



**NEW YORK  
CITY BAR**

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**REPORT ON LEGISLATION BY THE  
TRUSTS, ESTATES AND SURROGATES' COURTS COMMITTEE AND  
ESTATE AND GIFT TAXATION COMMITTEE**

**A.8297-A  
S.5801**

**M. of A. Weinstein  
Sen. Bonacic**

AN ACT to amend the estates, powers and trusts law, in relation to the exercise of a power of appointment and an authorized trustee's authority to invade trust principal; and to repeal certain provisions of such law relating thereto.

**THIS BILL IS APPROVED<sup>1</sup>**

Section 10-6.6(b) of the Estates, Powers and Trusts Law permits a trustee who has authority to invade trust principal to exercise that power by appointing the principal to a new trust. The act of invading the trust principal under this statute is called “decanting”. The proposed legislation expands the existing statute but includes provisions aimed at preserving the settlor’s intent and protecting the rights of beneficiaries.

The proposed legislation permits a trustee to pay over the principal of a trust to a new trust even if the trustee does not have absolute or unlimited discretion to invade the principal of the trust; clarifies the operation of the statute in the context of a multi-beneficiary trust; clarifies the extent a power of appointment can be granted to a beneficiary in the new trust; protects the interests of beneficiaries that are vested absolutely; includes provisions aimed at protecting certain tax results that could otherwise be lost as a result of paying the assets to a new trust; prescribes a fiduciary duty and a standard of care for the exercise of the pay over to a new trust; and clarifies the compensation that a trustee may receive if a trust is paid to a new trust.

In an effort to facilitate an understanding of the bill, we have attached an Appendix that gives examples illustrative of the application of the proposed legislation. Each example is intended to make one or more specific points about the proposed legislation and is not intended to address all possible results stemming from the facts presented. Rather, the examples are meant to demonstrate the practical application of the bill in a number of trust situations and to highlight the beneficial flexibility that would be provided by the new law, particularly where the facts involve a change in a beneficiary’s circumstances.

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<sup>1</sup> This bill was introduced at the request of the Office of Court Administration and is based on a proposal drafted by the Trusts, Estates and Surrogates’ Courts Committee and the Estate and Gift Taxation Committee of the New York City Bar Association (the “Committees”). The Committees fully support the bill in its current form and encourage its enactment.

This proposed legislation will be a model for other states, just as New York's original enactment of Section 10-6.6(b) was such a model in 1992. The Trusts, Estates and Surrogates' Courts Committee and the Estate and Gift Taxation Committee of the New York City Bar Association endorse the enactment of the proposed legislation.

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[Attached: Appendix of Case Examples]

## APPENDIX: CASE EXAMPLES UNDER THE PROPOSED LEGISLATION

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.

- (a) T may pay the principal of the trust to an appointed trust for Beatrix to continue for her entire lifetime.
- (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' health, education, maintenance, and support).
- (c) T may grant Beatrix a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of the beneficiary, the creator, or 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. Such power may be presently exercisable or exercisable at a later point in time, such as at death.

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.

- (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.
- (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.
- (c) The appointed trust may contain the same unlimited discretion standard contained in the invaded trust or include a narrower standard (*e.g.*, the appointed trust may provide that distributions shall be made to Beatrix, Bartholomew, and Benedict only for their health, education, maintenance, and support).

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.

- (a) T must pay one-third of the principal outright to Beatrix. T may pay the balance of the principal of the trust to an appointed trust for Beatrix' lifetime.
- (b) The appointed trust may retain the same unlimited discretion standard contained in the invaded trust or include a narrower standard (*e.g.*, the appointed trust may provide that distributions shall be made to Beatrix only for her health, education, maintenance, and support).

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.

- (a) T may pay the principal of the trust to an appointed trust for Beatrix' lifetime.
- (b) The appointed trust must give Beatrix the right to receive all of the trust income.
- (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 the beneficiary, the creator, or 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.

Example 5: 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 12. T has unlimited discretion to make principal distributions to Beatrix.

- (a) T may pay the principal of the trust to an appointed trust for Beatrix' lifetime.
- (b) The appointed trust does not have to provide for all of the trust income to be paid to Beatrix upon reaching the age of 25.

Example 6: T is the trustee of a trust for the benefit of Beatrix. Beatrix is entitled to withdraw the greater of \$5,000 or five percent of the trust principal on the last day of each calendar year. The trust is to terminate at Beatrix' death. T has unlimited discretion to make principal distributions to Beatrix.

- (a) T may pay the principal of the trust to an appointed trust for Beatrix' lifetime or for a shorter trust term.
- (b) The appointed trust must give Beatrix the right to withdraw the greater of \$5,000 or five percent of the trust principal on the last day of each calendar year.
- (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 the beneficiary, the creator, or 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.

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.

- (a) T may pay the principal of the trust to an appointed trust for Beatrix' lifetime.
- (b) 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 in the invaded trust.

- (c) The appointed trust may not grant any beneficiary a power of appointment unless such power was granted in the invaded trust.
- (d) Once Beatrix attains age 40, if the trust is still in existence, the appointed trust can provide that T has unlimited discretion to make principal distributions to Beatrix. In addition, the appointed trust must retain the same standard of distribution even after the term of the invaded trust would have otherwise ended.

