

Decanting From Trusts With Perpetuities Savings Provisions

Clauses intended to avoid violations of the rule against perpetuities can affect the use of decanting that would prolong the distribution of trust assets.

WILLIAM R. CULP, JR. AND BRIANI BENNETT MELLEN, ATTORNEYS

Estate planning practitioners have encountered ever-increasing changes to traditionally understood trust law. For example, modern legislation has altered state trust codes to repeal the rule against perpetuities as it applies to trusts, to authorize self-settled trusts, and to include trust decanting provisions, whereby trust assets may be distributed to other trusts. These changes present new opportunities for traditional estate planning vehicles.

These new laws, however, also create a previously uncharted landscape, rife with questions regarding how, and to what extent, they may be put to use. One of these questions includes whether, and under what terms, the duration of a trust may be extended via trust decanting, particularly where a state has repealed its rule against perpetuities as it applies to trusts.¹

The authors of this article have previously concluded that, in certain situations, it may be possible

to extend the term of a trust indefinitely under a state's trust decanting statute and repeal of the rule against perpetuities.² The next question becomes whether a trust with a perpetuities savings clause may be extended beyond the limitations period provided in such clause.

Generally, there are two types of rule against perpetuities savings clauses. The first type provides that the trust must terminate if the trust property does not vest within a life or lives in being plus a stated term of years, such as 21 years. The second type of savings clause states that no trust created under the trust instrument will be construed to extend beyond the period permitted by applicable law. This article discusses the issues that must be addressed when decanting from a trust that contains the first type

of perpetuities savings clause. If a trust contains the second type of savings clause, the clause would not seem to raise an issue regarding how long the trust can be extended through a decanting, so long as the extension does not violate applicable law.

Trust decanting

Trust decanting generally refers to the distribution of trust assets from one trust to another. A trustee's power to decant may be authorized under the terms of the trust instrument, common law, or a state decanting statute.³ Decanting may be used to address various trust matters, including updating outdated provisions, amending administrative terms, or responding to the changed circumstances of the trust or its beneficiaries.⁴

The power to decant generally is premised on a trustee's discretionary authority to distribute property to or for the benefit of the trust's beneficiaries. The trustee's

WILLIAM R. CULP, JR. is a partner in Culp Elliott & Carpenter, P.L.L.C. in Charlotte, North Carolina. BRIANI BENNETT MELLEN is an associate in the tax group of Nexsen Pruet in Columbia, South Carolina.

power to distribute is treated as a special power of appointment that may be exercised to distribute property to one or more beneficiaries outright or via some lesser estate, such as further in trust.⁵

A trustee may have a broad power to decant, such as where the trust grants the trustee absolute discretion to distribute trust property for the benefit of one or more beneficiaries. Such a power provides the trustee the widest range of discretion to make distributions to address the particular needs and circumstances of the trust's beneficiaries.

Trustees also may be authorized to decant pursuant to a more limited standard of discretion, such as a power to distribute for health, education, maintenance, or support. This power to decant, however, may limit the permissible terms of the trust receiving the decanted property, such as by requiring the same limitations on the trustee's power to distribute and the same identity of trust beneficiaries as contained in the original trust.⁶

While the power to decant may give the trustee broad authority to vary the terms of an existing trust

by sending property to another trust with differing provisions, including provisions that may seem advantageous from a wealth transfer tax perspective, the trustee should only take action that is consistent with the settlor's original intent and purposes for the trust. The trustee also is bound by its fiduciary duties to exercise the decanting power to benefit and protect the interests of the trust and its one or more trust beneficiaries, consistent with the settlor's intent.⁷ The trustee must inquire into the interests of the beneficiaries and the effects the decanting would have on those interests. This includes the careful consideration the trustee must give to decanting from a tax perspective.

