

Decanting in Connection with Divorce

A Case Study

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This article examines trust decanting in connection with dissolution of marriage proceedings within the framework of the Ferri v. Ferri-Powell opinions.

Trust and estate practitioners should be wary of decanting. When a trust is decanted, the trust property is typically transferred to another trust or the same trust with different terms. Decanting has the effect of “amend[ing] an unamendable trust, in the sense that [the trustee] may distribute the trust property to a second trust with terms that differ from those of the original trust.”¹ Thus, when a trust is decanted, there is a risk that the character of the trust property will change. For example, a trust that is property subject to division in a divorce proceeding

can potentially be changed to a trust that is not marital property and thus not subject to division in a divorce.

This article discusses decanting in the context of divorce property divisions. It focuses on four opinions involving the *Ferri v. Ferri-Powell* divorce² to illustrate why practitioners must remain vigilant when dealing with trust decantings.

Decanting Generally

Decanting may be accomplished pursuant to a statutory provision³ or pursuant to judicial doctrine of a state.⁴ Decanting is a relatively new

phenomenon and has recently been employed in a variety of circumstances. “[In] a very real sense, when a trustee decants, [he] rewrites the settlor’s terms for the first trust. An obvious question raised is what limitations exist in regard to such trustee rewrites.”⁵

Without a violation of a specific limitation on a trustee’s decanting power, “it is difficult, if not impossible, to predict how courts will hold trustees accountable for exercising decanting powers. There is very little case law on trust decanting.”⁶ But courts will likely find problematic those exercises of decanting powers that

are inconsistent with other principles of law or that constitute a violation of public policy.

The Colorado Uniform Trust Decanting Act

Colorado adopted its version of the Uniform Trust Decanting Act in 2016.⁷ The Colorado Act permits a trustee to change the dispositive provisions of the trust provided that the trustee has “expanded distributive discretion.” Expanded distributive discretion is defined as sole or absolute discretion (sometimes referred to as “extended discretion”) or the power to distribute for purposes beyond ascertainable standards (such as for a beneficiary’s benefit, comfort, or happiness).⁸ The Colorado Act requires the trustee to give notice of the proposed decanting to “qualified beneficiaries,” who are beneficiaries currently eligible to receive distributions of income or principal, or who would be eligible to receive such distributions in the future.⁹ The Colorado Act differs from the Uniform Act in one very important aspect: the Colorado Act does not affect

(1) whether a beneficial interest in a first trust or second trust is considered property or an asset of a spouse for purposes of distribution of property under the Colorado divorce property division statute; or

(2) the power of a divorce court to fashion remedies between the parties in an action under CRS Title 14.¹⁰

Although the Colorado Act prohibits a decanting from affecting the property division in divorce, it does not affect a decanting made under the laws of another state that governs the trust instrument, or other means of achieving a trust modification.¹¹

The *Ferri* decanting involved consideration of a trust in a Connecticut divorce that was governed by Massachusetts law. The *Ferri* opinions thus shed light on issues Colorado practitioners and courts should consider when facing a trust decanting involving a party to a pending dissolution of marriage proceeding, where the trust is governed by another state’s law.

***Ferri v. Powell-Ferri*: The Facts**

*Ferri*²¹² sets forth the facts of the *Ferri* divorce. As relevant to the topic of trust decanting, *Ferri*,

the husband, was the beneficiary of a trust his father established in 1983 (the 1983 Trust). The 1983 Trust gave husband a right to withdraw portions of the trust property at different ages. One of trustees of the 1983 Trust was husband’s brother, who was also his business partner, and

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the other was an apparently unrelated individual (the trustees).

In 2010, wife filed to dissolve the marriage in Connecticut. While the divorce was pending, in March 2011, the trustees created the Declaration of Trust for Paul John *Ferri*, Jr. (the 2011 Trust).

As with the 1983 Trust, husband was the sole beneficiary of the 2011 Trust. The trustees subsequently distributed substantially all of the assets of the 1983 Trust to themselves. They decanted the 1983 Trust without informing husband and without his consent, out of concern that wife would reach the 1983 Trust assets as a result of the divorce action. According to the trustees, the assets were valued at approximately \$69 million and comprised securities and hedge and investment funds and entities holding Valvoline franchises. At the time the 1983 Trust was decanted, husband possessed the right to withdraw 75% of the trust property.

