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Susan T. Bart
Reporter, Uniform Trust Decanting Act
Sidley Austin LLP
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Dear Susan,

The following are comments that came to mind as I listened to the ABA webinar on the Uniform Trust Decanting Act (Act) and read the June 6, 2014, draft of the Act. I am primarily interested in the manner in which the Act will address charitable trusts but a few of the comments below are more general. Since I have not seen the draft section that will address charitable trusts, my comments are not as specific as they might otherwise be and may have been addressed.

Comments Relating Specifically to Charitable Trusts

1) **Charitable Trusts**. I do not think the Act should permit the trustee of a charitable trust to decant to (i) change the charitable purpose of a trust or part of a trust, (ii) change the standard applicable to the trustee's discretion to distribute principal or income for charitable purposes, or (iii) change the identity of any specified charitable beneficiary. I suggest that the Act leave intact existing law as it applies to these changes. Allowing such changes via decanting would constitute a major and, I think, unexpected change to existing law (i.e., it would be contrary to provisions in the Uniform Prudent Management of Institutional Funds Act (UPMIFA), the Uniform Trust Code, the recently adopted Model Protection of Charitable Assets Act (MPOCAA), the Restatement (Third) of Trusts, the (in process) Restatement of the Law of Charitable Nonprofit Organizations, and the common law). In addition, if the Act applies retroactively to existing charitable trusts, allowing such changes via decanting could be subject to challenge on constitutional grounds.

2) **Default Rules**. I believe default rules should be consistent with expectations, and that most people who create a charitable trust for a specific purpose or to benefit a specific beneficiary expect that the trustee will be legally obligated to administer the trust in accordance with the donor's specified terms and purposes. Accordingly, the default rules should, in my opinion, be existing law, and the burden should be on the rare charitable donor who wishes to grant a trustee broad discretion to alter the purposes or beneficiaries of his or her trust to expressly grant such discretion in the trust instrument. I am concerned that granting charitable trustees broad decanting rights could ultimately disadvantage charitable trustees, charities, and the public by discouraging charitable giving. In addition, although the Act could be written to permit charitable donors to

expressly "opt out" of its application, I do not think that would be appropriate because it would be inconsistent with existing law and expectations, it would assume very sophisticated donors (i.e., operate as a trap for the unwary), and it would not address charitable trusts in existence on the effective date of the Act.

3) **"Administrative" Changes**. Some of the "administrative" changes that the Act permits via decanting, such as changing the situs of a trust, changing the duration of a trust, changing the law governing the administration of a trust, changing the powers of the trustee (e.g., allowing the sale of artwork or real property), or changing the trustee or successor trustee provisions, could be contrary to the settlor's charitable purpose or specific intent and should require an administrative deviation or *cy pres* proceeding, depending on the circumstances. For example, assume a settlor created a charitable trust to fund breast cancer research and expressly provided that the trust is to have a maximum duration of ten years. Part of the settlor's purpose or intent was to ensure that all trust assets are spent on research within ten years so as to have the most dramatic impact (the settlor wanted the trust to be able to "punch above its weight" through large distributions over a relatively short period of time). Allowing the trustee to decant such a trust to extend its term (and the payment of trustee fees) would be contrary to the settlor's specific purpose and intent. I do not think the Act should permit decanting in these circumstances and, instead, existing law should apply.

4) **Restricted Charitable Gifts**. In some jurisdictions, a gift to a nonprofit corporation or a government entity to be used for a specific charitable purpose but not expressly "in trust" is nonetheless referred to as a charitable trust (e.g., a gift of five acres to a municipality to be used "forever as a public park"). The Act does not appear to be designed to address such gifts and I recommend they be expressly excluded from the Act to avoid confusion and unintended consequences.