For example, a trustee may find decanting desirable to protect the corpus of a trust from transfer tax consequences that could arise from termination of a trust in accordance with its terms, such as inclusion in the beneficiaries' estates or loss of protected generation-skipping transfer tax status. Just as with other fiduciary decisions a trustee faces, however, a decision to decant for tax

purposes should not be made in a tax-centric vacuum. A trustee that does not determine the overall interests of the trust beneficiaries first and foremost opens itself to liability.⁸ For a decanting to be advisable, the trustee should understand current and expected circumstances, and then decide whether anticipated tax protections afforded by decanting outweigh the benefit of distribution according to the trust's terms.

Extending the term of an irrevocable trust

Circumstances may create a strong case for decanting to extend the term of a trust, whether to provide additional protection from wealth transfer taxes, safeguard trust assets from the liabilities of its beneficiaries, protect a beneficiary from himself or herself, or promote consolidated management of the trust's property.⁹ Any extension of a trust, however, must satisfy not only the settlor's original intent for the trust, but also any applicable perpetuities laws.

Several states have not only enacted trust decanting statutes but also repealed, or substantially relaxed,

¹ In this article, the authors refer to extending the term of the trust but in some contexts it may be technically more accurate to refer to extending the time for the vesting of trust property.

² Culp and Bennett, "Use of Trust Decanting to Extend the Term of Irrevocable Trusts," 37 ETPL 3 (June 2010).

³ State decanting statutes have been enacted in nearly half of the states, including Alaska, Delaware, Florida, North Carolina, New York, and South Dakota. See Alaska Stat. § 13.36.157; 12 Del. Code § 3528; Fla. Stat. § 736.04117; N.C.G.S. § 36C-8-816.1; S.D. Codified Laws §§ 55-2-15 through 55-2-21.

⁴ For a general discussion of opportunities available through decanting, see Zeydel and Blattmachr, "Tax Effects of Decanting—Obtaining and Preserving the Benefits," 111 J. Tax'n 288 (November 2009); Culp and Mellen, "Trust Decanting: An Overview and Introduction to Creative Planning Opportunities," 45 Real Prop. Trust and Est. Law J. 1 (Spring 2010); and Halperin and O'Donnell, "Modifying Irrevocable Trusts: State Law and Tax Considerations in Trust Decanting," 42 Heckerling Inst. on Est. Plan. (2008).

⁵ See, e.g., *Matter of Est. of Mayer*, 176 Misc.2d 562, 672 N.Y.S.2d 998 (N.Y. Surr. Ct., 1998) (analyzing legal premise underlying state decanting statute); *In re Trust for the Benefit of Wold*, 310 N.J. Super. 382, 708 A. 2d 787

(1998) (acknowledging general principle that holder of power of appointment may exercise that power by appointing property to the fullest extent authorized or such lesser estate or interest in the absence of contrary indication by creator of power).

⁶ See, e.g., N.Y. E.P.T.L. § 10-6.6(c) (McKinney 2012) (providing that appointed trust must include same language authorizing distributions of income or invasion of principal as invaded trust where decanting is exercised pursuant to limited power to invade principal); N.C.G.S. § 36C-8-816.1(c)(7) (2011) (providing that if power to distribute is subject to ascertainable standard, then second trust must be subject to same ascertainable standard exercisable in favor of same current beneficiaries as original trust).

⁷ See *In re Hazan v. Hazan*, N.Y.L.J. 4/11/00, p. 30, col. 1 (Surr. Ct., Nassau County, 4/11/00) (applying implicit requirements of reasonableness and good faith imposed on trustees' authority to apply property for the benefit of trust's beneficiary to trustee's exercise of power to decant pursuant to such authority). State decanting statutes may expressly state that a trustee's exercise of a power to decant is subject to fiduciary standards. See, e.g., Del. Code Ann. tit. 12, § 3528(e) (2012) (providing that when exercising authority to decant, trustee is held to the standard of care

and the standard of liability applicable to the trustee when making outright distributions to or for the benefit of permissible distributees); N.Y. E.P.T.L. § 10-6.6(h), (o) (McKinney 2012) (providing that trustee exercising the power to decant has a fiduciary duty to exercise it in the best interests of one or more proper objects of the power and as a prudent person would under prevailing circumstances and must consider the tax implications of a decanting); S.D. Codified Laws § 55-2-15 (2012) (providing that prior to decanting, trustee determines whether decanting 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).

