, the Uniform Decanting statute provides minimal protection against trustee error in ascertaining the settlor's intention. The problem is most serious with existing trusts. If an understanding of decanting rules becomes widespread among trust lawyers, the danger will become smaller for new trusts. Because the right to decant is a default rule, trust settlors who prefer not to have trustees decant can include language in the trust instrument precluding decanting. That brings us to the issue of the next Part: Should decanting doctrine be concerned with more than effectuating settlor intent?

IV. DECANTING AND POLICY

Part III has assumed, to use language commonly found in trust law cases, "the cardinal rule in trust law is that the intention of the settlor is to be followed."[141] Given that premise, Part III demonstrated that a broad grant of decanting authority has the potential to undermine the settlor's objectives.

Trust law doctrine has long recognized, however, that the focus on the settlor's intent has its limits. Judicial fealty to freedom of testation is

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139 *Id.* § 4(a) ("In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties . . . ."). The statute, however, generally protects trustees against liability for failure to decant; the comment to section 4(b) provides that "[t]he Uniform Trust Decanting Act does not impose a duty on the authorized fiduciary to decant," and goes on to provide that "an authorized fiduciary generally should not be penalized for not modifying the terms of the trust."

140 See *supra* Section II.B.4.

141 Rollins v. Rollins, 755 S.E.2d 727, 730 (Ga. 2014); *see, e.g.*, Bacardi v. White, 463 So. 2d 218, 221 (Fla. 1985) ("[O]ne of the basic tenets for the construction of trusts is to ascertain the intent of the settlor and to give effect to this intent."); Morse v. Kraft, 992 N.E.2d 1021, 1026 (Mass. 2013) ("In interpreting a trust, the intent of the settlor is paramount."); Evans v. Moyer, 2012 WY 111, ¶ 21, 282 P.3d 1203, 1210 (Wyo. 2012) ("In interpreting a trust, our primary purpose is to determine the intent of the settlor.").

often accompanied by a qualifier: "[T]he goal is to determine the settlor's intent, which the court will effectuate if it is not contrary to law or public policy."[142] The premise behind the qualifier is that the focus on the settlor's intent must sometimes give way when effectuating that intent causes harm to others.

Decanting enables trustees to rewrite a trust's terms to impose externalities on non-parties to the trust. If the settlor were alive, the settlor might well applaud the effort to avoid taxes or creditors by using mechanisms not available when the settlor created the trust. This Part argues that there is no persuasive policy justification for permitting the use of decanting to achieve tax and creditor avoidance objectives not attainable when the settlor created the trust.

In outline form, the argument starts with recognition that all trusts have the potential to generate negative externalities. Trusts also have the potential to realize efficiency gains. We tolerate the externalities as a way to incentivize potential settlors to create those efficiency gains. Decanting, however, operates after the settlor has already established the trust. If the settlor created the trust without benefit of a particular set of negative externalities (tax or creditor avoidance), the incentive justification for tolerating those externalities disappears.

A. *The Social Costs and Benefits of Trusts*

Both by common law and by statute, trust law doctrine has long operated to constrain use of trusts to impose costs on third parties. The Statute of Uses itself was designed in large measure to preclude the use of trusts as a tax-avoidance device.[143] The long-standing American prohibition on self-settled spendthrift trusts and the more comprehensive English prohibition on all spendthrift trusts both operate to limit use of trusts as a mechanism for imposing harm on creditors.[144] Various restrictions on dead hand control by settlors, including the common law Rule Against Perpetuities, evince concerns with intergenerational externalities: the power of persons now dead to frustrate the preferences of beneficiaries who are currently alive.[145]

In light of the social costs trusts can generate, what reasons are there to permit settlors to create trusts? Trusts are not an essential

142 Citizens Nat'l Bank v. Kids Hope United, Inc., 922 N.E.2d 1093, 1097 (Ill. 2009); *see also* Gilbert v. Gilbert, 350 N.E.2d 609, 610 (N.Y. 1976) ("[I]n construing an Inter vivos trust, effect is to be given to [the settlor's] intention unless it is contrary to public policy or law.").

