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IN A NEW YORK STATE OF MIND: THE CORPORATE TRUSTEE'S TOOLKIT FOR EFFECTUATING NON-JUDICIAL TRUST MODIFICATIONS IN THE EMPIRE STATE

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ABSTRACT

When the need to effectuate a non-judicial trust modification of a New York trust arises, the law in its current form provides corporate trustees with a tremendous amount of power and flexibility to amend, revoke, and establish new trusts with more favorable provisions. Depending upon the facts and circumstances of a particular situation (i.e., whether the settlor is alive, whether minor beneficiaries hold an interest in the trust, and whether there is dissension and discord among the beneficiaries, etc.) there are various statutes that will help a corporate trustee implement a sound strategy to modify a trust to attain favorable results for all interested parties.

This article seeks to provide corporate trustees, trust officers, and other Trusts and Estates practitioners with an overview of several statutory mechanisms that can be implemented by a trustee to help mitigate the risk of litigation or judicial intervention. These statutes include EPTL § 7-1.13, which is commonly referred to as the "trust-splitting" statute, EPTL § 7-1.9, which allows for non-judicial trust modifications under circumstances where the settlor is still alive and where consent to reform the trust can be obtained from all interested parties under the instrument, and EPTL § 10-6.6, the so-called trust

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"decanting" statute, which permits the trustee of a trust to exercise a "special power of appointment" to invade the corpus of an existing trust and appoint the assets into new trusts with modified terms and provisions. This article will also provide a brief overview of general protections afforded to New York trustees under common law.

I. INTRODUCTION

There are countless scenarios in which a corporate trustee in New York will be charged with the task of effectuating a non-judicial trust modification agreement, including, but not limited to: (i) addressing changed circumstances such as contention among fiduciaries, beneficiaries, and family members; (ii) changing the governing law and situs provisions of the trust; (iii) achieving federal and state tax efficiency or maintaining existing favorable tax status; (iv) correcting or clarifying ambiguities in the trust without the need for court intervention; and (v) reducing the administrative costs of the trust.[1]

When trustees of high-net-worth trusts seek to modify existing trusts to preserve the wealth the settlors have accumulated during their lifetimes and address unforeseen changes in circumstances as referenced above, their teams of advisers will likely encourage or recommend the option of establishing new trusts in "trust friendly" jurisdictions such as South Dakota and Delaware where they will not be bound by the provisions of the New York Estates, Powers and Trusts Law ("EPTL").[2] Indeed, it has been estimated that billions of dollars in trust accounts are leaving New York each year to take advantage of jurisdictions with more favorable trust statutes and tax laws.[3]

The primary draw of these jurisdictions is twofold. *First*, many trust-friendly jurisdictions authorize the use of "dynasty" trusts, which permit settlors to shield their assets from creditors and tax exposure for generations in perpetuity.[4] *Second*, these jurisdictions also tend to authorize "directed trusts" which allow the responsibility of the trust administration to be allocated among various offices established by the

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[1] Jonathan G. Blattmachr et al., *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141, 147-50 (2012).

[2] Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359-60 (2005).

[3] *Id.* at 359.

[4] *See, e.g.*, *3 Ways to Help Create a Lasting Dynasty Trust*, FIDELITY (Jan. 2023), https://www.fidelity.com/learning-center/wealth-management-insights/flexible-multigenerational-dynasty-trusts; *Legacy Trust Services*, WELLS FARGO, https://www.wellsfargo.com/the-private-bank/solutions/specialized/legacy-trust/ (last visited Feb. 13, 2024); Matthew Johnston, *Dynasty Trusts: Leaving a Legacy of Multigenerational Wealth*, NORTHWESTERN MUTUAL (Dec. 21, 2022), https://www.northwesternmutual.com/life-and-money/dynasty-trusts-leaving-a-legacy-of-multigenerational-wealth/.

trust such as a corporate trustee, a trust protector, a distribution adviser, and an investment adviser, where each office performs its own specific role, and each office has limited exposure to liability for tasks they are directed to perform.[5]

Certainly, a move to these jurisdictions may be enticing—indeed, not only can trustees modify a trust to adapt to a change in unforeseen circumstances but they can also take advantage of more favorable tax and trust laws.

But what happens in situations where it is not practicable or cost-efficient to move the trust out of New York and into a trust-friendly jurisdiction?

While much of the literature surrounding New York trust law centers around the desire of the trusts and estates community to modernize existing law in order to become more uniform with other jurisdictions,[6] the purpose of this article is to emphasize that under the *existing* EPTL, New York offers an arsenal of powerful tools to trustees that will help them adapt to a variety of changed circumstances such as the enactment of new tax laws, the development of unusual family dynamics, hostility among beneficiaries and fiduciaries, and a change in a settlor's estate planning goals and objectives.

Section II of this article provides an overview of EPTL § 7-1.13, which is commonly referred to as the "trust-splitting" statute, a powerful yet underutilized statute which permits a trustee to split a single trust into multiple trusts without the need for judicial intervention in most circumstances, and even unilaterally under certain enumerated circumstances. Section III of this article provides an overview of EPTL § 7-1.9, which allows for non-judicial trust modifications under circumstances where the settlor is still alive and where consent to reform the trust can be obtained from all interested parties under the instrument. This section also discusses EPTL § 10-6.6, the so-called trust "decanting" statute, which permits the trustee of a trust to exercise a "special power of appointment" to invade the corpus of an existing trust and appoint the assets into new trusts with modified terms and

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[5] C. Raymond Radigan & Jennifer F. Hillman, *New York Needs a Directed Trust Statute*, N.Y.L.J., Nov. 20, 2012; *see also Directed Trust Act – Uniform Law Commission*, UNIFORMLAWS.ORG, https://www.uniformlaws.org/committees/community-home?CommunityKey=ca4d8a5a-55d7-4c43-b494-5f8858885dd8 (last visited Feb. 13, 2024).

[6] *See, e.g.*, C. Raymond Radigan & Jennifer F. Hillman, *A Comment on Modernizing New York Trust Law*, 43 ACTEC 311 (2018).

provisions. Section IV of this article provides a brief overview of general protections afforded to New York trustees under the common law. Section V concludes that various provisions of the EPTL will help a corporate trustee implement a sound strategy to modify a trust to attain favorable results for all interested parties.