⁸ See, e.g., *First Ala. Bank of Huntsville, N.A. v. Spragins*, 515 So.2d 962 (Ala., 1987) (providing that trustee may be found negligent in failing to diversify trust assets where it fails to determine the needs of the beneficiaries, "a basic step which should have preceded formulation of a prudent plan for management of the trust property").

⁹ For a discussion of the practical and tax implications of extending the term of an irrevocable trust through decanting, see Culp and Bennett, "Use of Trust Decanting to Extend the Term of Irrevocable Trusts," 37 ETPL 3 (June 2010).

the rule against perpetuities as it applies to trusts.¹⁰ A trust decanting statute coupled with a repeal of the rule against perpetuities may provide an opportunity to extend the term of a trust beyond its original term. In these situations, the question will arise as to whether the trust may be extended consistent with the settlor's intent for the trust.

The power to decant may give the trustee broad authority to vary the terms of an existing trust by sending property to another trust with differing provisions.

The question is compounded where the terms of a trust contain the type of rule against perpetuities savings clause that generally provides that the trust may in no event continue beyond lives in being plus 21 years as of the applicable date of the trust's creation. This type of savings clause could be used in the context of either a common law or USRAP rule. In this situation, the trustee must determine whether an otherwise desirable trust decanting that extends the term of a trust is prohibited by the settlor's intent that the trust terminate at some given time.

Common law rule against perpetuities

The rule against perpetuities is an antiquated doctrine that limits the period of time that property may be held in trust. John Chipman Gray provided the most popular statement of the rule, stating that "[n]o interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."¹¹

If a trust instrument violates the general requirement that interests in trust property must vest or fail within lives in being plus 21 years, then the transfer is invalid and the trust property must be returned to the grantor or distributed in accordance with the applicable laws governing descent and distribution. Compliance with the common law rule against perpetuities was essential to protect the validity of a trust at its creation.¹²

For generations, the rule has plagued law students with its often complicated or obscure doctrines, such as those involving the fertile octogenarian, unborn widow, or unforeseen administrative contingencies.¹³ The difficulties of protecting against application of the rule against perpetuities are so prevalent that at least one court has acknowledged that violation of the rule against perpetuities may not, under the given circumstances, necessarily result in attorney malpractice.¹⁴ To help protect against potential violations of the rule against perpetuities that may be lurking in any given trust document, common practice evolved to include a perpetuities savings provision that would provide a legally reliable limit to the trust's duration.

Trusts containing a perpetuities savings provision

As a backdrop form of protection against violation of the rule against perpetuities, many trusts contain a provision mandating that in any and all events, the trust will terminate 21 years after the death of any life in being identified in the trust document. This type of language is a "savings provision" because it is intended to override other language in the trust that would, standing alone, violate the restrictions limiting the permissible term of the trust under applicable law. The perpetuities savings provision thus would protect against a potential violation of the rule against perpetuities that would render the trust invalid at the time of its creation.¹⁵

For example, assume that an inter vivos trust provides that it benefits the settlor's spouse for life, then continues in trust for the settlor's children and ultimately pays out to grandchildren at their death. This trust would violate the rule against perpetuities because the settlor potentially could have another child born after the date of the trust that survives the other children by more than 21 years. A rule against perpetuities savings clause could protect such a trust from the potential violation by requiring that

¹⁰ Arizona, Delaware, New Hampshire, North Carolina, and South Dakota have decanting statutes and have repealed the common law rule against perpetuities and permit perpetual trusts. Ariz. Rev. Stat. §§ 14-10819, 14-2901; Del. Code Ann. Tit. 12, § 3528, Tit. 25, § 503; N.H. Rev. Stat. Ann. §§ 564-B:4-418, 564:24; N.C.G.S. §§ 36C-8-816.1, 41-23; S.D. Codified Law §§ 55-2-15, 43-5-1, 43-5-4, and 43-5-8. Alaska, Florida, Nevada, and Tennessee also have decanting statutes and allow trusts to continue for 360 to up to 1,000 years. Alaska Stat. §§ 13.36.157, 34.27.051 and 34.27.100; Fla. Stat. Ann. §§ 736.04117(1)(a), 689.225; Nev. Rev. St. §§ 163.556, 111.1031; Tenn. Code Ann. §§ 35-15-816(27), 66-1-202(f).