5) **Attorney General**. The Act currently provides in § 202(d) that "The [Attorney General] has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state." I think that means that the Attorney General (AG) would be given 60 days notice of the proposed decanting of a charitable trust (see § 201(c)), but the AG could not "block" the decanting (i.e., require the trustee to seek court approval). In the webinar, it was noted that beneficiaries are not given the right to block a decanting because it could lead to adverse gift tax consequences for the beneficiaries. That is not a concern with regard to the AG, and I recommend that the Act allow the AG to block the decanting of a charitable trust and require the trustee to seek court approval when the AG determines that the decanting is not permissible. I do not think the burden should be on the AG to file suit to object to improper decantings of charitable trusts because AG offices have limited resources and such a rule would effectively allow trustees to change charitable purposes and beneficiaries absent a particularly well-funded and highly motivated AG's office. I think the burden should be on trustees to work with the AG, as representative of the public, to either structure charitable trust decantings so they comport with what is permissible under the Act or seek court approval. The Texas decanting statute has an example of such a "blocking" provision:

> If the authorized trustee receives a written objection to the distribution from the attorney general not later than the 30th day after the date the notice required by Section 112.074 was received by the attorney general, the trustee may not make a distribution under Section 112.072 or 112.073 without petitioning a court to approve or modify the exercise of the trustee's power to make a distribution under this subchapter. Tx. Property § 112.077(c).

6) **Limiting the Act's Coverage**. You might consider drafting the Act to apply only to charitable lead, charitable remainder, and other split-interest trusts, with the qualifications discussed above, and to exclude "pure" charitable trusts (trusts with only charitable beneficiaries) and restricted charitable gifts (in some jurisdictions such gifts are referred to as charitable trusts). I do not think donors intend or desire that trustees of pure charitable trusts or donees of restricted charitable gifts be granted broad discretion over the administration of such trusts or gifts absent express provisions granting such discretion in the instruments of conveyance.

7) **Interested Parties**. You might consider soliciting comments on the Act from the drafters of UPMIFA, MPOCAA, the Restatement (Third) of Trusts, and the Restatement of the Law of Charitable Nonprofit Organizations, as well as state charity regulators. I am sure they could provide you with many helpful examples and insights as you consider these issues.

General Comments

1) **Settlor's Purpose/Intent**. The draft does not appear to require that decanting be consistent with the settlor's purpose or intent in establishing the trust. I worry that § 501(b)'s requirement that a fiduciary "act in accordance with the fiduciary duties of the fiduciary" is too vague on this point, particularly when read in light of the rest of the Act, which grants a fiduciary broad decanting powers. Also, although the comments to § 501 provide that the exercise of the decanting power "should be in accordance with the purpose of the first trust" and "[t]he purpose of decanting is not to disregard the settlor's intent," "should" is not mandatory and comments are not binding.

The New Hampshire decanting provisions (which are part of New Hampshire's Uniform Trust Code and are effective as of July 1, 2014) require that decanting be consistent with the settlor's purpose or intent by providing as follows:

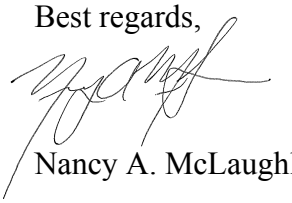
> A trustee may not decant to the extent that the terms of the second trust are inconsistent with a material purpose of the first trust. N.H. Rev. Stat. § 564-B:4-418(f).
>
> In exercising the power to decant, a trustee has a duty to exercise the power in a manner that is consistent with the settlor's intent as expressed in the terms of the trust, and the trustee shall act in accordance with the trustee's duties under this chapter and the terms of the first trust. N.H. Rev. Stat. § 564-B:4-418(o).

I think the Act should include similar provisions because if settlors of irrevocable trusts, whether private or charitable, cannot be assured that their overarching purposes will be carried out, I suspect they will turn to other vehicles to accomplish their long term goals, making trusts a less useful vehicle.

2) **Savings Clauses**. I am not sure how the "savings clauses" would work to save, e.g., marital or charitable deductions if the trustee of a trust administered in a state that has adopted the Act could decant to a second trust governed by the laws of another state with a more liberal decanting statute (situs change), and then decant into a third trust in that more liberal state to make changes that were not permitted under the Act and would render the original transfer nondeductible.

Thank you very much for the opportunity to provide comments. If I can answer any questions or otherwise be of any assistance please do not hesitate to contact me.

Best regards,



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