New York Law Journal

ALM Properties, Inc.
Page printed from: *New York Law Journal*

The Evolution of Trust Reformation and Modification Under New York Law

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New York Law Journal

07-09-2012

There is a central tension in the law of trusts between the rights of the deceased settlor and the rights of living beneficiaries. In many respects, the position of the settlor is paramount. The settlor establishes the terms of the trust and has the power to determine the extent of the beneficiaries' interests and the extent of their control. Yet, only the beneficiaries hold any ownership interest in the trust. This article analyzes the constant tension, its evolution and how New York courts have moved away from their rigid beginnings, which disallowed all deviation from dispositive trust terms, toward a more liberal approach to trust modification and reformation.

Historic Principles

Historically, courts regarded the settlor's intent as the guide to trust administration.[1] The general rule was that the settlor alone determined the terms of the trust that would best serve that settlor's beneficiaries.[2] However, a settlor cannot address or even attempt to anticipate potential changing circumstances. As a result, there has been a move toward loosening the grip of "dead hand" control.

In general, reformation concerns an action to remove, or to add language to a trust, due to error or mistake, in order to conform the instrument to the settlor's intention. Modification, which may include termination, refers to changing an irrevocable trust for reasons other than mistake. For example, a trust may lack certain administrative powers that would facilitate trust administration, or the trust's value may not justify the continued cost of administering the trust.

At common law, a lifetime trust could be modified or terminated by consent of the settlor and all of the beneficiaries.[3] In a practical sense, modification by consent was rare because the settlor usually was no longer living.[4] Absent the consent of the settlor, the beneficiaries had little ability to modify a trust if doing so was contrary to the settlor's plain intent.[5] This trend permeated American trust law for more than a century. American courts could not or would not interfere with the material purposes of a trust absent some violation of law or public policy.[6]

New York

New York courts have generally prohibited reformation or modification of testamentary and non-testamentary instruments because of concerns that doing so would frustrate the intent of the testator's plan and/or lead to excessive litigation.[7] In theory, if there is no ability to reform or modify an instrument, the testator's intent is effectuated and no person is unjustly enriched.[8] Accordingly, New York courts were hesitant to reform testamentary instruments and adhered to the "no-reformation" rule.

Consistent with the "no-reformation" rule, deviation from dispositive terms was disallowed due to the great deference given to the settlor's intent.[9] This caused tension between the settlor and the beneficiaries when an administrative provision of the trust instrument required the trustee to act in a manner at odds with the interest of the beneficiaries. The trustee was not allowed to deviate from the problematic provision.[10]

In more recent years, New York appellate courts have decided cases which suggest the abandonment of the "no-reformation" rule particularly in the case of mistake or reformation for the special needs of a beneficiary.

One of the most common situations where beneficiaries seek reformation for mistake concerns simultaneous execution of wills by two testators, usually husband and wife. At the execution ceremony, through the negligence of the supervising attorney or some other scrivener error, each is given and signs the will drafted for the other. Prior to 1978, a long line of cases dating back to the 1800s denied probate of these types of wills.[11]

In a milestone case, *In re Snide*, the Court of Appeals addressed precisely this situation where identical mutual wills were simultaneously executed; however, it was only discovered after the death of the husband that he had signed his wife's will and not his own. In its decision, the Court of Appeals reasoned that because the will was undoubtedly genuine, and it was executed in the manner required by statute, it was properly admitted to probate.[12] Despite this departure, the Court of Appeals was still careful to note that its decision was not the "first step in the exercise of judicial imagination relating to the reformation of wills" as suggested by the dissent.[13]

New York courts have also reformed trusts into supplemental needs trust (SNT) when the testator's intent is not frustrated and the requirements of EPTL 7-1.12 are satisfied. EPTL 7-1.12 was enacted in 1993 to provide the legislative framework for the use of trusts to meet the supplemental needs of persons with disabilities whose basic needs are met through government benefits or assistance programs.[14] For example, in *Matter of Rappaport*,[15] the decedent's 2006 will created a testamentary trust naming the decedent's disabled daughter as income beneficiary.[16] The disabled child's guardian petitioned the court to reform the trust into an SNT.[17]

The Supreme Court, Nassau County, reformed the trust, holding that the reformation met the criteria set out by EPTL 7-1.12 and the decedent's intent was for the trust's assets to be used to supplement, not supplant government benefits. Furthermore, the court reasoned that the proposed reformation did not alter the decedent's testamentary plan and the requested reformation was in the best interests of the disabled child.[18]

In *Rappaport*, it was not dispositive that the decedent's will was executed after the enactment of EPTL 7-1.12. Instead, the court looked to whether reformation altered the decedent's testamentary plan, and whether the requested reformation was in the best interests of the beneficiary. In other cases, New York courts have liberally permitted reformation of traditional trusts into an SNT when the decedent's child was already needy, and either the attorney did not advise the settlor to create an SNT or the requirements of EPTL 7-1.12 were not properly met.[19]