II. AN OVERVIEW OF EPTL § 7-1.13 ("TRUST-SPLITTING" STATUTE): ONE OF THE MOST POWERFUL (AND OFTEN OVERLOOKED) TRUST ADMINISTRATION TOOLS FOR NEW YORK TRUSTEES

When corporate trustees in New York are tasked with effectuating non-judicial trust modifications where unforeseen changed circumstances present themselves, especially in situations where conflict exists between the trustee and a beneficiary or where trustees are attempting to secure favorable tax benefits, advisors commonly direct their attention to either EPTL § 10-6.6 for the purposes of decanting the trust[7] or EPTL § 7-1.9 for the purposes of reforming or revoking the trust in its entirety.[8] In doing so, however, they frequently overlook EPTL § 7-1.13, which is arguably one of the most powerful statutes available to the corporate trustee. This statute provides three separate mechanisms for a trustee of an express trust to split the trust into two or more separate trusts, unless such an act is expressly prohibited by the terms of the disposing instrument.[9]

First, under section (a)(1), the trustee is authorized to *unilaterally* (i.e., without the need to obtain court approval or the consent of the persons interested in the trust) establish two or more separate trusts in order to segregate the trusts for a variety of tax purposes, including, but not limited to, the following purposes: (i) to separate marital deduction property from non-marital deduction property; (ii) to qualify certain property for a charitable deduction; (iii) to qualify the trust as qualified subchapter S stock; and (iv) to avoid the imposition of generation skipping taxes.[10] If a trust is split for one of these purposes, the

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[7] *See infra* Section III(B).
[8] *See infra* Section III(A).
[9] *See generally* N.Y. EST. POWERS & TRUSTS LAW § 7-1.13.
[10] N.Y. EST. POWERS & TRUSTS LAW § 7-1.13(a)(1)(A)-(G) (McKinney 2002).

separate trust shall be established by an instrument or instruments in writing, signed and acknowledged by the trustee only.[11]

Second, under section (a)(2), "the trustee of an express trust may divide such trust into two or more separate trusts, with the consent of all persons interested in the trust but without prior court approval, for any reason which is not directly contrary to the primary purpose of the trust."[12] If a trust is split under section (a)(2), the separate trust shall be established "by an instrument or instruments in writing" and shall also be "signed and acknowledged by all the persons interested in the trust (or the guardian of the property, committee, conservator, adult guardian, or personal representative of such persons each of whom is hereby empowered to consent thereto without prior court approval)."[13] Thus, even if a person interested in the trust is a minor, his or her consent to split the trust can be obtained by an adult guardian without the need of court approval.[14]

Third, under section (a)(3), "the court . . . upon the petition of the trustee or of any person interested in the trust and upon notice to all such persons, may direct the establishment of two or more separate trusts for any reason not directly contrary to the primary purpose of the trust."[15]

For purposes of obtaining the necessary consent to effectuate the trust split in accordance with EPTL § 7-1.13, "the term 'all persons interested' is defined as those who would have to be joined in a proceeding to settle the trustee's account, taking into consideration virtual representation under SCPA[16] 315."[17] Moreover:

> [W]ith certain limited exceptions, court approval is required where the proposed separate trusts are not each funded with property fairly representative of the appreciation and depreciation at the fair market value of the assets on distribution or if the trustee is to receive

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[11] *Id.* § 7-1.13(e).
[12] *Id.* § 7-1.13(a)(2).
[13] *Id.* § 7-1.13(e).
[14] *Id.*
[15] *Id.* § 7-1.13(a)(3).
[16] Refers to the New York Surrogate's Court Procedure Act.
[17] *In re* Schlesinger, 640 N.Y.S.2d 743, 744 (Sur. Ct. N.Y. Cnty. 1996).

> additional commissions following the split (EPTL 7-1.13 [d], [j]).[18]

Subsection (j) of the trust-splitting statute provides that:

> Unless otherwise provided for in the disposing instrument, the commissions allowed to a trustee . . . shall not be increased by reason of the establishment of separate trusts pursuant to subparagraph one of paragraph (a) of this section unless the court otherwise permits an increase, provided, however, that such trustee shall be entitled to charge the trust for any additional reasonable and necessary expenses incurred in the administration of such separate trusts.[19]

Thus, this statute does not entitle a trustee to split a trust into multiple trusts and collect additional commissions that he would have been entitled to prior to the split without having secured approval from the court.[20]

A. Legislative History: Identifying a Need to Provide a Safe Harbor for Corporate Trustees

A review of the legislative history and initial commentaries concerning the enactment of EPTL § 7-1.13 makes it apparent that the primary purpose of the statute was to provide a safe harbor to trustees (especially corporate trustees and banks) to split trusts in order to achieve federal estate and gift tax savings following a series of complex updates to the Internal Revenue Code (i.e., to address amendments and updates to the marital deduction, charitable deduction, and generation skipping tax provisions).[21] Prior to the enactment of the statute, the Internal Revenue Service did not readily respect the establishment of split trusts (even if authorized by the disposing instrument) unless there was court approval.[22] Thus, the "uncontroversial" bill was

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[18] *Id.*
[19] N.Y. EST. POWERS & TRUSTS LAW § 7-1.13(j).
[20] *Id.*
[21] *See* Legislative Bill Jacket to Act of Aug. 2, 1995 Assemb. Bill 3222-B, 1995 N.Y. Laws ch. 523 [hereinafter *Legislative Bill Jacket*].
[22] *Id.*

enacted to reduce a surge of court proceedings following the amendment to the Internal Revenue Code in 1986.[23]

In enacting this statute, however, the Legislature intended that it would be applied in other circumstances unrelated to federal tax objectives.[24] The memorandum in support of the bill commented that:

> [T]he division of a trust may be desirable for reasons unrelated to taxation; when the interests of the beneficiaries pull in different directions in terms of the place of administration, the desire for different trustees, the desire for different investment objectives, situations involving disputes as to the manner in which the trustee's discretion over income and/or principal is exercised, or to ameliorate hostility or tensions among the beneficiaries or between a beneficiary and a trustee.[25]

There does, however, exist one significant ambiguity in the statute, as it is not entirely clear as to the terms and provisions that would govern the newly established split trusts.[26] Indeed, the Committee on Trusts, Estates and Surrogates' Courts Committee on Estate and Gift Taxation (hereinafter the "Committee") cautioned that this statutory language was ambiguous and did not provide enough guidance to interested parties with respect to the terms and provisions governing the split trusts:

> The committee also has reservations about subdivision (C) of the bill which states that (absent modifications approved by the court) the terms of the disposing instrument are to govern each separate trust "except as implicit in the establishment of separate trusts authorized by this section." The committee feels that **the quoted language does not provide sufficient guidance to the trustee as to when, and to what extent, the terms of the original trust must be strictly applied to each of the separate trusts**.[27]

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[23] *Id.*
[24] *Id.*
[25] *In re* Duell, 1998 NYLJ LEXIS 716, at *6 (Sur. Ct. N.Y. Cnty. 1998) (quoting Mem in Support, 1995 McKinney's Session Laws of NY, at 2224).
[26] *See Legislative Bill Jacket*, *supra* note 21.
[27] *Id.* (emphasis added).

In its report, the Committee posed the following illustrative example:

> [I]f the trust is divided in order to separate GST-exempt property from nonexempt property, it is not entirely clear whether or not it is implicit in the establishment of the separate trusts that mandatory distributions to different beneficiaries can be made from different trusts rather than being made pro rata from each of the resulting trusts.[28]

Notwithstanding the concern expressed by the Committee, however, New York courts are generally in agreement that to the extent implicit in the establishment of separate trusts under this section, "the terms of the disposing instrument would generally govern the separate trusts, unless modified by the court."[29]

B. Circumstances Where Trust-Splitting has been Permitted by the Court

As an initial matter, unless the terms of the trust instrument expressly prohibit the splitting of the trust into separate trusts, upon application, the court "may direct the establishment of two or more separate trusts for any reason not directly contrary to the primary purpose of the trust."[30] But when would the need to split a trust materialize?

