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New York Enacts Important New Law Governing a Trustee's Power to Pay Trust Assets to a New Trust

By Pamela Ehrenkranz, Michael I. Frankel and Lindsay N. O'Donnell

New legislation recently enacted as New York Estates, Powers and Trusts Law 10-6.6(b)-(t) (EPTL) substantially alters a trustee's ability to pay assets from one trust to another. Under EPTL 10-6.6(b), prior to the enactment of the new legislation, a trustee was required to have "absolute discretion" to invade the principal of a trust for the benefit of a beneficiary in order to appoint all or part of the principal of such trust to another trust. Under the new law, which became effective August 17, 2011, absolute discretion is no longer a prerequisite. Specifically, under EPTL 10-6.6(c), a trustee with any authority to invade the principal¹ of a trust for the benefit of a beneficiary may appoint such principal to a new trust, so long as the new, appointed

trust² retains the same standard of distribution governing the original, invaded trust.³

In addition to expanding the application of the statute and enhancing its flexibility, the new statute

- clarifies ambiguities that existed under the prior law, including in whose favor the power to invade must be exercised and the permissible scope of powers of appointment granted to beneficiaries under the appointed trust;
- confirms that the term of the appointed trust may be longer than the term of the invaded trust;⁴
- imposes a fiduciary duty on a trustee exercising the power and prescribes a standard of care; and
- takes steps to protect the creator's intent, a

beneficiary's rights, and the tax attributes of the invaded trust.

This article reviews the more significant provisions of the new EPTL 10-6.6(b)-(t).

Background

When EPTL 10-6.6(b)⁵ was initially enacted in 1992, it was the first state statute permitting a trustee to pay assets from one trust to another, and its goal was primarily tax oriented.⁶ The statute proved, however, to have breadth and vitality far greater than anticipated. Similar statutes passed in other states subsequent to the enactment of the New York statute incorporated additional provisions that augmented a trustee's ability to take advantage of enhanced planning opportunities.⁷ Recognizing the need to revitalize EPTL 10-6.6(b), the Trusts, Estates and Surrogates' Courts Committee and the Estate and Gift Taxation Committee of the New York City Bar Association began working on a proposed new provision to expand the statute and clarify ambiguous provisions. The Committees worked with the Office of Court Administration (OCA) to make additional modifications, and this modified proposal was introduced as Assembly Bill A8297 and Senate Bill S5801 in June 2011; it was enacted as legislation on August 17, 2011.

Overarching Principles of the New Statute

1. The new statute retains the provision of the prior law permitting a trust agreement to override expressly the application of the new statute.

2. The statute clarifies that the existence of the statute itself does not create or imply a duty on a trustee to exercise a power to invade principal, and no inference of impropriety is to be made as a result of a trustee not exercising the power.⁸

3. The trustee exercising the power under the statute has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the power and as a prudent person would exercise the power under the prevailing circumstances.⁹

4. The creator's intent must be considered¹⁰ and the beneficiaries' rights protected.¹¹

5. The new statute does not affect the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.¹²

6. Use of the statute is permitted even if the trust agreement includes a spendthrift clause or a general provision that prohibits the amendment or revocation of the trust,¹³ and even if there is no current need to invade trust principal.¹⁴

7. Consistent with prior law, the statute confirms that the exercise of the power to invade trust principal under the statute is considered the exercise of a special power of appointment.¹⁵

Key Provisions of the New Law

Absolute Discretion No Longer Required.

If a trustee of an invaded trust has the ability to pay trust principal *for any purpose*, new EPTL 10-6.6 permits a trustee of such trust to pay principal¹⁶ to an appointed trust. In contrast, under prior law, a trustee was required to have absolute discretion to pay principal to a new trust.

The applicable provisions of the statute will vary depending on the trustee's authority to invade principal under the invaded trust, which can be classified into three types under the statute:

Invaded Trust Type A: The authorized trustee¹⁷ has unlimited discretion and there is no modification of or limitation on the power to distribute principal.

Invaded Trust Type B: The authorized trustee's ability to pay principal is limited to one or more specific purposes.

Invaded Trust Type C: The authorized trustee has unlimited discretion *and* the authority to pay principal for one or more specific purposes.