Decanting Statute

In 2011, EPTL 10-6.6 was revised to expand the use of New York's decanting statute. Decanting authorizes the trustee of an irrevocable trust to appoint trust property in favor of another trust—much like you may decant liquid from one pitcher into another. When it was originally codified in 1992, EPTL 10-6.6 prohibited decanting by a trustee with limited discretion. Now a trustee can decant even when the trustee's discretion is limited.[20]

Pursuant to EPTL 10-6.6(c), if a trustee with limited discretion is decanting, there are certain requirements which must be met including that (i) the current, successor and remainder beneficiaries of the new or "appointed" trust shall be the same as the current, successor and remainder beneficiaries of the original or "invaded" trust (EPTL 10-6.6(c)); and (ii) the language authorizing the trustee to distribute income and/or invade principal must be identical in each trust (EPTL 10-6.6 (c)(1)).

There are some other additional flexibility provisions in EPTL 10-6.6 which expand New York's utility of the decanting statute. For example, if the term of the appointed trust is extended beyond the term of the invaded trust, the trustee may have unlimited discretion to invade the principal of the appointed trust during the extended term (EPTL 10-6.6(c)(2)). Pursuant to EPTL 10-6.6(j)(3) the trustee is not required to decant all of the assets of the invaded trust. EPTL 10-6.6(n)(1) allows decanting to a supplemental needs trust, as long as the requirements of EPTL 7-1.12 are met.

These provisions, as well as others within the revised EPTL 10-6.6, are another example of New York's move toward a more liberal approach to trust modification and reformation.

New York Trust Code

In an earlier article, we addressed the ongoing discussion of whether New York should adopt a uniform trust code.[21] For several years, various organizations, at the request of the New York State Legislative Advisory Committee have considered whether to recommend the adoption of a uniform trust code for New York. In the recently published Sixth Report, the committee reviewed sections 410 through 417 of the Uniform Trust Code (UTC), which concerns when a trust can be terminated or modified other than by its express terms.

In reviewing the UTC, the committee recommended adopting these sections, with some revisions and changes. For example, UTC §411 allows for modification or termination of a non-charitable irrevocable trust by consent,[22] where the beneficiaries compel the modification or termination, with or without the consent of the settlor. UTC §412 allows for modification or termination because of unanticipated circumstances or inability to administer the trust effectively, broadening the court's equitable powers. See also UTC §413 (codifies the court's inherent authority to apply cy pres, and modify an administrative or dispositive term or terminate a charitable trust); UTC §414 (modification or termination of an uneconomic trust); UTC §415 (reformation to correct mistakes); UTC § 416 (modification to achieve settlor's tax objections); UTC §417 (combination and division of trusts).

These sections seek to enhance flexibility in trust modification and reformations, while remaining true to the principle that preserving the settlor's intent is paramount. The committee's recommendations in the Sixth Report tailor the UTC provisions to conform with and further codify long-standing tenets of New York trust law.

Conclusion

New York law has moved away from its rigid beginnings, which disallowed all deviation from dispositive trust terms, toward a more liberal approach to trust modification and reformation in limited circumstances. This development helps to strike the appropriate balance between the needs of living beneficiaries and the intent of the now-deceased settlor.

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Endnotes:

1. Benjamin D. Patterson, "The Uniform Trust Code Revives the Historical Purposes of Trusts and Reiterates the Importance of the Settlor's Intent," 43 CREIGHTON L, REV. 905, 906 (2010) [hereinafter Patterson].

2. Patterson at 910.

3. Robert E. Hamilton, "Modifying Irrevocable Trusts," SR003 ALI-ABA. 97, 102 (2009) [hereinafter Hamilton].

4. Hamilton at 103.

5. Id.

6. Id.

7. See *In re Rappaport*, 866 N.Y.S.2d 483, 486 (2008) (stating that courts generally refrain from reforming testamentary instruments).

8. Id.

9. Id.

10. Id. at 743-745.

11. *In re Snide*, 52 NY2d 193 (1981).

12. Id. at 196.

13. Id. at 197.

14. Prior to enactment of this statute, the courts validated discretionary trusts for the supplemental needs of disabled beneficiaries. *Matter of Escher*, 94 Misc2d 952 (Surr Ct Bronx Co 1978) aff'd 75 AD2d 531 (1st Dept.) aff'd 52 NY2d 1006 (1981).

15. *In re Rappaport*, 21 Misc.3d 919 (Sup. Ct. Nassau Co. 2008).

16. Id.

17. Id. at 921.

18. Id. at 924.

19. EPTL §7-1.12(f); *In re Hulett*, No. 28,661 (Surr Ct Cattaraugus Co. Feb. 18, 1999) cited by Warren's Heaton on Surrogate's Court Practice, Seventh Ed. §211.04(1).

20. This is a default statute, so a settlor can disallow decanting by stating within the trust that this statute does not apply.

21. C. Raymond Radigan, Jennifer F. Hillman and Peter K. Kelly, "Does New York Need a Trust Code?" Jan. 31, 2011, NYLJ at S1.

22. The committee did not recommend adoption of UTC §411(a), but decided to retain EPTL §7-1.9.