As one common example, a settlor may establish a so-called "pot trust" whereby two or more qualified beneficiaries are entitled to receive distributions of income or principal for their health, education, maintenance, and support from the same "pool" of funds at the complete discretion of the trustee.[31] Unfortunately, this type of scheme tends to result in a myriad of litigation as beneficiaries of these trusts oftentimes possess hostility towards the trustee and other beneficiaries,[32] may have different investment goals and tax objectives,[33] and

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[28] *Id.*

[29] Brody v. Brody, 2008 NYLJ LEXIS 3637, at *9 (Sur. Ct. Nassau Cnty. 2008) (citing Legislative Memo, 1995 New York Session Laws at 2221, 2222).

[30] N.Y. EST. POWERS & TRUSTS LAW § 7-1.13(a)(3) (McKinney 2002).

[31] Rebecca Lake, *How Does a Pot Trust Work?*, SMARTASSET (Aug. 30, 2021), (https://smartasset.com/estate-planning/pot-trust.

[32] *See, e.g.*, Duell v. Duell (*In re* Judicial Settlement), 685 N.Y.S.2d 686, 686 (App. Div. 1999).

[33] *See, e.g.*, *In re* Rutgers, No. 2014-1479, 2014 N.Y. Misc. LEXIS 4869, at *3 (Sup. Ct. N.Y. Cnty. Nov. 13, 2014).

may also feel that they are not being treated as fairly as other beneficiaries.[34]

In *In re Rutgers*,[35] for example, the court held that an application to split the corpus of the subject trust "into three separate trusts, one for each grandchild" beneficiary was "consistent with the grantors' intent to provide regular income distributions to their grandchildren in equal shares."[36] The court granted petitioners' application and explained that even though each grandchild would ultimately have a reduced pool of funds available as a result of the split, "the effect is likely de minimis given that such distributions were at the trustee's discretion."[37] The court further explained to the extent the split deviated from the intent of the grantor, any potential harm to the beneficiaries was "outweighed . . . by petitioners' uncontroverted assertions that the income beneficiaries have different investment goals and financial needs, better served by separate trusts."[38] The court also emphasized that "severing the trusts has no material effect on the distribution plan for the Trust corpus upon termination."[39]

In *Duell v. Duell*,[40] a case that began as a trustee removal proceeding, the Appellate Division (in the context of the removal proceeding) found that there were demonstrated antagonisms between one of the co-trustees and the trust beneficiaries.[41] This resulted in the co-trustee interfering with the proper administration of the estate and tended to demonstrate that future cooperation was unlikely between the parties.[42] The court held that the evidence presented on the trial of the removal action also supported the application to split the trust pursuant to EPTL § 7-1.13(a)(3).[43]

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[34] *See, e.g.*, *In re* James, 65 N.Y.S.2d 756, 764 (Sur. Ct. N.Y. Cnty. 1946) ("When assets are being distributed among legatees of the same class, the executors must treat all of the legatees fairly and equally.").
[35] *In re* Rutgers, 2014 N.Y. Misc. LEXIS 4869.
[36] *Id*. at *2.
[37] *Id*. at *2-3.
[38] *Id.* at *3 (citing *In re* Jones, 2006 N.Y. Misc. LEXIS 9438, at *5, NYLJ, Oct. 10, 2006, at 21, col 3 (Sur. Ct. N.Y. Cnty.)).
[39] *Id.*
[40] Duell v. Duell (*In re* Judicial Settlement), 685 N.Y.S.2d 686, 686 (App. Div. 1999).
[41] *Id.*
[42] *Id.*
[43] *Id.*

In *In re Schlesinger*,[44] the petitioner-trustee applied for approval to split a testamentary trust into two separate trusts pursuant to EPTL § 7-1.13 for the primary purpose of reducing administration expenses.[45] In granting the trustee's application, the court explained that "[i]n all other ways, the parties' interests will remain unchanged by the proposed split of [the trust]" and that "[r]educing administration expenses is clearly a reasonable purpose" to split the trust under EPTL § 7-1.13.[46] The court concluded by stating that "[s]ince the parties' interests will remain unchanged by the proposed split and its purpose is appropriate, the application is granted."[47]

At least one case has specifically held that the trustee's application to split a trust does not constitute a *per se* breach of fiduciary duty. In *In re Loeb & Loeb LLP*,[48] the court explained that a trustee's "separation of the residuary trust into three separate shares . . . does not constitute a breach of fiduciary duty per se" because EPTL § 7-1.13 "expressly authorizes the division of trusts in many circumstances, 'for any reason which is not directly contrary to the primary purpose of the trust,' and division was not necessarily improper in this case."[49]

In analyzing whether the proposed trust split was contrary to the settlor's intent of the trust, the court noted that "[t]he decedent directed outright distribution of the trust property to his daughters in separate shares after the death of Beatrice, which belies objectants' broad contention that joint control of the assets was a critical aspect of decedent's testamentary plan."[50] The court further explained as follows:

> The court also notes that any division of the residuary trust ultimately would have required either the objectants' consent (see EPTL 7-1.13 [a][2]) or court approval (see EPTL 7-1.13 [a][3]). In either case, the plan could not have been carried out in breach of any duty on Beatrice's part.

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[44] 640 N.Y.S.2d 743.
[45] *Id.* at 940.
[46] *Id.* at 941.
[47] *Id.*
[48] No. 4332-2002, 2011 NYLJ LEXIS 4741, at *6 (Sur. Ct. N.Y. Cnty. May 6, 2011).
[49] *Id.*
[50] *Id.* at 6-7.

> Further, objectants' allegation that Beatrice's position as executor "was used" to place her in control of estate assets (even apart from its failure to identify the alleged wrongdoer) does not state a cognizable claim for improper fiduciary conduct. So long as she was sole executor-in accordance with her appointment under her husband's will and therefore presumptively in accordance with his wishes-it was Beatrice's right and obligation to control businesses wholly owned by the estate.[51]

As explained hereinabove, the trust-splitting statute has remained fairly "non-controversial" since its enactment as the terms of the statute are generally regarded as clear and unambiguous.[52] Thus, at the time of this writing, there are limited published decisions in which the courts have denied an application for splitting a trust, as will be discussed below.

C. Limited Circumstances Where Trust-Splitting has been Denied by the Court

In re Stifting[53] is one example where an application to split a trust has been denied by the court. There, the petitioner co-trustee, a bank, petitioned the court "to divide the trust into three separate trusts" for the purposes of "easing contention among the beneficiaries" and further "requested permission to resign, as co-trustee."[54] Under the terms of the original trust, during the measuring life of the individual co-trustee, Hugo Belt, "the net income is to be held for, or distributed, in equal shares to Hugo Belt, to the issue per stirpes of Hugo Belt's deceased brother Erwin Belt, and to the issue per stirpes of Hugo Belt's deceased sister Charlotte B. Burin."[55] Upon the trust's termination, "the remainder is to be distributed, in equal shares, to the issue then living per stirpes of Erwin Belt, Hugo Belt, and Charlotte B. Burin."[56]

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[51] *Id.* at 7.
[52] *See* Letter from Robert F. Ambrose to Honorable Michael Finnegan, Counsel, N.Y. Governor (July 18, 1995), *Legislative Bill Jacket*, *supra* note 21, at 37.
[53] 2003 N.Y. Misc. LEXIS 2002, at *3 (Sur. Ct. N.Y. Cnty. Oct. 24, 2003).
[54] *Id.* at *1.
[55] *Id.*
[56] *Id.*