143 *See supra* notes 9–11 and accompanying text.

144 *See supra* notes 18–19 and accompanying text.

145 *See supra* notes 20–22 and accompanying text.

feature of a legal system; historically, civil law countries have done without them. Even within common law jurisdictions, trusts of personal property played a minor role until well into the nineteenth century. What social benefit do trusts generate to justify their continued enforcement—and, in particular, to justify the practice of decanting, which expands the possibility for negative externalities?

As John Langbein has demonstrated, trusts have proven valuable as an instrument of commerce.[146] Trust law's fiduciary duties provide investors with off-the-rack protection for investors, ensuring that asset managers will act in the best interest of the beneficial owners of those assets.[147] At the same time, because trust law enables the parties to modify default rules to meet individualized needs, the trust's flexibility has provided, for some enterprises, efficiency advantages over the more highly regulated corporate form.[148]

Within the realm of personal wealth management, trusts enable settlors to avoid inefficiencies that background law would otherwise create. The most obvious of these is the cost of probate. For many persons of means, creating an inter vivos trust, either revocable or irrevocable, avoids the need for trust assets to pass through the probate process, which has historically been notorious for costs and delays beyond those necessary to ensure smooth transition of wealth from decedent to the decedent's beneficiaries of choice.[149]

Trusts also avoid the inefficiencies associated with legal life estates. Historically, a wealthy landowner who wanted to divide ownership interests over time would do so with a combination of life estates and remainders. The resulting divided ownership created conflict over appropriate use of the land, and also made alienability cumbersome.[150] Trusts avoid these difficulties by reposing legal title in the trustee, who would have authority to decide on use of the land and power to transfer title to third parties. Moreover, as intangible property has replaced land as the primary source of wealth, the trust grew in importance because life estates and remainders were particularly ill-suited for resources

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146 Langbein, *supra* note 17.

147 *Id.* at 182.

148 *Id.* at 183–84. Langbein wrote when LLCs were in their infancy as an alternative to corporate organization, but trusts remain a common form of organization in a number of commercial areas—particularly real estate and pensions.

149 Probate avoidance became an American obsession during the 1960s, when Norman F. Dacey's *How to Avoid Probate!* became a *New York Times* best seller, topping even William H. Masters and Virginia E. Johnson's *Human Sexual Response*. *See The New York Times Best Seller List July 17, 1966*, HAWES, http://www.hawes.com/1966/1966-07-17.pdf (last visited June 11, 2017).

150 *See supra* note 15 and accompanying text.

other than land; for these assets, trusts provided the primary mechanism for dividing ownership over time.[151]

Finally, trusts enable property owners to ensure competent investment and spending management for less-than-capable trust beneficiaries. People who have accumulated wealth may want to benefit family members or others with less financial acumen. Outright gifts to these beneficiaries risk premature dissipation or waste of the assets. Moreover, a property owner might engage in less productive activity, or more low-value consumption, if the property owner could not convey property to beneficiaries with some assurance that the beneficiaries will derive personal benefit from the owner's resources.[152] That focus on incentives to the initial owner provides the primary justification (albeit a questionable one) for spendthrift trusts and supplemental needs trusts: needy beneficiaries would suffer, without commensurate gain to anyone else, if their potential benefactors could not ensure that the assets would be used to benefit the beneficiaries themselves rather than their creditors.

Trusts, then, are useful mechanisms. The question, then, is whether decanting makes them even more useful, or merely increases the opportunities for imposing external costs without generating significant benefits. The next two Sections address that question.

B. *The Social Costs of Decanting*

From the standpoint of potential users, decanting's attraction includes the potential to impose social costs on others—primarily through tax avoidance and avoidance of creditor claims. And, in fact, states that have the most liberal decanting statutes are also the states most attractive to trust settlors who want to create perpetual trusts or asset protection trusts. According to one survey, eight of the ten most decanting-friendly states are also among the "top ten" states measured by their amenability to perpetual trusts and asset protection trusts.[153]

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151 *See supra* note 16 and accompanying text.