¹¹ Gray, *The Rule Against Perpetuities* § 201 (4th ed. 1942).

¹² Unif. Statutory Rule Against Perpetuities pref. n. (1990). The Uniform Statutory Rule Against Perpetuities adopts a "wait-and-see" approach that protects termination of interests that would have failed the common law rule. *Id.*

¹³ For a general discussion of potential violations of the rule against perpetuities, see

"Perpetuity Reform," 81 Mich. L. Rev. 1718 (August 1983).

¹⁴ Lucas v. Hamm, 365 P.2d 685 (Calif., 1961).

¹⁵ For a general discussion of perpetuities savings provisions, see Unif. Stat. Rule Against Perpetuities ("USRAP") § 1 cmt. B.

¹⁶ See Restatement (Second) of Prop.: Donative Transfers, § 11.1 cmt. d (1986); Restatement (Third) of Prop.: Wills & Other Donative Transfers, §§ 17.1 cmt. g, 19.14 cmt. f (2011). See also Fla. Stat. Ann. § 736.04117(3) (West Supp. 2008); N.Y. E.P.T.L. § 10-6.6(d) (McKinney 2012); N.C.G.S. § 36C-8-816.1(e)(1) (2011); S.D. Codified Laws § 55-2-19 (Supp. 2008).

¹⁷ USRAP § 1 cmt. D.

¹⁸ USRAP § 1 cmt. E.

¹⁹ USRAP § 1 cmt. F.

²⁰ USRAP § 1 cmt. F.

²¹ Del. Code Ann. tit. 12, § 3528(a) (2012); N.Y. E.P.T.L. § 10-6.6(b), (c) (McKinney 2012); N.C. Gen. Stat. § 36C-8-816.1(b) (2011); S.D. Codified Laws § 55-2-15 (2012).

the trust terminate no later than 21 years after the death of the survivor of the measuring lives in being when the trust was created.

The perpetuities savings provision, however, is a clear statement by the settlor limiting the potential duration of the trust. When a trustee considers a decanting of property from a trust with a perpetuities savings provision to a perpetual trust, the trustee must determine whether the extension of the trust is consistent with the settlor's original purpose. The question then becomes whether the settlor intended for the trust to terminate at a certain point regardless of any state law limitations on the trust's duration, or whether the settlor intended to create a trust that benefited the intended beneficiaries for the maximum time allowed by law.

If evidence can be established to show that a settlor intended a trust to continue for the maximum time allowed by law, the inclusion of a perpetuities savings provision should be viewed as just that: a savings provision that allows the trust to express the settlor's intent to provide for the trust's beneficiaries for an extended period without violating any then-applicable limita-

tions on the length of time property may be held in trust. It must be shown that the settlor's primary intent for the perpetuities savings provision is to protect the trust's validity upon creation, and not to set a strict term for the trust independent of any then-applicable rule against perpetuities.

The trustee must determine whether the extension of the trust is consistent with the settlor's original purpose.

Decanting as the exercise of special power of appointment

A trust decanting power is treated as a special power of appointment.¹⁶ Thus, to satisfy the common law or USRAP rule against perpetuities, it must be certain that a special power of appointment, including a trustee's fiduciary power to distribute trust property, may not be exercised to extend vesting beyond lives in being plus 21 years.¹⁷ Under USRAP, a fiduciary distributive power that is not

certain to be exercised (or fail to be exercised) within lives in being plus 21 years is valid for 90 years, but invalid thereafter and subject to court reformation.¹⁸

The rule against perpetuities applies not only to the validity of a power of appointment at creation, but also at its exercise.¹⁹ The validity of a power of appointment generally is determined at the time of its creation, but the validity of its exercise is a separate matter determined at the time of its exercise.²⁰ In the case of a special power of appointment (including a fiduciary distributive power), the exercise of the power may not violate the permissible period running from the time the power was created.