Invaded Trust Type A

Invaded Trust Type A, where an authorized trustee has unlimited discretion to invade trust principal, is controlled by EPTL 10-6.6(b). The following six examples¹⁸ will be used to illustrate the application of the statute where an authorized trustee has unlimited discretion to invade principal.

Example 1: T is the trustee of a trust for the benefit of Beatrix. The trust is to terminate when Beatrix attains age 40. Beatrix is age 12. T has unlimited discretion to make principal distributions to Beatrix.

Example 2: T is the trustee of a trust for the benefit of Beatrix, Bartholomew, and Benedict. The trust is to terminate when the youngest child, Benedict, attains age 25. Beatrix is age 12, Bartholomew is age 8, and Benedict is age 6. T has unlimited discretion to make distributions of principal to any of the beneficiaries.

Example 3: T is the trustee of a trust for the benefit of Beatrix. Beatrix is entitled to receive one-third of the principal at age 35 and the balance at 40. Beatrix is age 35. T has unlimited discretion to make principal distributions to Beatrix.

Example 4: T is the trustee of a trust for the benefit of Beatrix. Beatrix is entitled to receive all of the trust income upon attaining age 25. The trust is to terminate when Beatrix attains age 40. Beatrix is age 25. T has unlimited discretion to make principal distributions to Beatrix.

Example 5: T is the trustee of a trust for the benefit of Beatrix and Bartholomew. T has unlimited discretion to make distributions of principal to Beatrix; T may only distribute income to Bartholomew.

Example 6: T is the trustee of a trust for the benefit of Beatrix. The trust is to terminate when Beatrix attains age 50 or sooner dies and the principal is to be held in further trust for the issue of Beatrix's mother. Beatrix has two

brothers and three sisters. T has unlimited discretion to make principal distributions to Beatrix.

a. Lifetime Trusts. Assuming the requisite intent and fiduciary duty standards of EPTL 10-6.6(h) are satisfied, an authorized trustee may appoint the principal of the invaded trusts described in Examples 1 through 6 to appointed trusts under EPTL 10-6.6(b) for a term measured by the lifetime of the beneficiaries.¹⁹

Based on the foregoing examples, the following payments are permitted under the new statute:

Example 1(a): T may pay the principal of the trust to an appointed trust for Beatrix to continue for her lifetime.

Example 2(a): T may pay the principal of the trust to an appointed trust that will last until the death of the survivor of Beatrix, Bartholomew, and Benedict.

Example 3(a): T must pay one-third of the principal outright to Beatrix because Beatrix has already attained age 35 and the right to this principal distribution has vested. T may pay the balance of the principal of the trust to an appointed trust for Beatrix's lifetime.

Example 4(a): T may pay the principal of the trust to an appointed trust for Beatrix's lifetime.

Example 5(a): T may pay the principal of the invaded trust to an appointed trust for the benefit of Beatrix and Bartholomew, or to a trust for the sole benefit of Beatrix for Beatrix's lifetime. If the trust is also for the benefit of Bartholomew, Bartholomew may only receive distributions of income.

Example 6(a): T may pay the principal of the trust to an appointed trust for Beatrix for Beatrix's lifetime.

b. Beneficiaries and Standard for Distributions. Where a trustee has unlimited discretion, the authorized trustee can exercise that discretion in any manner, including by paying the principal to a new trust with a narrower standard for distributions than contemplated in the invaded trust. In addition, the trustee can appoint principal to an appointed trust that eliminates a current beneficiary of the invaded trust, so long as such beneficiary's vested rights are not altered²⁰ and the invaded trust's tax status is not jeopardized.²¹ The successor and remainder beneficiaries of the appointed trust, however, must be one, more than one or all of the successor and remainder beneficiaries of the invaded trust (to the exclusion of any one or more of such successor and remainder beneficiaries).

These provisions are illustrated in the following examples based on Examples 1, 2, 4, and 6, above.

Example 1(b): The appointed trust may retain the same unlimited discretion standard contained in the invaded trust or contain a narrower standard (e.g., the appointed trust may provide that distributions shall be made at the discretion of the trustee only for Beatrix's health, education, maintenance, and support).

Example 2(b): T may pay the principal of the trust to an appointed trust for Beatrix and Benedict or a trust exclusively for Beatrix or any other combination of beneficiaries of the invaded trust.