152 This focus on the initial owner's intentions underlies the questionable justification underlying spendthrift trusts and supplemental needs trusts. *See, e.g.*, Broadway Nat'l Bank v. Adams, 133 Mass. 170, 173 (1882) (emphasizing the right of the founder of the trust to dispose of assets with such restrictions "as he saw fit to impose"). By contrast, when the settlor attempts to create a spendthrift or supplemental needs trust for his own benefit, courts have been much more hostile. *See, e.g.*, Cohen v. Comm'r of the Div. of Med. Assistance, 668 N.E.2d 769, 771–72 (Mass. 1996) (noting that courts have not applied spendthrift or supplemental needs analysis to self-settled trusts).

153 *Compare* Oshins, *supra* note 62 (ranking states on decanting friendliness), *with* Steve Oshins, *7th Annual Domestic Asset Protection Trust State Rankings Chart*, LAW OFFICES OF OSHINS & ASSOCIATES, L.L.C. (Apr. 2016), https://media.wix.com/ugd/b211fb_d786f6cb9

Trusts generally have the potential to avoid otherwise-applicable taxes, but decanting exacerbates the tax avoidance problem in several ways. Consider three examples. First, if the settlor created a discretionary trust in her home state, and the home state's income tax treatment of trusts proved unfavorable, decanting allows the trustee to relocate the trust to a jurisdiction with more favorable state income tax treatment.[154]

Second, decanting allows the trustee to reduce income taxation by taking advantage of recent increases in the estate tax exclusion. Many people of means have created "credit-shelter trusts" to take advantage of the estate tax exclusions available to both spouses in a married couple. A husband, for instance, would create a trust funded with "exclusion amount" in the year of his death. By the terms of the trust, the trustee would be entitled to make payments of income to his wife, and might have discretion to make payments to a variety of beneficiaries (including the wife and settlor's children). The wife might have a nongeneral power to appoint the principal by will. The goal was to make sure the property passed through the husband's estate (where no tax would be due), but not through the wife's estate, where the property might be taxed at a high estate tax rate—if the wife's estate exceeded the exclusion amount in the year of her death. Legislation enacted in 2010, however, significantly increased the size of the exclusion amount.[155] As a result, inclusion of the property in the wife's estate might now be advantageous: inclusion in her estate would subject the assets to a "stepped-up basis" which could significantly reduce income taxation on those assets when they were sold.[156] At the same time, the increased exclusion amount might reduce or eliminate the estate tax due at the wife's death. Decanting would allow the trustee to transfer the trust assets to a new trust that gave the wife a general power of

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cda4f90bf13d7ed8dae9318.pdf (ranking states on asset-protection friendliness), *and* Steve Oshins, *5th Annual Dynasty Trust State Rankings Chart*, LAW OFFICES OF OSHINS & ASSOCIATES, L.L.C. (Oct. 2016), https://media.wix.com/ugd/b211fb_15c05b51f6 11475b83e6aaa778c69191.pdf (ranking states on friendliness to dynasty trusts). Eight states—South Dakota, Nevada, New Hampshire, Delaware, Tennessee, Ohio, Alaska, and Wyoming—appear in the top ten of each list, compiled by Steve Oshins, a Nevada lawyer. The methodology Oshins used explains some of the overlap: ten percent of the decanting score is derived from friendliness to asset protection trusts and dynasty trusts, 22.5% of the dynasty trust score is derived from friendliness to asset protection trusts and decanting, and 7.5% of the asset protection score is derived from friendliness to decanting.

154 *See* UNIF. TRUST DECANTING ACT § 11 cmt. (UNIF. LAW COMM'N 2015) (including change of jurisdiction of the trust as permissible action by the decanting trustee).