A trustee's power to decant is premised on the trustee's fiduciary power to distribute trust property.²¹ If the rule against perpetuities applies to a trust, the trustee would not be permitted to decant property to another trust that violates the permissible perpetuities period that applies to the first trust creating the trustee's fiduciary power to distribute.

If a state subsequently repeals the rule against perpetuities that applied to a trust at its creation, a trustee

6-in-1™ Estate and Trust Administration Patent Pending



LACKNER GROUP

Produce from a single entry of data:

- 706 (1990 - 2013)
- 1041 (2002 - 2013)
- State Estate/Inheritance Tax (all applicable states)
- State Fiduciary Income Tax (2002 - 2013)
(CT, DE, IL, IN, MA, NC, NJ, NY, OH, PA, VA, WI)
- State Inventory
- State Accounting

Purchase just those modules that you need...

Also includes:

- 709 (2003 - 2013)
- DecoupleCruncher (every calculation for all 21 states that have ever been decoupled in 2005 - 2014)
- Probate forms for multiple states
- Unrivaled tax, accounting, and technical support

Celebrating 29 years

800-709-1041

sales@lacknergroupp.com
www.lacknergroupp.com

would become empowered to decant property to a perpetual trust that would have violated the prior perpetuities limitations. At the time of the decanting, the trustee's distribution power would no longer be subject to the former perpetuities limitations, and the trustee would be able to decant property to a perpetual trust (assuming that it is otherwise consistent with the settlor's original intent).

If the law is subsequently amended to repeal any rule against perpetuities, the savings clause becomes an outdated provision that unnecessarily restricts the settlor's given intent for the trust.

For a trustee seeking to extend the vesting of a trust through trust decanting in a state that has repealed the rule against perpetuities as applied to trusts, the question becomes not whether the trustee has the power to decant to a perpetual trust, but whether the trustee is authorized to do so. This necessarily requires a determination of the settlor's intent for the trust.

Relation-back doctrine

To further complicate matters, the relation-back doctrine holds that interests created by the exercise of a nongeneral power are considered created by the donor of that power.²² The comments to USRAP indicate that the relation-back doctrine could be invoked to limit the maximum vesting period applicable to the exercise of a decanting power to the length of time stated in a perpetuity saving clause. Specifically, comment G of section 1 of USRAP states the following:

[T]he maximum vesting period applicable to interests created by the exercise of a nongeneral power would apparently be covered by the perpetuity saving clause in the document that created the power, notwithstanding any different period the donee purports to adopt.²³

If a trustee desires to decant property from a trust with a perpetuities savings provision, it may be desirable to get a judicial determination that the settlor only intended for the perpetuities savings provision to apply only to the extent perpetuities laws in fact limit the term of the trust.

Settlor's intent for the trust

A helpful consideration in establishing the settlor's intent is the primary purpose of the perpetuities savings provision: to protect against a violation of the rule against perpetuities. A perpetuities savings provision has one purpose, which is to preserve the validity of a trust consistent with the settlor's intent for the trust and its beneficiaries. A perpetuities savings clause is a standard legal provision included by the drafting attorney in the trust document to protect against a potential rule against perpetuities violation, and not a provision suggested by the settlor to clarify personal preference regarding the trust's duration.

In point of fact, the perpetuities savings clause is a provision that furthers the settlor's intent that the trust (1) be valid, and (2) be allowed to continue according to its terms without running afoul of applicable perpetuities laws. If the law applicable to a trust is subsequently amended to repeal any rule against perpetuities laws, the rule against perpetuities savings clause becomes an outdated provision that unnecessarily restricts the settlor's given intent for the trust.