Example 4(b): Because Beatrix has attained the age of 25, the appointed trust must give Beatrix the right to receive all of the trust income in the appointed trust. Note that if Beatrix were age 12 at the time the authorized trustee appointed the principal to the appointed trust, the appointed trust would not be required to provide for all of the trust income to be paid to Beatrix at age 25, as such right to receive income is not a current right.

Example 6(b): The remainder beneficiaries of the appointed trust may be one or more of Beatrix's brothers and sisters.

c. Power to Appoint. The appointed trust must be for one or more of the same beneficiaries or class of beneficiaries as the invaded trust. The appointed trust cannot add beneficiaries or accelerate a remainder beneficiary's interest. Pursuant to EPTL 10-6.6(b)(1), the appointed trust may, however, grant a beneficiary otherwise entitled to receive the trust principal outright a power of appointment, which includes as permissible appointees persons who are not beneficiaries of the invaded trust. (Presumably, the granting of a power of appointment to a beneficiary in this case does not undermine the creator's intent, as the granting of such power is consistent with giving the beneficiary the asset outright, which, in turn, is consistent with the terms of the invaded trust.) The rationale is that, if the beneficiary were to receive the property outright, the beneficiary could dispose of it as the beneficiary wished. Any power to appoint granted in the appointed trust under EPTL 10-6.6(b)(1) must be very broad and may exclude as permissible appointees only one or more of the beneficiary, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

The authority for an appointed trust to include a power of appointment provides additional flexibility, which could be used to avoid or postpone the imposition of a generation-skipping transfer tax on a trust by the exercise of a power of appointment to add a non-skip person to the class of beneficiaries, or permit the beneficiary to change the remainder beneficiaries of a trust.

The foregoing discussion applies to an Invaded Trust Type A if an appointed trust grants a power of appointment to a beneficiary that did not exist under the terms of the invaded trust. The appointed trust may, but is not required to, include a power of appointment that was granted under the invaded trust, so long as the power is exercisable in the same fashion as the power of appointment in the invaded trust.²² Accordingly, if the invaded trust granted a beneficiary a power of appointment exercisable in favor of a limited class of appointees, such as the creator's descendants (other than such beneficiary), such power could be granted under the appointed trust.

These provisions are illustrated in the following examples based on Examples 1 and 5, above.

Example 1(c): The appointed trust may grant Beatrix a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of Beatrix, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of Beatrix, the creator or the creator's spouse. Such power may be presently exercisable or exercisable at a later point in time, such as at Beatrix's death. If Beatrix had a testamentary power of appointment exercisable in favor of her descendants under the invaded trust, the appointed trust may grant such power to Beatrix, so long as it is exercisable in the same manner as under the invaded trust.

Example 5(c): The appointed trust may grant Beatrix a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of Beatrix, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of Beatrix, the creator or the creator's spouse. The appointed trust may not grant a power of appointment to Bartholomew because, under the terms of the invaded trust, Bartholomew is only an income beneficiary.

Invaded Trust Type B

Invaded Trust Type B, where an authorized trustee does not have unlimited discretion to invade trust principal, is controlled by EPTL 10-6.6(c). Set forth below are two examples describing situations where an authorized trustee does not have unlimited discretion.

Example 7: T is the trustee of a trust for the benefit of Beatrix. The trust is to terminate when Beatrix attains age 40. Beatrix is age 12. T is required to distribute the income and principal to Beatrix for her health, education, maintenance, and support.

Example 8: T is the trustee of a trust for the benefit of Beatrix (age 12), Bartholomew (age 8), and Benedict (age 6). T is required to distribute income and principal to any of the beneficiaries for their health, education, maintenance, and support until the youngest child attains age 30, at which time the trust terminates and is distributable in equal shares to Beatrix, Bartholomew, and Benedict, or their issue, *per stirpes*.

a. Lifetime Trusts. Assuming the requisite intent and fiduciary duty standards of EPTL 10-6.6(h) are satisfied, an authorized trustee may appoint the principal of the invaded trusts described in Examples 7 and 8 to appointed trusts under EPTL 10-6.6(c) for a term measured by the lifetime of the beneficiaries.²³

This concept is illustrated by the following examples, based on Examples 7 and 8, above.

Example 7(a): T may pay the principal of the trust to an appointed trust for Beatrix's lifetime.