155 The exclusion amount became $5,000,000, adjusted for inflation in years after 2010. 26 U.S.C. § 2010(c)(3) (2012).

156 *Id.* § 1014(a)(1) (providing for a stepped-up basis for property acquired from a decedent).

appointment,[157] avoiding capital gains taxes that would otherwise become due on sale of the assets.[158]

Third, by authorizing the trustee to extend the duration of a trust, decanting statutes might enable the trustee to leverage the generation-skipping transfer tax exemption to avoid multiple generations of estate taxation. Consider a settlor who used the GSTT exemption to create a trust that complied with the jurisdiction's Rule Against Perpetuities. That is, suppose the trust gave the trustee discretion to make payments to the settlor's daughter during the daughter's lifetime, and directed that at the daughter's death, the remaining trust principal should be distributed to the daughter's issue. By creating the trust, the settlor avoided estate taxation in the daughter's estate. However, once the trustee distributed the trust principal to the daughter's children, the property would become taxable in the estates of the children. Suppose, however, that after the settlor created the trust, the jurisdiction abolished the Rule Against Perpetuities (or substantially extended the Rule's period). Decanting might permit the trustee to distribute the trust property to another trust that would not require distribution at the daughter's death, but that would instead keep the property in trust for generations to come—avoiding estate taxation indefinitely.[159]

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157 *Id.* § 1014(b)(4) (including as property acquired from the decedent "[p]roperty passing without full and adequate consideration under a general power of appointment exercised by the decedent by will").

158 An example illustrates the tax advantages decanting might generate. Suppose husband had died in 2008, when the exclusion amount (and therefore the value of the trust) was $2,000,000. Wife dies in 2016, when the trust assets have grown to $4,000,000. Wife has assets of her own valued at $1,000,000. Wife would not be subject to estate tax at her death in any event. If the trust were not decanted, the trust beneficiaries would have an income tax basis equal to the value at the husband's death: $2,000,000. If they were to sell the assets, they would be liable for capital gains tax on the appreciation since the husband's death. At the current capital gains rate for persons in the highest tax bracket, the tax rate would be twenty percent, generating an income tax due of $400,000. If the trustee decanted the trust into a new trust that gave the wife a general power of appointment, the trust beneficiaries would have an income tax basis of $4,000,000, generating no income tax if the beneficiaries immediately sold the assets.

159 Whether a trustee can safely decant to accomplish this result is not free from doubt. If the trust is exempt from the GSTT because it was created before the 1986 enactment of the tax, often called a "grandfathered trust," treasury regulations make it clear that decanting would result in loss of the GSTT exemption unless decanting was available when the trust was created. *See* Treas. Reg. § 26.2601-1(b)(4)(i)(A)(1)(ii) (1995). Even if decanting were available when the trust was created, decanting could only extend the trust's duration for a term equal to lives in being or ninety years from the time of the trust's duration. *Id.* § 26.2601-1(b)(4)(i)(A)(2). *See generally* 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, 19–20 (2010). On the other hand, nothing in the Treasury Regulations imposes comparable restrictions on decanting from a trust exempt from the GSTT by reason of the exemption amount provided by 26 U.S.C. § 2631 for generation-skipping dispositions made after the statute's enactment. Many read this omission to permit decanting into a perpetual trust without losing the GSTT exemption. *See, e.g.*, Culp & Mellen, *supra*, at 25–26; James P. Spica, *A Newly Revised Post*

Decanting also enables a trustee to impose external costs on creditors of a trust beneficiary, and potentially on the public fisc, by decanting into a spendthrift trust or supplemental needs trust even when the original trust's terms would have made the trust assets fully available to the trust beneficiary. *In re Kroll*[160] illustrates the opportunities. In 1992, the settlor established a trust for the benefit of his nineteen-month-old grandson, Daniel.[161] By the terms of the trust, Daniel's parents, as trustees, had discretion to make payments of income and principal to Daniel until he reached the age of twenty-one. At that time, income payments to Daniel became mandatory.[162] The trust provided that principal would be distributed to Daniel in three installments, when he reached ages twenty-five, thirty, and thirty-five.[163] Unfortunately, over time it became clear that Daniel suffered from disabilities that were not apparent when the trust was created.[164] Five days before Daniel reached the age of twenty-one, Daniel's father, as trustee, sought to decant the trust assets into a supplemental needs trust designed to preserve Daniel's eligibility for public assistance.[165] The court, applying New York's decanting statute,[166] upheld the trustee's right to decant—preserving the $400,000 trust principal for the family, while shifting the costs of Daniel's care to the public at large.[167]