The terms of the 1983 Trust would likely have created a divisible property interest because it was a usufructory trust.¹³ However, the 2011 Trust was a spendthrift trust, meaning wife’s status as to the trust was that of a creditor, so she had no property interest in that trust. The rights of the trust beneficiaries are generally determined by the law of the governing instrument, but the property division is determined by the law of the divorce tribunal.¹⁴ Here, though the Connecticut court had jurisdiction over the divorce, the trust was governed by Massachusetts law. Thus, the Supreme Court of Connecticut certified questions to the Massachusetts Supreme Judicial Court. The Massachusetts court held the decanting to be valid. The Connecticut court accepted that ruling and likewise determined the decanting to be valid in the divorce case.

Meanwhile, while the divorce was pending, the trustees brought a declaratory judgment action against husband and wife in Connecticut seeking a declaration that (1) they validly exercised their powers under the 1983 Trust to distribute and assign the property and assets held by them as trustees of the 1983 Trust to the 2011 Trust; and (2) wife had no right, title, or interest, directly or indirectly, in the 2011 Trust. Wife moved for summary judgment, which the court granted. The court ordered restoration of 75% of the assets of the 2011 Trust (as they were held in the 1983 Trust) and an accounting of the 2011 Trust from inception to the date of restoration. It also awarded wife reasonable attorney fees.

A detailed discussion of these opinions follows.

Ferri 1: The 2015 Dissolution of Marriage Appeal

In *Ferri 1*,¹⁵ wife appealed various financial orders the trial court entered in the dissolution of marriage. The dispositive issue was whether the trial court properly rendered summary judgment in favor of husband on wife's cross complaint on the ground that it failed to plead a legally sufficient cause of action.

In the divorce, wife filed a cross-complaint alleging that husband breached his duty to preserve marital assets during the pendency of their dissolution action by failing to take affirmative steps to contest the decanting of the 1983 Trust. She subsequently filed amended counterclaims alleging claims of common law and statutory fraud, civil conspiracy, breach of fiduciary duty, breach of loyalty, and tortious interference with an expectancy.

The trial court found that husband "did not have a role in creating the 2011 trust or decanting any of the assets from the 1983 trust."¹⁶ The trial court further found that husband took no action to recover assets when he was informed by his brother about the decanting, noting that husband's reasoning for his inaction was that he "[did] not want to sue his family."¹⁷ The trial court ruled favorably on husband's motion for summary judgment, holding that wife failed to state a cause of action.

The trial court's opinion focused on the parties' fiduciary duties. It struck wife's fraud and conspiracy claims, stating "that while marital partners have a fiduciary responsibility of full and open disclosure to each other, that responsibility does not extend to require spouses to recover assets belonging to the marital estate."¹⁸ Apparently, the Connecticut Supreme Court agreed with this limitation of fiduciary responsibility; it concluded that Connecticut does not require a party to a dissolution action to take affirmative steps to recover marital assets taken by a third party, and it affirmed the trial court's judgment.

Colorado practitioners should take note of these general fiduciary principles as they apply to the marital relationship. Fiduciary relationships, such as those between a trustee and beneficiary, partners in a partnership, or officers and shareholders of a corporation, are

sometimes referred to as "formal" fiduciary relationships. "[A] fiduciary duty arises when one party has a high degree of control over the property or subject matter of another, or when the benefiting party places a high level of trust and confidence in the fiduciary to look out for

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the beneficiary's best interest," and it may arise "when a party relies on another's higher degree of expertise in an area."¹⁹ But while "a fiduciary duty encompasses a duty of good faith and fair dealing, the converse is not true . . . the duty of good faith and fair dealing merely requires the parties to 'deal fairly' with one another"; unlike a

fiduciary duty, it does not require a party to put the other party's interest before his or her own.²⁰ The burden of proving a fiduciary relationship lies with the party asserting the relationship.²¹

As a general rule, marriage does not automatically create a fiduciary relationship. But similar to other relationships, marriage may create a "confidential relationship," which is a fact-based fiduciary relationship that imposes fiduciary duties.²² "A confidential relationship arises when one party justifiably reposed confidence in another;"²³ it may arise from different circumstances, but its essential feature is that the party reposing trust must be justified in his or her belief that the party in whom trust is reposed will act in the interests of the party reposing trust.²⁴

Ferri 2: The 2017 Massachusetts Opinion

*Ferri 2*²⁵ was the Massachusetts Supreme Judicial Court's decision on the Connecticut Supreme Court's certified questions. The central question the Connecticut court presented to the Massachusetts court was whether, under Massachusetts law, the terms of the 1983 Trust allowed the trustee to distribute "substantially all of its assets (that is, to decant)" to the 2011 Trust.²⁶ In 2013, the Massachusetts Supreme Judicial Court had held that under common law a trustee is permitted to decant without the beneficiaries' consent or court approval.²⁷ In *Ferri 2*, the court held that "after having examined the extremely broad authority and discretion afforded the trustees by the 1983 Trust . . . we concluded that the terms of the 1983 Trust, read as a whole, demonstrate the settlor's intent to permit decanting."²⁸ Thus, the court held that the decanting was permitted under Massachusetts law.