The court explained that "[b]ecause the number of issue in each line and the ages of such issue vary, such division [of the trust into separate trusts for each family line] necessarily would be unequal."[57] The court denied the application to split the trust into three divisions as requested by the family in which they urged the removal of the so-called "cross remainders" to other family members, but granted the bank's application to split the trust into three equal trusts (i.e., maintaining the original dispositive scheme with Hugo Belt as the measuring life).[58] The court further explained that "[t]he separate trusts resulting from the division remain subject to the same dispositive terms of the original instrument,"[59] and concluded that "[s]ince the proposal of the Erwin Belt family would change the dispositive terms, the court declines to grant the unequal division they propose."[60]

Moreover, the court denied the bank's application to be removed as a trustee and stated the following:

> Under the terms of the original agreement, Mr. Belt would then be obligated to appoint one or two additional trustees. Given the acknowledged inability of the parties to cooperate or to agree on the investment policies of the trust, the best interests of the trust would not be served by granting Hugo Belt this degree of control over the shares set apart for his siblings' issue. The Court is mindful that the original instrument permits any trustee to resign. Petitioner, however, is a successor trustee and was not appointed under any mechanism provided in the trust agreement, but by order of the Court entered in 1989 to resolve a prior dispute between Hugo and Erwin Belt. In the particular circumstances of this case the Court finds that the trust provision authorizing resignation must yield to the trusts' best interests, and petitioner's resignation will not be permitted at this juncture.
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> The division of the trusts as provided herein would render the new trusts amenable to a change of trustees,

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[57] *Id.* at *2.
[58] *Id.* at *2-3.
[59] *Id.* at *2; *see also In re* Reed, NYLJ, Feb 20, 1997, at 30, col. 5.
[60] *Id.* at *3.

> should difficulties continue between the co-trustees or between a trustee and the trust beneficiaries. Petitioner may renew its request to resign upon a showing that suitable provision has been made for a successor or successors.[61]

Brody v. Brody[62] is an interesting case where a beneficiary of a testamentary trust petitioned the court to remove the trustees of his trust because of hostility expressed towards him or, in the alternative, split the trust into separate trusts with "neutral" trustees for each separate trust.[63] There, the subject trust contained so-called "cross-remainder" provisions whereby the remainder of the trust estate would be payable to different contingent remainder beneficiaries depending upon who survived the termination of the trust.[64] The court held that "[a]lthough the existence of an acrimonious relationship between the parties authorizes the court to establish separate trusts, this authority is limited pursuant to EPTL § 7-1.13(a)(3) to the extent that the testator's primary purpose in establishing the trust cannot be altered by the division of the trust into separate trusts."[65]

The court denied the trust-splitting and explained that it was "apparent that the cross-remainder provisions were an essential element in the testator's plan and would require drastic alteration to achieve the requested division" and that "[s]plitting the trust but retaining the cross-remainders would serve no useful purpose other than moving the alleged hostility from the main trust to the separate trust."[66]

In *In re Fussell*,[67] the Appellate Division reversed the lower court's granting of a trust-splitting provision finding that the Surrogate divided the trust prematurely on a per stirpes basis, because before the death of the income beneficiary it would not be known whether the remainder was payable per stirpes or per capita.[68] The court explained

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[61] *Id.* Although not directly addressed by the court, this opinion seems to imply that even if the split trust must follow and adhere to the same terms as the main trust (i.e., same acting trustee) there is at least some flexibility with the administrative provisions of the newly established trust.
[62] 2008 NYLJ LEXIS 3637 (Sur. Ct. Nassau Cnty. Sept. 30, 2008).
[63] *Id.*
[64] *Id.*
[65] *Id.* at 8.
[66] *Id.* at 10.
[67] *In re* Fussell, 821 N.Y.S.2d 733 (App. Div. 2006).
[68] *Id*. at 736.

that although it recognized that "where . . . the parties have different financial needs and investment priorities and there is an acrimonious relationship between the parties, the Surrogate has the authority to establish separate trusts,"[69] and that nevertheless, the Surrogate's authority pursuant to EPTL § 7-1.13(a)(3) "is limited to the extent that the settlor's primary purpose in establishing the trust shall not be altered by the division of the trust into separate trusts."[70] The court held that splitting the trust contravened the primary purpose of the trust, as it would disproportionately benefit one familial line over the other upon trust termination.[71]

Accordingly, when exercising their power under EPTL § 7-1.13, trustees should be very careful to "split" the trust in such a way as to ensure that the terms of the newly split trust comport with the general scheme that the settlor established in the original trust.

III. NON-JUDICIAL TRUST MODIFICATION AGREEMENTS AND TRUST DECANTING UNDER EPTL § 7-1.9 AND EPTL § 10-6.6

In situations where the trust-splitting of an irrevocable trust is not possible, a trustee is not without recourse. Notwithstanding that situation, under the express terms of EPTL § 7-1.16, a trust is deemed irrevocable unless the trust instrument expressly provides otherwise.[72] In situations where a trustee wishes to change the terms of an irrevocable trust without the need for judicial intervention, there are two commonly utilized statutes under the EPTL that permit such a modification, namely EPTL § 7-1.9 and EPTL § 10-6.6. As these statutes have been extensively analyzed and written about, this article will briefly address each of these sections and highlight several "hot" issues that commonly arise in connection with the exercise of powers under these provisions.

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[69] *Id.* at 737 (citing Sponsor's Memorandum in support of Law 1995, ch. 523, 1995 N.Y. Legis. Ann., at 393-94).
[70] *Id.*
[71] *Id.* at 737-38.
[72] N.Y. EST. POWERS & TRUSTS LAW § 7-1.16.

A. EPTL § 7-1.9: Non-Judicial Trust Modifications in Instances Where Settlor is Alive and All Beneficiaries Consent

1. Statutory Language and Mechanics

EPTL § 7-1.9(a) is a fairly straightforward statute and provides that a trust creator may "revoke or amend the whole or any part [of a trust]" upon the acknowledged consent of all persons beneficially interested in the trust.[73] Thus, in its simplest terms, "[t]his section allows the creator and beneficiaries of an irrevocable, unamendable trust of real or personal property to reform or terminate it."[74] Indeed, once the acknowledged consents of all persons beneficially interested therein are obtained, the courts have emphasized that Section 7-1.9 of the EPTL "places no other burden upon a creator who wishes to amend or revoke an irrevocable trust."[75] Notwithstanding the clear guidance from the statute, however, there are special considerations that a New York trustee must make prior to effectuating a trust modification under this statute.

2. Special Considerations When Effectuating a Trust Modification under EPTL § 7-1.9

i. General Requirements and Mechanics

As an initial matter, the express language of EPTL § 7-1.9 requires that the creator or settlor consents—meaning that the creator or settlor must be alive in order to effectuate a reformation under this section.[76] As explained by the Appellate Division, Second Department, where the trust instrument allows an amendment to be made with the

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[73] *Id.* § 7-1.9(a).