Of course, any well-drafted supplemental needs trust permits the beneficiary to retain eligibility for public assistance. But consider the justification for permitting a settlor like Daniel's grandfather to create a supplemental needs trust for a beneficiary like Daniel. The grandfather had no obligation to support Daniel or to provide for Daniel's benefit. If the settlor chose to leave money to relatives other than Daniel in order to preserve Daniel's eligibility for public assistance, the public fisc would be no larger than if courts enforced a supplemental needs trust for Daniel's benefit. Therefore, the availability of supplemental needs trusts encourages settlors to make provision for disabled beneficiaries without cost to taxpayers. That justification, however, does not apply when the *trustee* seeks to decant the trust into a supplemental needs trust. The settlor has already committed the assets to Daniel's use without the

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Perpetuities Reform RAP Applicability Flowchart for Property Subject to Michigan Law, 59 WAYNE L. REV. 1347, 1370–72 (2014).

160 971 N.Y.S.2d 863 (Sur. Ct. 2013).

161 *Id.* at 864.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b) (McKinney 2002).

167 *In re Kroll*, 971 N.Y.S.2d at 864, 866.

incentive of supplemental needs protection; decanting simply shifts the burden of Daniel's care from the family to the public.

C. *The Social Benefits of Decanting*

From a policy perspective, the question is whether there is any justification for enabling a trustee to decant into a new trust that imposes externalities not generated by the initial trust. Those justifications could sound in efficiency or in equity. From an efficiency perspective, decanting could generate social benefits in either of two ways. First, decanting could induce people to create benefit-generating trusts they would not otherwise create. Second, decanting could extend the social benefits generated by already-existing trusts. From an equity perspective, decanting might put trusts drafted by run-of-the-mill lawyers on the same footing as trusts drafted by cutting-edge lawyers. Ultimately, however, none of these justifications withstands analysis.

1. Decanting and the Incentive to Create Trusts

What effect does enactment of a decanting statute have on a potential settlor's incentives to create a trust? First, the primary impetus for decanting statutes has been the desire of trustees and beneficiaries to amend trusts already in existence. Enactment of a decanting statute can provide no incentives to create trusts once they have already been established. To the extent decanting generates social costs, those costs will not be mitigated by any incentives to create beneficial trusts. Consider, for instance, the problem in *In re Kroll*.[168] The settlor had already created the trust for his grandson twenty years before the trustees sought to decant into a new trust; decanting was unknown to the settlor, and could not have influenced his decision to create the trust. Structurally, the problem is identical to the problem associated with copyright term extension: extension of an existing copyright term provides no incentives to create new copyrighted works, but generates the social costs associated with allowing the copyright owner to monopolize copyrighted works for an additional period.[169]

168 971 N.Y.S.2d 863.

169 *See* Eldred v. Ashcroft, 537 U.S. 186, 254 (2003) (Breyer, J., dissenting) ("What copyright-related benefits might justify the statute's extension of copyright protection? First, no one could reasonably conclude that copyright's traditional economic rationale applies here. The extension will not act as an economic spur encouraging authors to create new works.").

Second, one might surmise that the availability of decanting would encourage future settlors to create trusts. If decanting statutes did nothing more than explicitly authorize the trustee to decant in certain circumstances, the surmise might be plausible. A potential settlor (or her lawyer) who was otherwise indifferent to creating a trust might be enticed to do so if armed with the knowledge that the trustee could make modifications that would enable the trust to adapt to changed circumstances. But decanting statutes go beyond enabling the settlor to confer decanting power on the trustee. They make decanting available as a default rule even when the trust instrument is silent about the trustee's power to decant.[170] A settlor or lawyer sophisticated enough to worry about adapting a trust to changed circumstances will have no need for a default rule; the settlor would explicitly include decanting power in the trust instrument.