However, the concurring opinion was careful to limit the court's holding and suggested that the decanting might have been found to be contrary to public policy and disallowed under Massachusetts divorce law. The concurrence noted that the court did not decide "whether Massachusetts law will permit trustees in Massachusetts to create a new spendthrift trust and decant to it all the assets from an existing non-spendthrift trust where the sole purpose of

the transfer is to remove the trust's assets from the marital assets that might be distributed to the beneficiary's spouse in a divorce action."²⁹ The court hinted that had the Connecticut Supreme Court presented this specific question, it likely would have held the decanting void as contrary to public policy.³⁰

Ferri 3: The Second Dissolution of Marriage Appeal

*Ferri 3*³¹ was wife's appeal of the dissolution of marriage action following resolution of the certified questions from the Massachusetts court. Among other issues, in *Ferri 3* wife asserted that the trial court incorrectly (1) determined that she did not contribute to the 1983 Trust, (2) denied her motion for contempt, and (3) determined that the 2011 Trust was not a marital asset.

Wife contended that she contributed to the trust by providing homemaking and childcare activities, which allowed husband to develop the business assets of the trust, and that she donated tax refunds to the trust. The appellate court attributed no value to these activities, and it found that the trust was used for investment purposes, not daily living expenses.³² It reasoned that the Massachusetts Supreme Judicial Court held the decanting to be valid, and under Connecticut law the trial court had properly weighed the statutory factors and wife's alimony of \$25,000 a month in fashioning the property division.

Wife also claimed that the trial court should have cited husband for contempt for failure to attempt to recover the assets of the decanted trust. She argued that the decanting constituted a dissipation of the assets. The appellate court stated that husband was under no duty to recover the assets from a third party.³³ He neither participated in the decanting nor knew about it. Further, the appellate court noted that courts have judicially recognized dissipation in the contexts of "gambling, support of a paramour, or the transfer of an asset to a third party for little or no consideration."³⁴ The appellate court stated that wife "failed to convince us that [husband's] failure to bring an action against the trustees was equivalent to a dissipation of marital property,"³⁵ and "[n]othing in our rules of practice requires a party to file an action

DECANTING CONSIDERATIONS DURING A DIVORCE

When either party to a divorce has a trust asset, practitioners must consider how decanting may affect the classification of that asset. Practitioners should consider the following factors.

Jurisdiction. The family law court in Colorado has jurisdiction over divorce proceedings, but it may need to apply another state's law if that state's law governs the trust.

Notice. If a decanting occurs, notice may not be required, but it may be beneficial to provide notice to a party who is not required to receive it.

Standing. Decide who has the ability to challenge a decanting.

Trust Distributions. If distributions were previously made, determine if they were regular and whether they stopped in connection with the pending divorce.

Timing. Determine whether the decanting was done in anticipation of the divorce.

against a third party whenever he or she may have a viable cause of action."³⁶

Wife argued that even if the trustees acted lawfully and husband believed their actions were in his best interest, he nevertheless had a concrete chose in action for breach of fiduciary duty against the trustees that the trial court should have considered as a marital asset. The appellate court found that wife failed to establish that husband had a chose in action that the trial court could have distributed. It cited *Mickey v. Mickey*³⁷ for the Connecticut rule of law that a chose in action can be classified as an intangible property interest subject to distribution only if a party had an existing cause of action for breach of fiduciary duty at the time of dissolution.

The fact that husband did not play a role in creating the decanted trust was critical to the finding of no dissipation of assets. This fact, combined with the court's view that the trust was used during the marriage for investment purposes and not daily living expenses, were key to the appellate court's ruling in favor of husband.

Ferri 4: The Declaratory Action Appeal

*Ferri 4*³⁸ was the appeal by the trustees and husband from the declaratory judgment action.

The Connecticut Supreme Court concluded that the trial court incorrectly determined the trustees did not have authority to decant the 1983 Trust and, accordingly, reversed on that issue.