[74] Perosi v. LiGreci, 948 N.Y.S.2d 629, 632 (App. Div. 2012) (citing Turano, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 17B, EPTL § 7–1.9, at 281)).

[75] *Id.*

[76] N.Y. EST. POWERS & TRUSTS LAW § 7-1.9; Jo Ann Engelhardt & Philip J. Hayes, *Choice of Situs for Itinerant Trustee and Peripatetic Beneficiaries*, SL003 ALI-ABA 395, 427 (2005) ("The New York statute, EPTL 7-1.9(a), provides that while the grantor is alive, he can amend an irrevocable trust with the consent of all living beneficiaries. The statute is helpful but is limited to the situation in which the grantor is still living.").

joint consent of the grantors, "a surviving grantor may not unilaterally amend the trust after the death of the co-grantor."[77] The Appellate Division, First Department has further explained that "the consent of the 'creator,' required by EPTL § 7–1.9, has been construed to require the consent of *all* the creators or settlors."[78]

Notwithstanding the foregoing, it is important to emphasize that even with authority granted to trustees under EPTL § 7-1.9, "[t]he scope of the authority to revoke or amend a trust is . . . defined by the terms of the trust indenture and New York law" and "[c]ompliance with the method set forth in the trust instrument for amendment is required for an amendment to be effective."[79] In other words, "[w]here a trust instrument specifies a procedure by which the trust may be amended, an amendment will only be valid where that procedure has been followed," but "if a trust instrument does not set forth an amendment procedure, then the creator is only restricted by the statutory requirements set forth in EPTL 7–1.9."[80]

In *In re Chiaro*, for example, the court rejected a proposed trust modification effectuated by a property guardian of one of the incapacitated grantors because the express language of the trust provided, in pertinent part, as follows:

> This trust may not be amended during the lifetime of both Grantors without the written agreement of both Grantors, unless one of the Grantors is incapacitated or incompetent, in which case the other Grantor shall have the right to modify this trust . . . From and after the death of the first Grantor, the surviving Grantor shall have the power to alter, amend, or revoke Trust 'A' in

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[77] Culver v. Title Guar. & Trust Co., 296 N.Y. 74, 77 (1946) ("When, originally, an attempt was made to revoke this trust in its entirety, the Appellate Division properly directed judgment for the defendant . . . and pointed out in the course of its opinion, citing cases, that, were there no applicable statutes and had a power of revocation been reserved to the joint settlors of the trust - which was not the case here - all would be required to join in the revocation and that, had death occurred as to one, the survivors would be unable to effect it.").

[78] Rosner v. Caplow, 456 N.Y.S.2d 50, 53 (App. Div. 1982) (citing practice commentary to McKinney's EPTL § 1–2.2, stating that unless the context requires otherwise, "whenever 'creator' is encountered in this law, it should be understood as referring to testators and settlors, and, depending upon the context, to grantors and donors as well").

[79] *In re* Chiaro, 903 N.Y.S.2d 673, 678 (Sup. Ct. Suffolk Cnty. 2010).

[80] Perosi v. LiGreci, 948 N.Y.S.2d 629, 632-33 (App. Div. 2012).

> whole or in part, but Trust 'B' may not be altered, amended or revoked by any person. From and after the death of the surviving Grantor, Trust 'A' may not be altered, amended or revoked by any person.[81]

The court held that:

> To conclude that [the Property Management Guardian for the incapacitated grantor] could effectively amend the trust as the property management guardian for [the incapacitated grantor] is to conclude that [the incapacitated grantor] was imbued with a power or authority to act, and that such power or authority was to be exercised on her behalf by her guardian. However, pursuant to the trust provisions, [the incapacitated grantor] had no power to amend the trust once she became incapacitated. Appointment of the Guardian did not restore her power or authority to act in contravention of the governing terms of the trust.[82]

Likewise, another hotly contested issue is whether an agent acting pursuant to a power of attorney instrument executed by a grantor during his or her lifetime is permitted to consent to a trust modification pursuant to EPTL § 7-1.9 on behalf of an incapacitated grantor.[83] While the analysis will depend upon the facts and circumstances of each case, the Appellate Division, Second Department, has articulated the analysis as follows:

> Generally, the scope of a power of attorney is limited only by the boundaries of the principal-agency relationship . . . . There are a few exceptions to the powers which can be granted to an attorney-in-fact. These exceptions include, but are not limited to: the execution of

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[81] *Chiaro*, 903 N.Y.S.2d at 678.

[82] *Id.* at 679. "A remedy that is not available, however, is amendment of the trust pursuant to EPTL 7–1.9. As noted in [Rosner v. Caplow, 90 A.D.2d 44, 49 (N.Y. App. Div. 1982)], 'EPTL 7–1.9, has been construed to require the consent of *all* the creators or settlors,' (citing, inter alia, [Culver v. Title Guar. & Trust Co., 296 N.Y. 74, 77–78 (1946)]. Thus, inasmuch as Ralph Chiaro has died, EPTL 7–1.9 cannot be employed to amend the trust, even if it is assumed that a Mental Hygiene Law article 81 guardian could be empowered to act for Edythe Chiaro under that provision . . . ." *Id.* at 680.

[83] *See generally Perosi*, 948 N.Y.S.2d. at 634-35.

> a principal's will (*see* EPTL 3–2.1[a][3]); the execution of a principal's affidavit upon personal knowledge; or the entrance into a principal's marriage or divorce. Absent any special circumstances or contrary directives, the amendment of the Trust by the attorney-in-fact, with the consent of all the beneficiaries, was not an act which "by [its] nature, by public policy, or by contract," required the creator's personal performance. Indeed, while the Legislature has determined that an agent cannot execute a principal's will (*see* EPTL 3–2.1[a][3]), there is no such legislative enactment which precludes an agent from amending a principal's trust.
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> We disagree with the Supreme Court's determination that the creator, acting through the attorney-in-fact, was not permitted to amend the Trust absent a specific delegation of that power in the trust instrument or in the power of attorney. **Rather, we hold that since the Trust did not prohibit the creator from amending the Trust by way of his attorney-in-fact, the attorney-in-fact, as the alter ego of the creator, properly amended the Trust**.[84]

Accordingly, when considering EPTL § 7-1.9 to effectuate a non-judicial trust modification, the case law makes it clear that in order to uphold the validity of the modification, each of the original settlors must be alive and have the capacity to execute the acknowledgment instruments on his or her own behalf.[85] While an authorized agent may be able to act on behalf of the settlor in the event that the settlor is incapacitated or otherwise not able to execute the necessary instruments, the case law concerning the authority of an agent to act on behalf of a settlor under EPTL § 7-1.9 is less established.

ii. Consent of Minor Contingent Beneficiaries Is Not Necessarily Required

Another common issue that arises in the context of non-judicial trust modifications of irrevocable trusts is whether the trustee is

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[84] *Id.* (internal citations omitted) (emphasis added).
[85] *Title Guar. & Trust Co*., 296 N.Y. at 77; *Caplow*, 456 N.Y.S.2d at 53.

required to obtain the consent of minor beneficiaries to effectuate the modification, even if the minor beneficiary is only a contingent remainder beneficiary under the terms of the subject trust.[86] As a general rule, where minors hold a beneficial interest in an irrevocable trust, their consent to any trust amendment, modification, or termination is required.[87]