Example 8: 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, or 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.

Example 9: 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) 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' lifetime and such time when all of Beatrix, Bartholomew, and Benedict attain age 30.
- (b) 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).
- (c) Once the youngest child attains age 30, if the trust is still in existence, the appointed trust can provide that T has unlimited discretion to make principal distributions to Beatrix, Bartholomew, or Benedict. In addition, the appointed trust

must retain the same standard of distribution even after the term of the invaded trust would have otherwise ended.

- (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, or 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.

Example 10: 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' mother. Beatrix has two brothers and three sisters. T has unlimited discretion to make principal distributions to Beatrix.

- (a) T may pay the principal of the trust to an appointed trust for Beatrix for Beatrix' entire lifetime.
- (b) The remainder beneficiaries of the trust may be Beatrix' brothers and may exclude Beatrix' sisters.

Example 11: T is the trustee of a trust for the benefit of Beatrix and her spouse. The trust is to terminate when Beatrix attains age 40. Beatrix is age 30 and has no spouse. T has unlimited discretion to make principal distributions to Beatrix.

- (a) T may pay the principal of the trust to an appointed trust for Beatrix and her spouse for Beatrix' entire lifetime. Alternatively, T may pay the principal of the trust to an appointed trust only for Beatrix for her entire lifetime.
- (b) The appointed trust may be for the benefit of Beatrix and her spouse if she subsequently marries (even if she marries after age 40).
- (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 the beneficiary, the creator, or 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.

Example 12: T is the trustee of a trust for the benefit of Beatrix and her issue. The trust is to terminate when Beatrix attains age 40. Beatrix is age 30 and has one daughter. T has unlimited discretion to make distributions of principal to Beatrix and her issue.

- (a) T may pay the principal of the trust to an appointed trust only for Beatrix for Beatrix' entire lifetime.
- (b) 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 the beneficiary, the creator, or 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.

- (c) The appointed trust may grant to the youngest of Beatrix' children even though such child may or may not yet be living either a general power of appointment or a special power of appointment only excluding as permissible appointees one or more of the beneficiary, the creator, or 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) Alternatively, the appointed trust may include all of Beatrix' issue, even issue who are not yet lives in being.
- (e) The appointed trust may grant Beatrix' daughter, even though she is no longer a beneficiary of the 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, or 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.

Example 13: 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.

- (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. If the trust is also for the benefit of Bartholomew, Bartholomew may only receive distributions of income.
- (b) The appointed trust may retain the same unlimited discretion standard contained in the invaded trust or contain a narrower standard but cannot authorize distributions of principal to Bartholomew.
- (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 the beneficiary, the creator, or 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) The appointed trust may not grant a power of appointment to Bartholomew because under the terms of the invaded trust Bartholomew was only an income beneficiary.

Example 14: T is the trustee of a trust for the benefit of Beatrix. The trust is to terminate when Beatrix attains age 50. T has unlimited discretion to make principal distributions to Beatrix. The invaded trust is a trust to which the creator of the invaded trust is not considered the owner under Subpart E of Part I of Subchapter J of Chapter 1 of Subtitle A of the Internal Revenue Code (the "Code"). The authorized trustee can pay the principal of the trust to a trust that is a trust which the creator is considered the owner of under the Code.

Example 15: T, an individual, is the trustee of a trust for the benefit of Beatrix. Beatrix is entitled to receive one-half of the principal at age 40 and all of the remaining principal at age 50. If Beatrix dies before attaining age 50, the principal is payable to her issue, or if none, to the issue of her parents. Beatrix is age 30. T has unlimited discretion to make principal distributions to Beatrix. T is entitled to receive commissions in such amounts as the laws of the State of New

York in effect from time to time allow and has taken a full statutory commission pursuant to surrogate's court procedure act section 2309 each year.

(a) T may pay the principal of the trust to an appointed trust for the benefit of Beatrix for Beatrix' entire lifetime.

(b) T may continue to receive statutory commissions from the appointed trust.

Example 16: T, a corporation, and Beatrix, an individual (who is Bartholomew's guardian), are trustees of a trust for the benefit of Bartholomew. Bartholomew is age 12, is an orphan, and lives with his guardian, Beatrix. Bartholomew is entitled to receive all of the principal at age 25. The trustees have unlimited discretion to make principal distributions to Bartholomew. T has taken compensation in accordance with its regularly published schedule of compensation. Beatrix is entitled to \$5,000 of commissions each year.

(a) T and Beatrix may pay the principal of the trust to an appointed trust for the benefit of Bartholomew that will end when Bartholomew attains age 40.

(b) For acting as trustee of the appointed trust, T may receive compensation in accordance with its regularly published schedule of compensation in effect at the time such compensation is paid and Beatrix may receive \$5,000 of commissions each year. Beatrix may not receive additional compensation over the \$5,000 each year; in order to receive such additional compensation, Beatrix will have to apply to the court with jurisdiction over the trust.