A key issue was whether wife had standing to challenge the trustees' action of decanting the 1983 Trust. The trustees claimed that the trial court incorrectly concluded that wife had standing to challenge their actions of decanting the 1983 Trust and to assert her counterclaims against them in connection with their actions as trustees because she was not a beneficiary of the 1983 Trust. As an initial matter, the Connecticut Supreme Court determined that because standing is a procedural issue, Connecticut law governed.³⁹ The court stated:

Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue. . . . Standing requires no more than a

colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .⁴⁰

The Court held that wife had standing by relying on the *Restatement (Second) of Trusts*, which states:

A person who has an interest in the subject matter of trust, although he is not a beneficiary of the trust, can maintain a suit against the trustee to prevent injury to his interest in the subject matter of the trust. This is not a suit, however, to enforce the trust. Thus, if the trustee of a term of years threatens to commit waste, the remainderman can maintain a suit to enjoin him.⁴¹

Accordingly, the court concluded that the trustees' actions frustrated wife's equitable claim to a marital asset, namely, the 1983 Trust.⁴² Therefore, she had standing to challenge the decanting.⁴³

The next logical question is whether a spouse's interest in a trust could be considered the subject matter of the trust while the spouse's rights are inchoate. It can be argued that a spouse's inchoate interest is different than the remainderman example in the *Restatement* comment above because a remainderman's interest can be considered more substantial than a spouse's inchoate interest during the marriage.

Takeaways for Colorado Practitioners

Colorado practitioners should ponder how a Colorado court would decide the issues presented in the *Ferri* cases. As an initial matter, the 1983 Trust interest might have constituted divisible marital property under Colorado law.⁴⁴ Marital property comes into existence only when a petition for a divorce or legal separation is filed because it is an inchoate interest that does not exist before the filing of the petition.⁴⁵ If the decanting occurred before the dissolution of marriage, arguably the wife would have no interest in the trust. But note *Michaelson v. Michaelson*,⁴⁶ in which the Colorado Supreme Court stated that "[f]rom marriage, a wife has an inchoate interest in her husband's property 'equitable though unadjudicated,'"⁴⁷ but when a petition for divorce is filed, a "vesting takes

place."⁴⁸ Put another way, until a petition for divorce is filed, marital property is akin to an elective share right in that one's right to an elective share in his or her spouse's property does not arise until death. This issue raises uncertainty as to whether a decanting will be upheld when it occurs either before or after the filing of a Colorado divorce, when it is meant to deprive a spouse of a divisible trust interest.

Author Chorney has opined that "it may be necessary for the courts to later explore the uncharted waters of both trust and matrimonial law as to whether a former spouse has standing with respect to a trust in connection with a claim

arising from a property division."⁴⁹ Apparently that time has come. Decanting is a powerful tool that has the broad potential to change what previously was very difficult to change. As a result, "implementing a sensible approach to decanting will not be easy."⁵⁰ It is uncertain how a Colorado court would rule concerning a trust that was modified on the eve of a divorce proceeding. It is likely that a decanting that occurred well in advance of the pendency of a divorce proceeding would be judged less harshly. But depending on the circumstances, public policy considerations could persuade a court's findings on the propriety of a decanting. CL



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NOTES

1. *Ferri v. Powell-Ferri*, 72 N.E. 3d 541, 546 (Mass. 2017).
2. *Ferri v. Powell-Ferri*, 116 A.3d 297 (Conn. 2015) (hereinafter *Ferri 1*); *Ferri v. Powell-Ferri*, 72 N.E. 3d 541 (hereinafter *Ferri 2*); *Ferri v. Powell-Ferri*, 165 A.3d 1124 (Conn. 2017) (hereinafter *Ferri 3*); and *Ferri v. Powell-Ferri*, 165 A.3d 1137 (Conn. 2017) (hereinafter *Ferri 4*).
3. See Bart, Summaries of State Decanting Statutes, <https://www.ACTECorg/assets/1/6/Bart-State-Decanting-Statutes.pdf>.
4. See, e.g., *Morse v. Kraft*, 992 N.E.2d 1021 (Mass. 2013), discussed below.
5. Newman, "Trust Law in the Twenty First Century: Challenges to Fiduciary Accountability," 29 *Quinnipiac L.J.* 261, 289 (2016).
6. *Id.* at 291.
7. CRS §§ 901 et seq. See Broderick, "Modifying Irrevocable Trusts Under the New Colorado Uniform Trust Decanting Act," 45 *Colo. Law.* 55 (Nov. 2016), for a discussion of the Act.
8. See CRS § 15-16-902(11).
9. CRS § 15-16-902(20).
10. CRS § 15-16-903(6)(a). This provision was adopted as a result of input from the Colorado Bar Association Family Law Section.
11. Such modifications could occur under the deviation doctrine (what the settlor would have intended had the circumstances in question been anticipated) or by a power of appointment held in a fiduciary capacity,