In applying EPTL § 7-1.9, however, the courts have occasionally dispensed with the consent of infant beneficiaries where the amendments sought are clearly favorable to them. For example, in *In re Cord*,[88] the New York Court of Appeals held that the consent of infant beneficiaries was not required where the trust modifications "could only have added to and not cut down on the benefits available to the beneficiaries."[89] In rendering its decision, the Court of Appeals turned to the legislative history of the statute, and explained:

> The history behind EPTL 7-1.9 and its predecessor, section 23 of the Personal Property Law, informs us that the design was to protect trust beneficiaries against unauthorized or unwarranted invasion. Suffice it then to say that, though an irrevocable trust ordinarily cannot be modified except by consent of all those who may be adversely affected thereby, that did not prevent the settlor-testatrix here from undertaking to pay trust tax obligations out of a different fund. The product of this action could only have added to and not cut down on the benefits available to the beneficiaries. . . . Consequently, it would be unreasonable to say that consent was required under these circumstances.[90]

Thus, when structuring a non-judicial trust modification under EPTL § 7-1.9, trustees and their advisors should pay careful consideration as to whether the benefits flowing to the minor contingent beneficiaries under the modified agreement put the minor beneficiary in a better economic position.

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[86] *See generally In re* Dodge's Trust, 250 N.E.2d 849, 851-52 (N.Y. 1969).
[87] *Id.*
[88] *In re* Estate of Cord, 449 N.E.2d 402 (N.Y. 1983).
[89] *Id.* at 405.
[90] *Id.* (citations omitted).

B. EPTL § 10-6.6: Trust Decanting

1. Brief Overview of Statutory Language and Mechanics

The subject of trust decanting in New York has been written about extensively, and the focus of this section is to highlight some special issues that a corporate trustee should take into consideration when decanting a trust in New York.[91] It is interesting to note that New York has been credited with being the very first jurisdiction to authorize the "'pouring' of trust assets from one trust into another."[92]

In its most basic terms, so-called "trust decanting" is the process of using the assets of one trust to create a new trust.[93] Under EPTL § 10-6.6, trust decanting is technically an exercise of a "special power of appointment" which is defined under EPTL § 10-3.2.[94] Under this statute, the level of discretionary power given to a trustee under the terms of the trust is the key consideration in analyzing a trustee's power to decant in accordance with EPTL § 10-6.6:

> An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries).[95]

Accordingly, if the governing trust instrument grants the trustee "unlimited discretion" to make distributions of principal to a beneficiary of the trust for their "best interests, welfare, comfort or

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[91] *See* Alan S. Halperin & Zoey F. Orol*, Modern Variations on an Ancient Theme: Fundamental Changes in Trust Law--Part II*, 89-APR N.Y. ST. B.J. 25, 26 (2017) ("The concept of decanting has been the subject of a large body of literature and extensive legislative consideration, particularly in New York.").

[92] 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, 480 (2014).

[93] *See* Halperin & Orol, *supra* note 91.

[94] N.Y. EST. POWERS & TRUSTS LAW § 10-3.2; *id.* § 10-6.6(d) ("An exercise of the power to invade trust principal under paragraphs (b) and (c) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2 of this article.").

[95] *Id.* § 10-6.6(b).

happiness" or for any other reason whatsoever, the express language of the statute provides that the trustee can exercise the special power of appointment to invade the trust and appoint the assets to a new trust for the benefit of one or more of the current beneficiaries.[96]

Indeed, this power granted by this statute stems from common law. In *In re Davidovich v. Hoppenstein*,[97] the grantor of an irrevocable life insurance trust became estranged from his daughter after she made "excessive demands for money," so he directed the trustees of the original trust to decant the life insurance policy to a new trust.[98] Notwithstanding that the new trust eliminated the grantor's daughter and her descendants as beneficiaries, the Appellate Division, First Department upheld the validity of the decanting because the terms of the original trust provided the trustees with unfettered discretion to invade the principal.[99] The court further emphasized that under EPTL § 10-6.6(k) "[t]his section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises . . . under common law."[100] Additionally, the statute clarified that "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."[101]

On the other hand:

> An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.[102]

Thus, under the express language of the statute, if the trustee's discretionary power to invade the principal of the trust is limited to an

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[96] *Id.*
[97] Davidovich v. Hoppenstein, 79 N.Y.S.3d 133 (App. Div. 2018).
[98] *In re* Hoppenstein, 2017 N.Y. Misc. LEXIS 1707, at *1, *3 (Sur. Ct. N.Y. Cnty.).
[99] *Davidovich*, 79 N.Y.S.3d at 134.
[100] *Id.*
[101] *Id*. at 133.
[102] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(c).

ascertainable standard such as for the beneficiary's health, education, maintenance and support (i.e., anything less than absolute discretion), the trustee can appoint the assets of the invaded trust into a new trust, but the current and remainder beneficiaries must remain the same.[103]

It is important to emphasize that even if the governing instrument grants discretion to a trustee to invade the corpus of the trust, subsection (h) of EPTL § 10-6.6 expressly limits the exercise of such power to decant:

> An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.[104]

Accordingly, if a corporate trustee wishes to limit exposure to potential claims of breach of fiduciary duty in connection with the decanting of a trust, special consideration should be given to the following points.

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[103] *Davidovich*, 79 N.Y.S.3d at 133.
[104] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(h).

i. Special Considerations When Effectuating A Trust Decanting Under EPTL § 10-6.6

a. Limitations of a Trustee's Power to Decant

As a preliminary matter, it is worth emphasizing that in addition to the restrictions set forth in EPTL § 10-6.6(n), the statute specifically states that a trustee cannot effectuate an exercise of a power to appoint to effectuate the following:

> (1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. . . .
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> (2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;
>
> (3) To eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section unless a court having jurisdiction over the trust specifies otherwise;
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> (4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or
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> (5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the internal revenue code, the marital deduction under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the internal revenue code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the internal revenue

> code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code.[105]

Accordingly, to avoid exposure to liability for breach of fiduciary duty, advisors should be very careful to ensure that the terms and provisions of the invaded trust do not violate these provisions.

b. The Case of Multiple Fiduciaries

EPTL § 10-10.7 provides, in pertinent part, that:

> Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power . . . including a power in a trustee to invade trust principal under section 10-6.6 of this article or under the terms of the dispositive instrument, conferred upon three or more fiduciaries . . . may be exercised by a majority of such fiduciaries . . . .[106]

This provision has many implications. On the one hand, if only a majority of trustees are required to exercise the power to decant, the trust administration may be conducted more efficiently, especially if there is a co-trustee who is unable or unwilling to act due to incapacity, unavailability, or friction between his or her co-fiduciary.[107] On the other hand, it is well-established under New York case law that fiduciaries can be held liable for the actions of their co-fiduciaries.[108]

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[105] *Id.* § 10-6.6(n).
[106] *Id.* § 10-10.7 .
[107] *In re* Estate of Sheppard, 63 A.D.3d 1358, 1358 (N.Y. App. Div. 2009) ("Friction or hostility between the potential joint fiduciaries can be a valid reason to reject a joint appointment, as friction or lack of cooperation can interfere with the efficient administration of the estate.").
[108] *See, e.g.*, *In re* Bloomingdale, 853 N.Y.S.2d 92, 94 (App. Div. 2008) ("Cofiduciaries are regarded in law as one entity. Where a fiduciary has the means to know of a cofiduciary's acts, and has assented or acquiesced in them, the fiduciary is bound by those acts and jointly liable for them."); Zimmerman v. Pokart, 662 N.Y.S.2d 5, 7 (App. Div. 1997) ("Cofiduciaries are, of course, regarded in law as one entity. If plaintiff's obligations as cofiduciary under the testamentary trust were in question, his protestations that he passively relied on the expertise of his co-fiduciary would not allow him to escape liability.").