"Wait-and-see" approach

A counterargument to the necessity of the perpetuities savings clause is that, in states that have adopted the Uniform Statutory Rule Against Perpetuities, the trust would not necessarily be invalid because it could continue in force under the "wait-and-see" approach. The wait-and-see approach would allow the trust to continue according to its terms for a permissible period, generally 90 years, and only those interests still contingent at the end of the 90-year period would fail. At this time, the Uniform Statutory Rule Against Perpetuities allows a judicial reformation of the trust to dispose of the property within the permissible period in a manner that approximates the settlor's intended disposition.²⁴

The wait-and-see approach and potential judicial reformation may save an otherwise invalid trust under the common law rule against perpetuities. This method, however, does not ensure that the settlor's intended disposition will be carried out upon creation of the trust, and it may be administratively costly if a judicial reformation becomes necessary. For drafting purposes, it is thus better to state the settlor's intended plan for disposition of the trust property, and include a perpetuities savings provision that directs termination and disposition of the trust property in accordance with the settlor's wishes.

²² USRAP § 1 cmt. G; Restatement (Second) of Property, Donative Transfers § 11.1 cmt b (1986).

²³ USRAP § 1 cmt. G.

²⁴ USRAP § 3.

²⁵ See N.C.G.S. §§ 41-15, 41-23 (repealing USRAP and the common-law rule against perpetuities as applied to trusts administered in the state, whether created before or after the repeal).

²⁶ See, e.g., *Cutter v. American Trust Co.*, 213 N.C. 686, 197 S.E. 542 (1938) (discussing court's equitable power to modify terms of a trust to preserve it but not defeat or destroy it).

²⁷ See UTC § 412(a), 7C U.L.A. 507 (2006).

The wait-and-see approach further complicates matters because it cures a formerly invalid perpetual trust if there is a later change in the law that was not anticipated at the time the trust was drafted. If a perpetual trust with no perpetuities savings clause had been drafted under USRAP, the trust would have violated the common law rule against perpetuities and been allowed to continue for the permissible period under USRAP's wait-and-see approach. If the law of the state is later changed to repeal USRAP and the common law rule against perpetuities as it applies to trusts, then the formerly perpetual trust may be allowed to continue according to its terms indefinitely, and not merely for 90 years.²⁵

Evidence showing the settlor's intent for the trust

Other evidence that may be relevant to a settlor's intent as to a rule against perpetuities savings provision or other limitations on a trust's term may include the following:

- The rule against perpetuities savings provision was intended to protect the trust's validity under applicable local law, but the settlor otherwise intended for the trust to continue for the maximum period allowed by law.
- A trust that continues for the lives of the settlor's children and then terminates and pays out to grandchildren was intended to benefit from generation-skipping transfer tax protection while satisfying the time limitations imposed by the rule against perpetuities.
- At the time of the creation of the trust, perpetual trusts were not authorized, but the settlor desired use of the trust vehicle to protect the trust property

from the liabilities of its beneficiaries for the maximum period allowed by law.

- The settlor intended for the trust to protect the trust property against adverse transfer tax implications for the trust's beneficiaries for as long as the trust is economically feasible for the maximum period allowed by law.
- Although the trust by its terms terminates in favor of certain remainder beneficiaries, current beneficiaries were given the power to direct the property in further trust through the exercise of a power of appointment, subject to the perpetuities savings provision.

Additional evidence may exist to support a finding or determination that the settlor intended for the trust to continue to preserve the trust property for the benefit of its beneficiaries, despite a rule against perpetuities savings provision requiring termination of the trust at a particular date.

Judicial determination of settlor's intent

Although a trustee may independently determine that extension of the term of a trust is in accord with

the settlor's original intent, a judicial ruling that confirms the trustee's conclusion could provide peace of mind or protection from contrary claims of a beneficiary (or the IRS, discussed in more detail below).

Authority exists to support an IRS challenge to a decanting that occurs prior to a judicial determination as to its validity, but not thereafter.