Example 8(a): T may pay the principal of the trust to an appointed trust for the benefit of Beatrix, Bartholomew, and Benedict that will end at the later of Beatrix's lifetime and such time when Beatrix, Bartholomew, and Benedict have all attained age 30.

b. Ability to Expand Distribution Standard if the Trust Term Is Extended. If the authorized trustee pays the assets to an appointed trust for a term that extends beyond the term of the invaded trust, then for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust may include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during the extended term.²⁴ The distribution standard of the appointed trust, however, also must be maintained during such extended period.

The applicable provisions of the statute will vary depending on the trustee's authority to invade principal under the invaded trust.

This provision is illustrated in the following examples based on Examples 7 and 8, above.

Example 7(b): Prior to Beatrix attaining age 40, T can appoint the trust principal to an appointed trust with an extended term, where T has unlimited discretion to make principal distributions to Beatrix after she turns age 40, so long as the appointed trust continues to require distributions to Beatrix for her health, education, maintenance and support for the entire trust period.

Example 8(b): The appointed trust can provide that, once the youngest child attains age 30, T has unlimited discretion to make principal distributions to Beatrix, Bartholomew, or Benedict, provided that the appointed trust continues to retain the same standard of distribution with respect to Beatrix, Bartholomew and Benedict for the entire trust period (even after the term of the invaded trust otherwise would have expired).

c. Beneficiaries and Standard for Distributions. The appointed trust must maintain the same limitations on distributions applicable to the invaded trust and the same beneficiary or class of beneficiaries as the invaded trust. In addition, if a beneficiary or beneficiaries have any vested rights in the invaded trust, such rights cannot be affected.²⁵ Furthermore, consistent with the provisions applicable to Invaded Trust Type A, the provisions of the appointed trust may not reduce, limit, or otherwise change mandatory distributions of income, or mandatory annuity or unitrust interests, or a right annually to withdraw a percentage of the value of the trust, or a right annually to withdraw a specified dollar amount after such annual right to withdraw a percentage or specified dollar amount *has come into effect* with respect to the beneficiary.²⁶

These provisions are illustrated in the following examples based on Examples 7 and 8, above.

Example 7(c): The appointed trust must retain the same standard of distribution (i.e., T is required to

distribute the income and principal to Beatrix for her health, education, maintenance, and support). The appointed trust may not expand T's authority to make distributions or give T greater discretion than T had under the terms of the invaded trust. Note that T may appoint the principal of the invaded trust to an appointed trust even if there is no current need to distribute trust principal to Beatrix for her health, education, maintenance and support.²⁷

Example 8(c): The appointed trust must retain the same standard of distribution (i.e., T is required to distribute the principal to Beatrix, Bartholomew, and Benedict for his or her health, education, maintenance, and support).

d. Power to Appoint. With a limited exception, assets from an Invaded Trust Type B cannot be paid to an appointed trust that grants a power of appointment to a beneficiary that was not granted under the terms of the invaded trust. If the trustee appoints the principal of an Invaded Trust Type B to an appointed trust with an extended term, and if a trustee has unlimited discretion to invade principal during such extended term, such appointed trust may grant a power of appointment to the beneficiary, exercisable during such extended term. The appointed trust, however, must include a power of appointment if the invaded trust included such power, and the class of permissible appointees of such power must be the same as in the invaded trust.

These provisions are illustrated in the following examples based on Examples 7 and 8, above.

Example 7(d): The appointed trust may not grant Beatrix a power of appointment unless she had a power of appointment under the terms of the invaded trust.

Example 8(d): After the term of the invaded trust would have otherwise ended, the appointed trust may grant to any beneficiary of the invaded trust a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of the beneficiary, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse, provided that a trustee also had unlimited discretion to invade principal during such extended term.

Invaded Trust Type C

Invaded Trust Type C is a hybrid of Invaded Trust Type A and Invaded Trust Type B. Specifically, an authorized trustee of Invaded Trust Type C has unlimited discretion to invade principal *and* the ability to pay principal for one or more specific purposes. In this case, it is not necessary for the appointed trust to include the same class of beneficiaries as the invaded trust or the same limitation on distributions that was contained in the invaded trust because, in this case, the provisions of EPTL 10-6.6(b) take precedence over EPTL 10-6.6(c).²⁸

The concept of EPTL 10-6.6(f) is illustrated in the following Example 9:

