Common Law Decanting Is Alive and Well

By David A. Bamdad

I. Introduction

For 25 years after the enactment of Estates, Powers & Trusts Law 10-6.6 (EPTL), commonly referred to as New York's decanting statute, no New York court had interpreted subparagraph (k) thereof. EPTL 10-6.6(k) provides that the remainder of EPTL 10-6.6 does not abridge a trustee's right to appoint trust assets under the common law or the terms of the governing instrument.[1] The lack of case law concerning subparagraph (k) resulted in uncertainty as to whether every decanting has to comply with the requirements of the decanting statute, the terms of the trust, or the common law. This uncertainty posed problems for trust and estate practitioners. However, after a quarter of a century, New York courts have weighed in. In *Davidovich v. Hoppenstein*, the Appellate Division, First Department affirmed two New York County Surrogate's Court's decisions[2] holding that a trustee need not comply with the notice requirements of EPTL 10-6.6 if the trust instrument grants the trustee the absolute discretion to distribute assets in further trust for the benefit of one or more beneficiaries.[3] This article will discuss the decanting statute, the *Hoppenstein* decisions, and the ramifications thereof.

II. The Decanting Statute

New York's decanting statute finds its origins in a donee's power of appointment. Judge Preminger explained that

> The legal premise underlying [EPTL 10-6.6] is that a trustee with an absolute power to invade principal is analogous to a donee of a special power of appointment. A donee of a special power, unless the donor indicated otherwise, may exercise the power in further trust. It follows that a trustee with an absolute power to invade ought to be able to exercise that power in further trust.[4]

Accordingly, pursuant to EPTL 10-6.6(b), a trustee who has absolute discretion to distribute trust principal may appoint part or all of the trust principal in further trust for the benefit of one or more of the invaded trust's beneficiaries, provided the trustee complies with the stringent requirements of subparagraph (j) of the statute. Subparagraph (j) requires a written and acknowledged instrument evidencing the appointment and specifying the extent of the assets being distributed.[5] It also requires the trustee to provide copies of that instrument, the invaded trust and the appointed trust to the beneficiaries at least 30 days prior to the appointment.[6] However, EPTL 10-6.6(k) provides that nothing contained in EPTL 10-6.6 shall "be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law. . . ."[7] Although subparagraph (k) of the Section appears to retain a trustee's authority to decant under common law and the terms of the trust without complying with subparagraph (j)'s stringent notice requirements, until recently, no New York court ever upheld a decanting pursuant to that section.

"Davidovich v. Hoppenstein is the first case to test the limits of EPTL 10-6.6(k) and address whether that section should be interpreted according to its plain language or in some other limited manner."

III. *Davidovich v. Hoppenstein*

Davidovich v. Hoppenstein is the first case to test the limits of EPTL 10-6.6(k) and address whether that section should be interpreted according to its plain language or in some other limited manner. In *Hoppenstein*, the grantor of the trust created an irrevocable life insurance trust primarily for the benefit of his issue. The trust was the owner of a $10,000,000 life insurance policy on the life of the grantor. After years of discord between the grantor and one of his children, the independent trustee of the trust distributed the life insurance policy to another trust which excluded that child and her issue as beneficiaries. The trustee did so pursuant to his authority under the trust instrument to distribute any or all of the trust's principal and income to one or more of the grantor's children, to the exclusion of the others, as the trustee determined in his sole discretion. The trust also included a provision permitting the trustee to make any distribution to a trust for the benefit of one of more of the trust's beneficiaries.

David A. Bamdad is a partner at Meltzer, Lippe, Goldstein & Breitstone, LLP. David focuses his practice on estate and trust litigation. In his practice, he regularly counsels fiduciaries and beneficiaries in contested probate, administration, accounting, discovery, turnover, and other miscellaneous proceedings.

Furthermore, the trust only required the independent trustee to advise the beneficiaries that he intended to make a distribution of principal 45 days prior to the distribution. The trust did not require a written and acknowledged instrument evidencing the distribution, nor did it require the trustee to notify the beneficiaries of the extent of the principal being distributed or to provide them with copies of the invaded or appointed trusts.

Years later, after the death of the grantor, the disinherited daughter and her children challenged the distribution, arguing, among other things, that the distribution was void because the trustee did not comply with the requirements of EPTL 10-6.6(j). The independent trustee countered that, pursuant to subparagraph (k), he did not have to comply with the statutory requirements of EPTL 10-6.6 because he was permitted to make the distribution pursuant to the terms of the trust instrument itself and under common law. The Surrogate's Court agreed with the trustee and upheld the trustee's distribution of the life insurance policy.[8] In dismissing the objectants' reliance on EPTL 10-6.6(j), Surrogate Mella explained that the trustee's failure to comply with subparagraph (j) was immaterial because the trustee did not rely on the decanting statute to make the distribution.[9] Instead, the trustee relied on his power to make discretionary distributions of principal under the trust instrument.[10] Therefore, "[t]he procedure for decanting outlined in EPTL 10-6.6 has no bearing on this case."[11]

The First Department, in affirming the Surrogate's Court's decisions, also confirmed the trustee's authority to make the distribution under common law. The court explained:

> Under common law, a trustee with an absolute power to invade principal was able to exercise that power by appointing in further trust unless the creator of the trust indicated otherwise. The trustees of the Reuben Hoppenstein 2004 Insurance Trust (2004 Trust) had the absolute power to invade principal, as evidenced by Article 2(c) of the 2004 trust instrument. Article 9(f) gave the trustees the power to create further trusts. Thus, the transfer of the life insurance policy at issue from the 2004 Trust to the Hoppenstein 2012 Insurance Trust was valid.[12]

Therefore, *Hoppenstein* confirms that EPTL 10-6.6(k) is to be interpreted according to its plain language and that the requirements of the decanting statute are irrelevant to distributions of principal and/or income made pursuant to the express terms of the trust or under common law.