- assuming that applicable state law defines such a power as a power of appointment.
12. *Ferri 2*, 72 N.E. 3d 541.
 13. The term "usufructory" is used here to mean a trust that does not constitute "property" in divorce. It is usually a multi-generational trust or a trust that has several beneficiaries. For a discussion of when a trust interest constitutes a divisible property interest, see Chorney, *Trusts in Divorce Property Divisions*, ch. 2 (2d ed. CLE in Colo., Inc. 2014).
 14. See, e.g., *Tremaine v. Tremaine*, 663 A.2d 387 (Conn. 1995).
 15. *Ferri 1*, 116 A.3d 297.
 16. *Ferri 1*, 116 A.3d at 300.
 17. *Id.* at 301.
 18. *Id.*
 19. *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo.App. 1992).
 20. See *Wil-Roye Inv. Co. II v. Wash. Mut. Bank, F.A.*, 142 S.W.3d 393, 409 (Tex.App. 2004).
 21. *Ferri 2*, 165 A.3d at 546-547.
 22. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). See also *Yousif v. Yousif*, 814 NE. 2d 14 (Mass.App. Ct. 2004); *Lasater v. Guttmann*, 5 A.3d 79 (Md. App. 2010); *Restatement (Second) of Trusts*, § 2, cmt. B (American Law Institute 1959). When fiduciary duties exist, the fiduciary has an obligation to the beneficiary that includes a duty to act in the beneficiary's best interests even if it disadvantages the fiduciary. Often, the remedy is the imposition of a constructive trust

on the property in question. See Anderson, "The Wolf at the Campfire: Understanding Confidential Relationships," 53 *SMU L. Rev.* 315, for a discussion of fact-based fiduciary relationships, including those between spouses. California law is an exception; Ca. Fam. Code § 721(b) provides that spouses automatically have fiduciary duties that are subject to the same rights and duties of non-marital business partners.

23. *Page v. Clark*, 592 P.2d at 798.

24. *Id.*

25. *Id.*

26. *Id.*

27. See *Morse*, 992 N.E.2d 1021.

28. *Ferri 2*, 72 N.E. 3d 541.

29. *Id.* at 552.

30. The wife's argument was successful in *Hartog v. Hartog*, 623 N.Y.S. 2d 537 (N.Y. 1995), where the non-owner spouse was deemed a contributor to the value of the business assets by reason of her homemaking and childcare activities.

31. *Ferri 3*, 165 A.3d 1124, 1133.

32. *Id.* at 1131-32.

33. *Id.* at 1132.

34. *Id.*

35. *Id.*

36. *Id.* at 1133.

37. *Mickey v. Mickey*, 974 A.2d 641 (Conn. 2009).

38. *Ferri 4*, 165 A.3d at 1143.

39. *Id.* at 1144.

40. *Id.* at 1143.

41. *Id.* at 1137.

42. *Id.* at 1145 (quoting *Restatement (Second) of Trusts* § 200, cmt. (d)).

43. *Id.* at 1145.

44. See *In re Marriage of Balanson*, 25 P.3d 28, 38 (Colo. 2001) ("The value and income-generating potential of a spouse's separate property may constitute an economic circumstance in determining an equitable distribution of marital property."); Chorney, *supra* note 13 at 68-69. Authority for the contrary view lies in *Univ. Nat. Bank v. Rhoadarmer*, 827 P.2d 561, 564 (Colo.App. 1991), which held that "property subject to a donee's general power of appointment is available to his creditors only if the power is exercised."

45. In *In re Questions Submitted by United*

States Dist. Court Concerning C.R.S. 1963, 41-1-5 and 1971 Perm. Supp., C.R.S. 1963, 46-1-113, 517 P.2d 1331, 1334-35 (Colo. 1974), the Court stated "[e]xcept for those rights which vest upon the filing of the divorce action, we in no way change the Colorado law that a husband's property is free from any vested interest of the wife and with a possible exception or two, he can sell it or give it away."

46. *Michaelson v. Michaelson*, 884 P.2d 695 (Colo. 1994), *rev'd* 939 P.2d 835.

47. *Id.* at 702 (citations omitted).

48. In *re Questions Submitted by United States Dist. Court*, 517 P.2d at 1335.

49. Chorney, *supra* note 13 at 100.

50. Sterk, "Trust Decanting: A Critical Perspective," 38 *Cardozo L. Rev.* 1993 (2017). An interesting dilemma for the trustees was whether to serve notice to the wife. They decided to serve her, but it is peculiar to serve someone and then argue they do not have standing.

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