Example 9: T is the trustee of a trust for the benefit of Beatrix, Bartholomew, and Benedict. The trust is to terminate when the youngest child, Benedict, attains age 25. Beatrix is age 12, Bartholomew is age 8, and Benedict is age 6. T has unlimited discretion to make distributions of principal to any of the beneficiaries. In addition, T is required to distribute income and principal to any of the beneficiaries for their health, education, maintenance, and support.

a. T may pay the principal of the trust to an appointed trust for the benefit of Beatrix, Bartholomew, and/or Benedict. It is not necessary for the appointed trust to be for the benefit of Beatrix, Bartholomew, and Benedict.

b. It is not necessary for the appointed trust to retain the same standard of distribution.

c. The appointed trust may grant to any beneficiary of the invaded trust a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of the beneficiary, the creator, the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

d. If T pays the principal of the invaded trust to an appointed trust for the sole benefit of Beatrix, the appointed trust may grant a power of appointment to Bartholomew even though he is no longer a beneficiary of the trust.

Fiduciary Duty, Standard of Care and Respect for the Creator's Intent

EPTL 10-6.6(h) expressly imposes a fiduciary duty on the authorized trustee and applies a standard of care for purposes of reviewing the authorized trustee's actions. Specifically, the authorized trustee has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power²⁹ and as a prudent person would exercise the power under the prevailing circumstances.

EPTL 10-6.6(h) further provides that the authorized trustee may not exercise the power to appoint if

- there is substantial evidence of the creator's contrary intent; 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 statute confirms that 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.³⁰ (A general prohibition on the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift

clause is not deemed to be a prohibition on the exercise of the power by the authorized trustee.³¹

The bar for preventing the authorized trustee from exercising the power is high: the evidence of the creator's contrary intent must be substantial and not overcome by establishing that the creator would likely have changed his or her intention under the circumstances. If the creator is alive (and not incapacitated), an authorized trustee may wish to seek the creator's input prior to the exercise of the power. (The mere expression by the creator of his or her wishes, which is not binding or controlling on the authorized trustee, should not cause estate tax inclusion in the creator's estate under Internal Revenue Code § 2036 (I.R.C.)) In any event, the new statute requires that the creator, if living, receive notice of the authorized trustee's exercise of the power.³²

Protection of Beneficiaries' Rights

As illustrated by the examples set forth above, the statute protects a beneficiary's vested rights, such as a mandatory right to distributions of income or principal. Furthermore, all persons interested in the trust are required to receive notice of an authorized trustee's exercise of the power, and the exercise does not become effective until 30 days after the date of service (although the persons entitled to notice may consent to a sooner effective date).³³ The notification requirement is especially protective when one considers that a trustee is not required to give notice to any beneficiary prior to making a principal distribution to a beneficiary.

Consistent with prior law, a beneficiary is not required to consent to an authorized trustee's appointment of trust principal in further trust,³⁴ but under the new law a beneficiary is expressly permitted to object to an authorized trustee's exercise of the power³⁵ (although such objection will not prohibit the authorized trustee from paying the assets to the appointed trust). A failure to object is not deemed to be a consent or ratification of the action,³⁶ and no beneficiary (whether such beneficiary objects or is silent) is foreclosed from objecting to an account or compelling a trustee to account after the receipt of notice of the exercise of the power.³⁷

Limitation on Ability to Alter the "Tax Status" of the Trust

Prior to its amendment, EPTL 10-6.6(b) did not specifically protect the "tax status" of a trust. Accordingly, a trustee could pay the assets of the trust to another trust and knowingly – or unknowingly – adversely alter the tax structuring related to the funding or ongoing operation of the invaded trust. As amended, the statute requires the authorized trustee to consider the tax implications of the exercise of the power of appointment.³⁸ The statute also includes a provision to protect and safeguard the tax status and structuring related to the creation of the invaded trust by overriding a trustee's powers under

EPTL 10-6.6(b) and (c) to the extent that such powers could affect any right under the invaded trust that is necessary or required for tax purposes or for the creator or trust to receive certain tax results or benefits for income, gift, estate, or generation-skipping transfer tax purposes.³⁹