Third, the existence of decanting is particularly unlikely to create incentives for those potential settlors whose objectives are to realize efficiency gains: probate cost-avoidance, efficient division of ownership over time, and competent management of resources. A potential settlor seeking to avoid probate costs is unlikely to eschew use of a trust merely because the trustee will not be able to modify the trust terms in case of an event the settlor cannot foresee. A person seeking to divide ownership of property over time has no good alternatives to the trust, whether or not decanting is an option. And a trust will also be the most promising alternative for a potential settlor concerned about providing for beneficiaries with no experience or competence at managing money; whether the trustee has decanting power is likely to be a trivial concern in whether to create a trust. In each of these cases, some informed settlors might prefer that the trustee have decanting power because of the private benefits the decanting power would create for the trust's beneficiaries. The absence of a decanting power, however, is unlikely to be a deal-breaker when the issue is whether to create a trust in the first instance.

2. Decanting as a Mechanism to Extend the Efficiency Gains Associated with Trusts

Even if the availability of decanting has no effect on creation of trusts, might decanting authority increase the trustee's ability to generate social benefits with respect to existing trusts? Decanting may, on occasion, enable the trustee to reduce administrative costs associated

[170] *See, e.g.*, UNIF. TRUST DECANTING ACT § 3(c) (UNIF. LAW COMM'N 2015).

with the trust. When these costs constitute deadweight losses, decanting may generate efficiencies compared to the terms of the original trust. For instance, a trustee with decanting power would be able to appoint successor trustees or successor co-trustees without the expense of court involvement.[171] Similarly, decanting would enable a trustee to consolidate multiple smaller trusts into a single larger trust to save on administrative expenses.[172]

Outside the realm of administrative cost savings, the social benefits of decanting are difficult to identify. Consider the social benefits generally associated with trusts. First, trusts avoid probate costs. But the mere creation of the trust accomplishes the probate-avoidance objective. Decanting could potentially extend a trust to avoid probate costs for another generation, but there is little reason to believe that decanting would be more effective at avoiding those costs than distribution to beneficiaries on the original trust's schedule. Distribution to beneficiaries would enable those beneficiaries to avoid probate costs by creating new trusts or using other probate avoidance devices.

Second, consider the efficiency advantages of the trust as a mechanism for dividing ownership over time. If dividing ownership over time itself generates social benefits, the trust provides an attractive mechanism for achieving those benefits. But what social benefits arise from allowing an owner to divide ownership over time? The primary benefit arises from the increased incentive for the owner to engage in productive activity if she knows that she can use the fruits of that activity to provide for her children and grandchildren.[173] Once the owner knows she can use the trust to provide for the beneficiaries she knows and cares for, the prospect of decanting to extend the trust will have a negligible impact, if any, on the owner's productive activity.

Third, consider the advantages that arise from professional management of the settlor's assets. Even without a trust, a beneficiary could engage an investment advisor to manage assets. The trust provides an advantage only when the settlor of the trust knows or suspects that the trust beneficiary lacks the proclivity or skill to obtain

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171 *Id.* § 11 cmt.

172 *Id.*

173 This supposed benefit is the subject of controversy. While many have argued that allowing property owners to dispose of their property to future generations creates incentives for industry, others have concluded that most intergenerational wealth transfers are the product of efforts to provide for one's own future needs in light of uncertainty. *Compare* Franco Modigliani, *The Role of Intergenerational Transfers and Life Cycle Saving in the Accumulation of Wealth*, 2 J. ECON. PERSP. 15 (1988), *with* Laurence J. Kotlikoff, *Intergenerational Transfers and Savings*, 2 J. ECON. PERSP. 41 (1988). *See also* Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 308 (1994) (discussing both explanations for wealth accumulation and citing empirical evidence that at least one-fourth of national wealth "is held as intergenerational, or bequest, savings").

appropriate investment advice. That advantage may be very real when the beneficiaries are people the settlor knows. But the advantage dissipates over time. There is little reason to believe that settlor has the foresight to anticipate the abilities of more remote descendants, and still less reason to assume that settlor would be in a better position than those descendants to make decisions about the appropriate source for investment advice. Decanting to extend the duration of the trust, therefore, is difficult to justify as a means to ensure optimal management of family resources. One might respond that even if the settlor is not in a position to evaluate the investment acuity of future beneficiaries, the trustee will be in a position to do so. But once again, the trustee faces an agency cost problem: extending the duration of the trust ensures more fees for the trustee, even if extending the duration is not in the interest of the beneficiaries.[174]

3. Decanting as a Means of Leveling the Playing Field

Assume decanting generates no efficiency gains. One might argue that it is inequitable to deprive a trust's beneficiaries of tax-avoidance or creditor-avoidance opportunities available to beneficiaries of other trusts drafted by more skilled lawyers.