IV. Ramifications and Future Considerations

The *Hoppenstein* decisions provide clarity to practitioners who had been proceeding without guidance as to the interpretation of EPTL 10-6.6(k). Specifically, the decisions make clear that the decanting statute does not override the express terms of a trust and is to be interpreted as a supplement to any authority to distribute principal in a trust agreement or under common law.

"While some may interpret the Hoppenstein *decisions as swallowing the decanting statute and rendering it obsolete, it seems clear that the decanting statute was merely a codification of the common law, intended to enhance the circumstances under which trustees can appoint assets in further trust, as opposed to limiting it."*

Furthermore, although the trust at the heart of the *Hoppenstein* case contained a notice provision and the explicit authority to distribute in further trust, neither the Surrogate's Court nor the Appellate Division relied upon the presence of those provisions in their holdings. Specifically, the Surrogate's Court held that EPTL 10-6.6 had no bearing on the case because the trustee relied upon his absolute power to make discretionary distributions, without reference to either of the other provisions.[13] Moreover, the First Department explained that, under common law, a trustee with absolute power to invade principal could do so in further trust, "unless the creator of the trust indicated otherwise," thus indicating that a provision explicitly authorizing such a distribution was not required, so long as the trust did not include explicit language prohibiting such a distribution.[14] The First Department also made no reference to the notice provisions in the trust at issue, which would tend to prove that the lack of such language would not prevent a trustee from decanting outside of the statute.

This interpretation also makes sense in light of the limiting language of subparagraph (j), which contains the notice requirements. Subparagraph (j) states that the notice requirements set forth therein are only ap-

plicable to "[t]he exercise of the power to appoint . . . under paragraph (b) or (c)" of the decanting statute. Had the legislature intended that the notice requirements apply to all decantings, there would have been no reason to include such limiting language.

V. Conclusion

After 25 years, New York courts have finally weighed in on EPTL 10-6.6(k). *Hoppenstein* has shed light on an area of trust and estate practice that had been cloaked in uncertainty for decades, now allowing practitioners to confidently rely on this provision of the statute. While some may interpret the *Hoppenstein* decisions as swallowing the decanting statute and rendering it obsolete, it seems clear that the decanting statute was merely a codification of the common law, intended to enhance the circumstances under which trustees can appoint assets in further trust, as opposed to limiting it. This appears to be the legislature's intent based on the language contained in the statute and New York's preference to defer to the intention of the grantor. To hold otherwise, where a trustee is granted absolute discretion to make distributions, would limit the trustee's authority in a manner not contemplated by the grantor.

Endnotes

1. EPTL 10-6.6(k).
2. The Surrogate's Court issued two decisions dated March 31, 2017 and October 10, 2017, upholding the decanting at issue. *See In re Hoppenstein*, No. 2015-2918/A, 2017 WL 1969401, at *9 (Sur. Ct., N.Y Co., Mar. 31, 2017); *see also In re Hoppenstein*, No. 2015-2918/A, 2017 WL 4551644 (Sur. Ct., N.Y. Co., Oct. 10, 2017). The March 2017 decision granted the trustees summary judgment on their accounting and the October 2017 decision granted the objectants reargument on the summary judgment decision, but adhered to the original decision. *See id.* The objectants in the accounting proceeding appealed from both decisions, as well as the decree that subsumed the decisions. *See Davidovich v. Hoppenstein*, 162 A.D.3d 512, 79 N.Y.S.3d 133 (1st Dep't 2018). This article addresses both of the Surrogate's Court decisions and the Appellate Division, First Department's decision entered on June 14, 2018.
3. *Davidovich*, 162 A.D.3d 512.
4. *In re Mayer*, 176 Misc. 2d 562, 564, 672 N.Y.S.2d 998 (Sur. Ct., N.Y. Co. 1998) (internal citations omitted).
5. EPTL 10-6.6(j).
6. *Id.*
7. *Id.* 10-6.6(k).
8. *In re Hoppenstein*, No. 2015-2918/A, 2017 WL 1969401, at *9 (Sur. Ct., N.Y. Co., Mar. 31, 2017) (decision granting summary judgment); *In re Hoppenstein*, No. 2015-2918/A, 2017 WL 4551644 (Sur. Ct., N.Y. Co., Oct. 10, 2017) (decision on reargument, adhering to prior decision).
9. *In re Hoppenstein*, 2017 WL 1969401, at *3.
10. *Id.*
11. *Id.* at *4.
12. *Davidovich v. Hoppenstein*, 162 A.D.3d 512, 79 N.Y.S.3d 133 (1st Dep't 2018) (internal quotations and citations omitted).
13. *In re Hoppenstein*, 2017 WL 1969401, at *4.
14. *Davidovich*, 162 A.D.3d 512, 512.