For example, if the trustee could appoint trust principal in further trust and eliminate a beneficiary's vested "five and five" withdrawal power, the credit for tax on prior transfers under I.R.C. § 2013 could be lost. Or, if the initial contribution to the invaded trust qualified for the marital deduction under I.R.C. § 2523, the authorized trustee may not pay the assets to another trust that does not qualify for the marital deduction. Similarly, if the initial contribution qualified for the annual gift tax exclusion under I.R.C. § 2503(b), the appointed trust must retain the right of exercise of any outstanding Crummey withdrawal power. If the invaded trust was created under I.R.C. § 2503(c), the appointed trust must retain a beneficiary's right to receive the principal of a trust upon attaining age 21. If the invaded trust initially qualified as a grantor retained annuity trust, the appointed trust must provide for the fixed annuity interest and include all of the other necessary provisions in order for the appointed trust to qualify as a grantor retained annuity trust under I.R.C. § 2702.

These limitations will not prevent the trustee from converting the invaded trust from or to a grantor trust under I.R.C. §§ 671, et seq. While grantor trust status for income tax purposes may be deemed a benefit from a tax perspective, there is nothing contained in the statute that would prohibit an authorized trustee from appointing principal from a grantor trust to a non-grantor trust (or the reverse).

Other Provisions

The new statute also modifies the notification and court filing requirements of the prior law,⁴⁰ settles ambiguities regarding a trustee's commissions,⁴¹ clarifies to which trusts the statute is applicable,⁴² defines key terms used in the statute⁴³ and imposes other limits on the substantive provisions of the appointed trust.⁴⁴

Conclusion

The new statute is a welcome improvement to New York's vanguard statute. It expands the use of the statute and answers questions raised by the prior statute, all while taking steps to protect the rights of beneficiaries and the creator's intent. ■

1. "Principal" is defined under EPTL 10-6.6(s)(8) to include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

2. "Appointed trust" is defined under EPTL 10-6.6(s)(1) as an irrevocable trust which receives principal from an invaded trust (as defined under EPTL 10-6.6(s)(6)) pursuant to the authority granted by the statute, including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust.