The trustee may seek a judicial determination that a perpetuities savings provision was intended to protect the trust against a rule against perpetuities violation, and not to otherwise limit the trust's potential duration. For the argument to be successful, the court must find that the settlor would not have included the rule against perpetuities savings provision but for application of the rule to the trust at the time it was created.

As a procedural matter, the trustee may petition the court for a trust modification pursuant to the court's common law power to modify a trust.²⁶ It may also be pos-

Alorse Genealogical Services, LLC

International Probate Research

We
**LOCATE
Missing
Heirs**



SERVICES INCLUDE:

- Missing & Unknown Heirs
- Genealogical Charts
- Genealogical Research
- Affidavits of Due Diligence
- Expert Court Testimony
- Independent Corroboration
- Comprehensive Reports

FOR OVER 75 YEARS
Local • National • International

(386) 760-5000

WWW.FINDANHEIR.COM

sible to request a court-ordered modification under the provisions of the Uniform Trust Code (UTC).

For example, the UTC allows for a court-ordered modification to address unanticipated circumstances that affect the trust. The UTC authorizes a court-ordered modification of the administrative or dispositive terms of a trust if (1) circumstances have occurred that were not anticipated by the settlor, (2) modification or termination would further the purposes of a trust, and (3) such modification is in accordance with the settlor's probable intention.²⁷

A trustee may also seek a judicial determination that a decanting to extend the term of the trust

is consistent with the settlor's original intent.²⁸ The court's approval would depend on whether the proposed decanting was within the trustee's discretionary authority, presumably under the abuse-of-discretion standard.²⁹ The trustee, however, should still request a modification to the original trust to remove or modify the perpetuities savings provision as a potential barrier to the proposed decanting.

Generic savings clause

As part of a proceeding to modify a trust to remove a perpetuities savings provision, a trustee may also seek to replace the provision with a more generic savings provision to address the possibility that sub-

sequently applicable law requires a limitation on the trust's term. For example, the trustee may seek inclusion of a generic savings provision that attempts to preserve the trust or direct disposition of the trust property if the trust's applicable law later is determined to limit the length of time property can be held in trust.

A sample generic savings clause could be drafted as follows:

Required Termination of Trust. Notwithstanding anything to the contrary herein, no trust created hereunder shall be construed to extend beyond the period permitted by applicable law. In the event any applicable law would require the termination of any trust within a certain period of time, such trust shall immediately terminate as of the later of (i) the last day on which the trust could exist under such applicable law; or (ii) the day before the date that such law becomes applicable. Upon termination of a trust under this paragraph, the remaining trust assets shall be distributed to the current beneficiary or beneficiaries of such trust in equal shares.

Practitioners should be advised to determine whether a particular provision attempting to condition the term of the trust on the later of two periods violates applicable law or otherwise has the unintended consequence of limiting the

Services and Information

ESTATE PLANNING

TO ORDER

Subscription Department1-800-431-9025
 FAX.....1-800-452-9009
 E-mailorders@thomsonreuters.com
 Internet.....http://ria.thomsonreuters.com/journals
 Or mail to:
 Thomson Reuters
 117 East Stevens Ave.
 Valhalla, NY 10595

CUSTOMER SERVICE

Billing Inquiries, Back Issues,
 and Change of Address1-800-431-9025
 Internethttp://support.rg.thomsonreuters.com
 Or send correspondence to the above address.

TO PLACE AN AD

Display or
 Classified Advertising800-322-3192
 FAX.....651-687-7374
 E-mailterry.storholm@thomsonreuters.com

EDITORIAL INQUIRIES

Address to: Estate Planning
 Thomson Reuters/WG&L
 1 New York Plaza, 34th Floor
 New York, NY 10004.....646-424-5283
 E-mail.....bob.scharin@thomsonreuters.com

PERMISSION TO PHOTOCOPY

Contact: Copyright Clearance Center.....978-750-8400
 FAX.....978-750-4744
 Or mail to:
 222 Rosewood Drive
 Danvers, MA 01923

²⁸ Although state decanting statutes generally do not require beneficiary consent or court approval for a decanting, trustees may be authorized to seek court approval for a decanting. See, e.g., NY EPTL § 10-6.6(j)(1) (McKinney 2012) (trustee may seek court approval with notice to interested persons); N.C. Gen. Stat. § 36C-8-816.1(h) (2011) (trustee or beneficiary may commence proceeding to approve or disapprove proposed decanting).