In practice, if a co-trustee believes that another co-trustee is exercising a power to invade the corpus in violation of EPTL § 10-6.6(h), it would be prudent for the trustee to promptly dissent or object to the exercise in writing to avoid unnecessary exposure to liability.[109]

c. Notice and Court Filing Requirement: Failure of a Beneficiary to Object to a Decanting Notice is Not a Consent to the Decanting

If a trustee exercises a special power of appointment to invade a trust and transfer the corpus into a new appointed trust, "a copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered" by either "registered or certified mail . . . or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust" to: (i) the creator of the invaded trust (if living);[110] (ii) any person with the right under the invaded trust to remove or replace the trustee exercising the special power of appointment;[111] and (iii) any person who is "interested"[112] in the invaded trust.[113]

Under subsection (j), "the exercise of the power to appoint to an appointed trust under . . . this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee."[114] Additionally, the statute provides that "the exercise of the power shall be effective thirty days after the date of service of the instrument . . . unless the persons entitled to notice consent in writing to a sooner effective date.[115] The exercise of the power is irrevocable on

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[109] *Bloomingdale*, 853 N.Y.S.2d at 94.
[110] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(j)(2)(A).
[111] *Id.* § 10-6.6(j)(2)(B).
[112] For the purposes of this statute, "[t]he term 'person or persons interested in the invaded trust' shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act." *Id.* § 10-6.6(s)(7).
[113] *Id.* § 10-6.6(j)(2)(C).
[114] *Id.*
[115] *Id.* § 10-6.6(j).

such effective date, either thirty days following service of the notice or the effective date as set forth in the written consent."[116]

There are two important provisions that are worth highlighting. First, subsection (j)(4), which states that "[a] person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. **The failure to object shall not constitute a consent**."[117] Second, subsection (j)(5), which states that:

> The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (b) or (c) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. **Whether the exercise of a power under paragraph (b) or (c) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation**.[118]

Thus, a trustee should take great care to obtain all consents in writing at the time of the exercise of the special power of appointment to limit exposure to potential challenges to the exercise of the power down the road. It must be noted that if the invaded trust was ever subject to a court proceeding (i.e., if the invaded trust is a testamentary trust, and the will establishing the trust was the subject of a Surrogate's Court proceeding), the statute expressly provides that "[a] copy of the instrument exercising the power shall be kept with the records of the invaded trust and, within twenty days of the effective date, the original shall be filed in the court having jurisdiction over the invaded trust."[119]

In other words, if a trustee wishes to decant a testamentary trust, the trustee will likely need to file the original instrument exercising the power of appointment with the Surrogate's Court within twenty

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[116] *Id.*
[117] *Id.* § 10-6.6(j)(4) (emphasis added).
[118] *Id.* § 10-6.6(j)(5) (emphasis added).
[119] *Id.* § 10-6.6(j)(6).

days of the exercise, which will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.[120] But a similar requirement for a court filing does not exist for an invaded inter vivos trust that was never subject to a judicial proceeding.[121]

IV. BRIEF OVERVIEW OF GENERAL LEGAL PROTECTIONS AFFORDED TO TRUSTEES AGAINST CHARGES OF POTENTIAL CONFLICTS OF INTEREST, BENEFICIARY HOSTILITY, AND BENEFICIARY DISSATISFACTION

Corporate trustees oftentimes find themselves in the crossfire of hostile beneficiaries and unusual family dynamics. Thus, in arming the corporate trustee with all of the power tools available to them in New York, it is worth emphasizing that trustees in New York are generally protected against being removed from office in situations where there is a potential conflict of interest, hostility between the trustee and the beneficiaries, and where beneficiaries are generally unsatisfied with how the trust is being administered. Below is a brief discussion as to how New York courts will handle an application to remove a trustee from office.

With respect to testamentary trusts, it is well-settled that pursuant to Section 719 of the New York Surrogate's Court Procedure Act ("SCPA"), "'the court may make a decree suspending . . . or revoking letters issued to a fiduciary from the court . . . *without a petition or the issuance of process*' where, among other things, 'any of the facts provided in [SCPA] 711 are brought to the attention of the court.'"[122] The circumstances set forth under SCPA 711 justifying "'a decree suspending . . . or revoking those letters' include a fiduciary 'having wasted or improperly applied the assets of the estate' (SCPA 711[2]) or having 'removed property of the estate . . . without prior approval of the court (SCPA 711[7]).'"[123]

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[120] *Id.*

[121] *Id.* ("Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required.").

[122] *In re* Steward, 147 N.Y.S.3d 589, 591 (App. Div. 2021).

[123] *Id.*

The Court of Appeals, however, has explained that "[b]y contrast, issuance of a decree without a hearing under section 719 will constitute an abuse of discretion where the facts are disputed, where conflicting inferences may be drawn therefrom, or where there are claimed mitigating facts that, if established, would render summary removal an inappropriate remedy."[124] "In other words, where it is clear that the full factual picture has not yet been painted, 'immediate action should [not] be taken without the fiduciary being heard.'"[125] In such circumstances, an opportunity to be heard and to present or contest relevant evidence would properly follow.

This is true because the "[r]emoval of a fiduciary constitutes a judicial nullification of the testator's choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established."[126]

Section 711 of the SCPA enumerates a list of specific examples of misconduct and bad acts warranting removal of a trustee:

> 1. Where the respondent was, when letters were issued to him, or has since become ineligible or disqualified to act as fiduciary and the grounds of the objection did not exist or the objection was not taken by the petitioner or a person whom he represents before the letters were granted.
>
> 2. Where by reason of his having wasted or improperly applied the assets of the estate, or made investments unauthorized by law or otherwise improvidently managed or injured the property committed to his charge, including by failing to comply with paragraph (c) of section 8-1.9 of the estates, powers and trusts law, or by reason of other misconduct in the execution of his office or dishonesty, drunkenness, improvidence or want of understanding, he is unfit for the execution of his office.
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> 3. Where he has willfully refused or without good cause neglected to obey any lawful direction of the court contained in any decree or order or any provision of law relating to the discharge of his duty.