3. "Invaded trust" is defined under EPTL 10-6.6(s)(6) as any existing irrevocable *inter vivos* or testamentary trust whose principal is appointed pursuant to the authority granted by the statute.
4. While the prior version of EPTL 10-6.6(b) is silent on this issue, the legislative history confirms that a trustee acting under the prior version of EPTL 10-6.6(b) was authorized to extend the trust term.
5. The act of invading the trust principal and paying the assets to a new trust under this statute commonly is referred to as "decanting"; EPTL 10-6.6(b) sometimes is referred to as the "decanting statute."
6. See Turano, McKinnney's Practice Commentaries EPTL 10-6.6 (the principal goal was to permit trustees to take advantage of generation-skipping transfer tax planning opportunities).
7. See, e.g., Alaska Stat. 13.36.157; Arizona Revised Statutes, § 14-10819; Delaware Code Ann Tit. 12 § 3528; Florida Statute § 736.04117(1); New Hampshire Revised Statutes § 564-B:4-418; North Carolina, N.C.G.S. § 36C-8-816.1; South Dakota Statute § 55-2-15; Tennessee Code Ann. 35-15-816.
8. EPTL 10-6.6(l). The fact that EPTL 10-6.6(b) can be used for myriad purposes, many of which could provide administrative, financial, or other benefits to the beneficiaries, raises the specter that a trustee potentially could be sued for failing to utilize the statute. EPTL 10-6.6(l) confirms that the failure to pay the assets to a new trust does not give rise to trustee liability.
9. EPTL 10-6.6(h).
10. *Id.*
11. EPTL 10-6.6(j), n(1).
12. EPTL 10-6.6(k).
13. EPTL 10-6.6(m).
14. EPTL 10-6.6(g).
15. EPTL 10-6.6(d).
16. It is not necessary for all of the assets of the invaded trust to be appointed to the appointed trust. If the authorized trustee intends to appoint all of the assets comprising the principal of the invaded trust to an appointed trust, however, any subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust shall also be deemed to have been transferred to the appointed trust. In the event that the authorized trustee does not intend to appoint all of the assets from the invaded trust to the appointed trust, any subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust will remain the assets of the invaded trust. See EPTL 10-6.6(i).
17. Under EPTL 10-6.6(s)(2), an "authorized trustee" is defined, with respect to an invaded trust, as any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (1) the creator, or (2) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity). If more than one trustee of the invaded trust qualifies as an authorized trustee, the power may be exercised by any one such trustee only if that trustee could otherwise make principal distributions without another trustee, protector, or other person's consent.
18. All examples are adapted from the New York City Bar Association Report on Legislation by the Trusts, Estates and Surrogates' Courts Committee and Estate and Gift Taxation Committee approving the new legislation.
19. EPTL 10-6.6(e).
20. EPTL 10-6.6(n)(1), which is consistent with the statute prior to its amendment. Notwithstanding the foregoing, the statute facilitates the creation of spendthrift trusts by permitting changes in mandatory rights when the trust pays over to a supplemental needs trust that conforms to EPTL 7-1.12, subject to limitations on changes that would jeopardize any tax benefit received or expected in connection with the contributions to the invaded trust.
21. EPTL 10-6.6(n)(5).
22. EPTL 10-6.6(b)(3).
23. EPTL 10-6.6(e).
24. EPTL 10-6.6(c)(2).
25. For example, if the trust grants a power of appointment, that power of appointment must continue in the appointed trust.
26. EPTL 10-6.6(n)(1). This is consistent with the statute prior to its amendment. See EPTL 10-6.6(b)(1)(A) and (b)(2)(A). As mentioned in the discussion of Invaded Trust Type A, the statute prevents changes in the appointed trust that will negatively impact the tax status of the invaded trust. Changes to mandatory distributions rights could negatively impact the tax status of the invaded trust. This concept is discussed in greater detail below, at "Limitation on Ability to Alter the "Tax Status" of the Trust."
27. EPTL 10-6.6(g).
28. See EPTL 10-6.6(f).
29. The authorized trustee does not have to exercise the power in the best interests of all of the beneficiaries. Indeed, if a trust is for more than one beneficiary, exercising the power to appoint trust principal in further trust for the benefit of only one of the beneficiaries is not in the best interests of all of the beneficiaries.
30. EPTL 10-6.6(h). Note that the statute retains the provision of prior law permitting a trust agreement to override the application of the new statute. EPTL 10-6.6(m).
31. EPTL 10-6.6(m).
32. EPTL 10-6.6(j)(2).
33. EPTL 10-6.6(j). Court approval is not required (although an authorized trustee may seek court approval with notice to all persons interested in the invaded trust). EPTL 10-6.6(j)(1).
34. EPTL 10-6.6(j)(1).
35. EPTL 10-6.6(j)(4).
36. *Id.*
37. EPTL 10-6.6(j)(5).
38. EPTL 10-6.6(o). For example, if the invaded trust qualified as a permitted shareholder of an S corporation within the meaning of I.R.C. § 1361(c)(2), consideration should be given to whether any provision of the appointed trust would disqualify the trust which owns S corporation stock from being a permitted shareholder. Similarly, if the invaded trust owns an interest in property subject to the minimum distribution rules of I.R.C. § 401(a)(9), consideration should be given to the provisions of the appointed trust that could shorten the minimum distribution period to which the property is subject under the terms of the invaded trust.
39. EPTL 10-6.6(n)(5).
40. See EPTL 10-6.6(j). The new statute removes the requirement of prior law that the instrument exercising the power be filed in court, except in those instances where the invaded trust has previously been the subject of a proceeding in the Surrogate's Court. If the trust is a revocable trust that became irrevocable at death and to which a will transferred assets, it is the authors' position that the filing of the revocable trust as part of the probate proceeding should not make the trust the subject of a proceeding in the Surrogate's Court for purposes of determining whether the filing requirement is triggered under the statute. The new statute also states that the creator (if living), any person having authority under the terms of the invaded trust to remove and replace the authorized trustee exercising the power and all persons interested in the trust must be given copies of the instrument exercising the power, the invaded trust, and the appointed trust. The instrument exercising the power is required to state whether the appointment is of all of the assets comprising the principal of the invaded trust or only a part of such assets and, if only a part of such assets, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.
41. See EPTL 10-6.6(q).
42. See EPTL 10-6.6(r).
43. See EPTL 10-6.6(s).
44. See, e.g., EPTL 10-6.6(n)(2) (the appointed trust may not decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence, and prudence) and EPTL 10-6.6(n)(3) (the appointed trust may not eliminate a provision granting another person the right to remove or replace the authorized trustee exercising the power unless a court having jurisdiction over the trust specifies otherwise).