²⁹ See Restatement (Third) of Trusts § 87 (2007).

³⁰ For example, USRAP § 1(e) provides that if a trust attempts to fix the term of a trust to the later of (a) 21 years after some specified lives in being, or (b) a period that exceeds or might exceed 21 years after some specified lives in being, the language would be inoperative to the extent it produces a period exceeding 21 years after the specified lives in being.

³¹ 1973-1 CB 405.

³² 387 U.S. 456, 19 AFTR2d 1891 (1967).

³³ 304 U.S. 64 (1938).

trust's term to the shorter of the two periods.³⁰

Status of trust extension for tax purposes

A judicial finding of the settlor's intent could protect a trustee from a claim by the IRS that a decanting is invalid if it extends the term of a trust. To oppose a decanting, the IRS could argue that a decanting that extends the term of a trust is invalid because it violates the settlor's original intent to limit the term of the trust. Authority exists to support an IRS challenge to a decanting that occurs prior to a judicial determination as to its validity, but not thereafter.

In Rev. Rul. 73-142,³¹ the IRS concluded that a non-adversary action effectively limiting the settlor's unrestricted right to remove and replace the trustee with anyone, including himself, was binding on the IRS. It appeared that the decree in that action was contrary to the decisions of the state's highest court. In the ruling, the IRS concluded that the trust property was not includable in the settlor's gross estate because his power to appoint himself as trustee was effectively extinguished by a lower court order, which subsequently was not appealed even though it was inconsistent with decisions of the state's highest court.

In *Estate of Bosch*,³² the U.S. Supreme Court held that the IRS was not bound by a ruling of a state probate court regarding the allo-

cation of estate tax between the marital and non-marital shares of the estate. Instead, the Court held that under the principles set forth in *Erie Railroad Co. v. Tompkins*,³³ only state law as announced by the highest court of that state was final and binding on questions of state law.

Unlike the decision in *Bosch*, in Rev. Rul. 73-142, the decree was handed down before the time of the event giving rise to the tax—the settlor's death. Because the court had jurisdiction over both the subject matter and the parties involved at the time of the decree at issue in Rev. Rul. 73-142, and the time for appeal had elapsed, the judgment was final and conclusive as to the parties, regardless of how erroneous the application of state law seemingly may have been. The ruling concluded that after the time for appeal had expired, the settlor no longer had the power to appoint himself as successor trustee. The rights and powers which would have brought the value of the trust corpus within the estate under Section 2036 or 2038 were effectively cut off by court action before the settlor's death.

While the decree would not have been binding on the IRS as to questions relating to the settlor's power to appoint himself as trustee prior to the date of the decree, it was controlling after the date for appeal had expired because the decree, in and of itself, effectively extinguished the power. In other words,

while there may have been a question whether the grantor had such power prior to the decree, there was no question that he did not have the power thereafter.

Applying this analysis to the removal of a perpetuities savings provision, the IRS may argue that a decanting to a perpetual trust that removes the provision is invalid as contrary to the settlor's intent for the trust. If, however, prior to the decanting, the trustee obtains a judicial modification of the trust that removes the perpetuities savings provision and a court order determining that the extension of the trust was consistent with the settlor's intent, then the trustee may be protected from a possible challenge by the IRS with respect to the settlor's intent.

Conclusion

Perpetuities savings provisions present a potential impediment to extending the term of a trust beyond the stated lives in being plus 21 years. A trustee should seek a court order modifying the original trust to remove the perpetuities savings provision and finding that removal is consistent with the settlor's intent for the trust. If the trustee intends to decant the original trust property to a perpetual trust, the trustee also may request a court order approving the decanting as within the trustee's authority and the settlor's intended purpose for the trust. ■