The first problem with this argument is one of baseline. The equity argument proceeds on the premise that the appropriate baseline is the group of very rich settlors and beneficiaries who have obtained the best (and often most expensive) legal counsel. Measured against that baseline, the beneficiaries of other trusts are at a disadvantage if the settlor's counsel did not foresee all of the strategies for imposing external costs on others. But, as this Article's introduction emphasizes, poor people—and most middle class people—do not create trusts. And those are the people who will bear much of the brunt of the externalities decanting might generate. It is not at all apparent that the baseline for measuring equity should be the one percent—or, more likely, the fraction of the one percent—of trust settlors and beneficiaries who obtain the best legal counsel rather than the ninety percent of individuals who do not have the resources to create trusts.

Even if the one percent were the relevant baseline, equity provides no basis for authorizing decanting to benefit from externality-creating legal rules unavailable to all settlors—even those with the best legal advice—at the time of trust creation. A blanket prohibition on

[174] *See supra* notes 131–33 and accompanying text.

decanting to take advantage of such rules would create a level playing field.

V. CONCLUSION: DEVELOPING APPROPRIATE LIMITS ON DECANTING

The last two Parts have highlighted the difficulties with according trustees broad decanting power, both as a matter of settlor intent and as a matter of social policy. But decanting, if appropriately cabined, remains a valuable innovation with the potential to reduce both private and social costs in a number of circumstances: enabling a trustee to act without judicial intervention in order to consolidate or divide trusts, or to provide for trustee succession, saves money for all trust beneficiaries without imposing external costs. The problem is not with decanting as a concept, but with the expansive scope its proponents advocate.

There is no unique path to preserving the benefits of decanting while minimizing disruption of a settlor's distributive scheme and limiting the potential for imposing external costs on taxpayers and creditors. One approach would be to limit the range of actions a trustee could take through decanting. To take a few examples, a decanting statute could explicitly prohibit extension of trust duration, change in the situs of the trust, and introduction of spendthrift provisions.

There are, however, two practical problems with this strategy. First, decanting statutes are typically drafted by practicing lawyers who, quite understandably, have their clients' interests in mind when they draft; their clients are trustees and beneficiaries, not creditors and general taxpayers. As a result, more care goes into ensuring that decanting does not inadvertently trigger increased tax liability[175] than into safeguarding the interests of creditors and taxpayers. Second, jurisdictional competition for trust business, in this area as in others, makes it difficult for states to resist enacting decanting-friendly statutes.[176]

Another strategy deals directly with the social costs of decanting: federal legislation that changes eligibility rules for Medicaid and other public assistance programs—amendments to the Internal Revenue Code to eliminate the tax advantages of decanting. This approach would avoid the problem of jurisdictional competition, but would be plagued by the

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175 *See, e.g.*, UNIF. TRUST DECANTING ACT § 11 cmt. (noting that the statute's prohibition on decanting into a trust that makes a remainder beneficiary of the first trust into a current beneficiary of the second trust is designed to avoid transforming a non-grantor trust into a grantor trust for tax purposes). *See generally* Blattmachr et al., *supra* note 35, at 159–60 (discussing the same issue).

176 *See* Sterk, *supra* note 4, at 1065–74 (discussing incentives for states to ignore out-of-state externalities when considering changes in trust law).

usual interest-group politics problem that stifles tax reform legislation.[177]

Implementing a sensible approach to decanting will not be easy. My objective is not to provide a road map, but instead to identify and analyze issues that have received too little attention. Decanting, despite its attraction, is no panacea. Recognition of that fact is long overdue.

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177 For a recent discussion, see Susannah Camic Tahk, *Public Choice Theory and Earmarked Taxes*, 68 TAX L. REV. 755, 757–61 (2015) (discussing the dynamics of tax reform legislation, in which interest groups typically work to increase possibilities for tax avoidance).