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[124] *In re* Duke, 87 N.Y.2d 465, 473 (1996) (internal citations omitted).
[125] *Id.* (citing 2 Warren's Heaton, op. cit., § 20.11 [3] [c], at 20-130).
[126] *Id.*

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> 7. Where he has removed property of the estate without the state without prior approval of the court.
>
> 8. Where he or she does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.[127]

Given that corporate fiduciaries have the backing of financial institutions with departments dedicated to carrying out the fiduciary duties of their trust officers, it is this author's opinion that it is not likely that a corporate trustee will ever be in a position to violate many of the expressly enumerated violations contained in the SCPA (i.e., it is highly unlikely that a corporate trustee will be removed ex parte for drunkenness), but rather that it is more likely that a charge of "waste" will be alleged against such trustee.[128]

Unlike testamentary trusts which fall under the purview of the SCPA, the removal of a trustee under an inter vivos trust agreement is governed by the Estates Powers and Trusts Law and common law.[129]

Indeed, whether the courts are dealing with a testamentary or inter vivos trust, removal of a trustee "is a drastic action, and courts are generally hesitant to exercise the power to remove a fiduciary absent a clear necessity."[130] A trustee may be removed "only upon a *clear showing* of serious misconduct that endangers the safety of the estate,"[131] and it is the plaintiff-petitioner who "bears the burden of demonstrating that the trustee" should be removed.[132]

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[127] SURR. CT. PROC. ACT § 711.

[128] *In re* Dominick Aragona, 2006 NYLJ LEXIS 5053, at *2-3 (Sur. Ct. Nassau Cnty. October 24, 2006) ("SCPA 711(2) provides that letters may be revoked where, among other things, the fiduciary has wasted assets of the estate. The term waste in SCPA 711(2) can refer to either action or inaction on the part of the fiduciary which results in some injury to the estate." (Warren's Heaton on Surrogate's Courts, 33.10[4][b], 7th ed.)).

[129] Greenfield v. Jaffe, No. 158802-2018, 2019 N.Y. Misc. LEXIS 2664, at *18-19 (Sup. Ct. N.Y. Cnty. May 24, 2019) ("Pursuant to EPTL § 7-2.6, the court may 'suspend or remove a trustee who has violated or threatens to violate his trust [...] or who for any reason is a person unsuitable to execute the trust.'").

[130] *In re* Joan Moran Trust, 88 N.Y.S.3d 590, 594 (App. Div. 2018).

[131] *In re* Duke, 663 N.E.2d 602, 640 (1996) (emphasis added).

[132] *In re* Giles, 902 N.Y.S.2d 717, 720 (App. Div. 2010).

Indeed, this a heavy burden to satisfy.[133] Thus, while a trustee acts as a fiduciary to the beneficiaries of the trust and "owes them a duty of loyalty, notwithstanding the trustee's latitude under the settlor's direction,"[134] a trustee's potential conflict of interest and the existence of hostility between the trustee and the beneficiaries are generally not enough to warrant removal of a trustee.[135] And although the Surrogate's Court Procedure Act generally applies only to proceedings brought in the Surrogate's Court, the specific instances of fiduciary misconduct enumerated under SCPA § 711 may provide guidance in a trustee removal analysis in Supreme Court.[136]

In *In re Richardson*,[137] a trustee's conflict of interest was not sufficient to justify grounds for suspension.[138] There, the court held that "[n]either a trustee's conflict of interest nor hostility between a trustee and beneficiary necessarily constitutes grounds for suspension of a trustee's powers."[139] In lieu of removing either co-trustee, the court directed that limited letters of trusteeship should be issued to an independent attorney-trustee for the sole purpose of determining whether the primary asset held by the trust should be sold or kept in

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[133] *Id.*

[134] *Greenfield*, 2019 N.Y. Misc. LEXIS 2664, at *19. The duty of loyalty is "inflexible" and "prohibits a trustee from even placing himself in a position of potential conflict with his or her duty to the trust." Sankel v. Spector, 819 N.Y.S.2d 520, 523-24 (App. Div. 2006); *see also* Mercury Bay Boating Club, Inc. v. San Diego Yacht Club, 76 N.Y.2d 256, 270 (1990) ("This strict standard is the usual and appropriate measure of a trustee's fiduciary obligations because the trustee must administer the trust for the benefit of the beneficiaries and cannot compete with the beneficiaries for the benefits of the trust corpus . . . .Thus, the trustee owes the beneficiary an undivided duty of loyalty and cannot, for example, take the economic benefit of a trust.").

[135] However, where only a potential conflict of interest exists, removal of the trustee is only appropriate where there is misconduct. *See In re* Palma, 835 N.Y.S.2d 755, 758 (App. Div. 2007) (noting "potential conflict of interest on the part of a fiduciary, without actual misconduct, is not sufficient to render the fiduciary unfit to serve").

[136] *See* Margaret Valentine Turano, Practice Commentaries, McKinney's Cons. Laws of NY, SCPA 711 ("Under EPTL 7-2.6, a Supreme Court judge can remove a trustee for insolvency and violating the trust (by actions described in this section and SCPA 719, for example.)").

[137] No. 2335/90, 2004 WL 6065973 (Sur. Ct. N.Y. Cnty. June 16, 2004) (Trial Order).

[138] *Id*.

[139] *Id.*

the trust.[140] Likewise, in *In re Estate of Rudin*,[141] the Appellate Division held that "[p]ersonal hostility between a trustee and a beneficiary is insufficient to justify removal unless it interferes with the proper administration of the trust . . . . As for objectant's second ground for removal, 'it is actual misconduct, not a conflict of interest, that justifies the removal of a fiduciary.'"[142]

Moreover, and as explained by the court in *In re Estate of Parker*,[143] the mere fact that a beneficiary of a trust is "not completely satisfied" with the administration of the trust, even if coupled with "friction and hostility between the corporate trustee and some of the beneficiaries[,]" is an insufficient reason to remove a trustee.

In *In re Graves' Estate*,[144] the beneficiaries of more than half the trust petitioned for the removal of the co-trustees because there was a lack of harmony, serious friction between the parties, and the beneficiaries simply "[did] not want them" serving as fiduciaries under the instrument. The court explained that:

> As a matter of law, however, if the respondent trustees establish that they have in all respects conducted themselves properly as trustees and are competent to continue to act as such, the mere fact of friction between them and the beneficiaries is not sufficient cause for their removal. If it were, an obstreperous malintentioned beneficiary could cause the removal of a competent trustee through no fault on the latter's part . . . .[145]

V. CONCLUSION

When the need to effectuate a non-judicial trust modification in New York arises, the EPTL in its current form provides corporate trustees with a tremendous amount of power and flexibility to amend,

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[140] *Id.* ("In all the present circumstances, however, including the conflict of interest concerning the trust's primary asset, the conceded hostility among the parties, and the trustees' patent failure to act with impartiality, the Court has determined that the best interests of the trust will be served by the appointment of a third independent trustee.").
[141] 15 A.D.3d 199 (N.Y. App. Div. 2005).
[142] *Id.* at 200.
[143] 209 N.Y.S.2d 254, 256 (Sur. Ct. Nassau Cnty. 1961).
[144] 110 N.Y.S.2d 763, 767 (Sur. Ct. Monroe Cnty. 1952).
[145] *Id*. (internal citations omitted).

revoke, and establish new trusts with more favorable provisions. Depending upon the facts and circumstances of a particular situation (i.e., whether the settlor is alive, whether minor beneficiaries hold an interest in the trust, whether there is dissension and discord among the beneficiaries, etc.) various provisions of the EPTL will help a corporate trustee implement a sound strategy to modify a trust to attain favorable results for all interested parties.