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Steve Leimberg's Estate Planning
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Subject: Sharon L. Klein on *Ferri vs. Powell* - Connecticut Supreme Court Finds that Trust Assets Were Moved Out of Reach of Divorcing Spouse, But Would Be Considered for Alimony Purposes

"In an on-going case involving access to trust assets in divorce, the Connecticut Supreme Court found that trust assets were moved out of reach of a divorcing wife through a 'decanting process,' but considered for alimony purposes. While about half the states provide statutory authority to decant, most states require that notice be given to beneficiaries.

It was important in the Ferri case that the decanting occurred without the Husband's permission, knowledge or consent. Query if the same result would follow if a beneficiary was given notice of the decanting, or whether notice alone would not alter the Connecticut Supreme Court's holding that Husband took 'no active role in planning, funding or creating the 2011 Trust' (emphasis added). Including decanting provisions in trust instruments may maximize flexibility without having to rely on state default law."

Sharon L. Klein provides members with timely commentary on the Connecticut Supreme Court's decision in the continuing saga of *Ferri v. Powell*.

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Here is Sharon's commentary:

EXECUTIVE SUMMARY:

In an on-going case involving access to trust assets in divorce, the Connecticut Supreme Court found that trust assets were moved out of reach of a divorcing wife, but considered for alimony purposes.

FACTS:

In *Ferri v. Powell-Ferri*, 476 Mass. 651 (2017), Husband was the beneficiary of a trust (the 1983 Trust) created by his Father under which he had the right to receive the trust assets at certain ages. The trust was valued between $69 – $98 million. The trustees, who were concerned divorcing Wife would reach trust assets, transferred the assets to a new trust (the 2011 Trust) without the knowledge or consent of Husband. At the time of the creation of the 2011 Trust, Husband had a right to request 75% of the 1983 Trust, and during the course of the legal proceedings, his right matured to 100%. The 2011 Trust extinguished Husband's power to request trust assets at stated ages, making distributions solely discretionary with the trustees. The process of transferring the original trust assets to a new trust with different terms is known as decanting. Wife had filed to dissolve the marriage in Connecticut. The trusts were settled in

Massachusetts. The Connecticut Supreme Court asked the Supreme Judicial Court of Massachusetts to determine whether the trustees, one of whom was Husband's brother, validly exercised their powers under the 1983 Trust to distribute the trust property to the 2011 Trust.

Decanting Was Authorized under Trust Instrument – Trustees Were Permitted to Create a New Trust with Different Terms

Relying on a previously decided Massachusetts case, Morse v. Kraft, 466 Mass. 92 (2013), the Supreme Judicial Court of Massachusetts held that there is no inherent decanting power under Massachusetts law. A trustee's decanting authority turns on the facts of each case and the terms of the trust. The Court noted that the rationale underlying the authority to decant is that, if a trustee has the discretionary power to distribute property to or for the benefit of the beneficiaries, the trustee likewise has the authority to distribute the property to another trust for the benefit of those same beneficiaries. The Court looked to the extremely broad discretion afforded the trustees by the 1983 Trust, the anti-alienation provision, the beneficiary withdrawal rights, and the settlor's affidavit regarding his intent in creating the trust. It concluded that the terms of the 1983 Trust, read as a whole, demonstrated the settlor's intent to permit decanting. The Court found that the beneficiary's withdrawal rights were not inconsistent with the decanting power, with the trustees maintaining full legal title to the trust property and the ability to exercise their fiduciary duties over "withdrawable" trust assets until those assets were distributed. According to the Court, because Father intended to convey to the trustees almost unlimited discretion to act, the conclusion that the settlor intended to authorize decanting seemed to follow necessarily. The Court only answered the questions certified to it, and did not rule on whether the trust assets must be considered in the divorce, including for alimony purposes.

Query if Same Result Would Have Followed if Husband Were Involved in Decision to Create New Trust

In a concurring opinion of the Court, it was emphasized that "under Connecticut law, the public policy that would prevent one spouse during a divorce proceeding from transferring marital assets to deprive the other spouse of those assets did not apply here because it was undisputed that the beneficiary husband did not have a role in creating the new 2011 Trust." The trial court had found that the trustees of the 1983 Trust, as

noted one of whom was Husband's brother, did not consult with Husband before taking these steps to frustrate Wife's equitable claim to these assets. The concurring opinion did not "offer any prediction as to whether this court might invalidate as contrary to public policy a new spendthrift trust created for the sole purpose of decanting the assets from an existing non-spendthrift trust in order to deny the beneficiary's spouse any equitable distribution of these trust assets."

The bottom line: The Massachusetts Court determined that decanting was authorized under the trust instrument. It did not rule on whether the trust assets must be considered in the divorce, including for alimony purposes.

COMMENT:

The Connecticut Supreme Court has just issued two opinions in the Ferri matters, one related to the decanting, the other related to the divorce action.

Action for Declaratory Judgment: Decanting was Authorized (*Ferri v. Powell-Ferri*, SC19432, SC19433)

The trustees sought a judgement declaring that they were authorized to decant assets to the new trust, and that Wife had no right or interest in those assets. The Connecticut Supreme Court adopted the opinion of the Massachusetts Supreme Judicial Court, and held that the decanting was proper.

The Connecticut Supreme Court did affirm the determination of the Connecticut trial court that Wife had standing to challenge the trustees' actions because their actions regarding the original trust directly affected the dissolution court's ability to make equitable financial orders in the underlying dissolution action. Under Connecticut law, the 1983 Trust was a marital asset because Husband had an absolute right to withdraw up to 75%, and later 100% of the principal.

The Court also rejected the Wife's argument that because Husband was entitled to 75% of the trust at the time of the divorce, the 2011 trust was actually reachable because it was self-settled. The Court noted that there was no dispute that the trustees created the 2011 Trust and decanted the

1983 Trust assets without informing the beneficiary in advance and without his permission, knowledge or consent. Because Husband took no active role in planning, funding or creating the 2011 Trust, the Court could find no authority for the proposition that it should be considered self-settled.

Action for Dissolution of Marriage: 2011 Trust not Marital Asset, but Could be Considered in Alimony Determination (*Powell-Ferri v. Ferri*, SC19434)

The Court noted that the Massachusetts Supreme Judicial Court determined that the decanting was appropriate: "Consequently, the assets from the 1983 Trust cannot be considered as part of the dissolution judgement..." With regard to the 2011 trust, because that was a spendthrift trust (protected from creditors), it was not considered an asset of the marital estate that the Court could divide under Connecticut law.

Wife's status was that of a creditor and the Court held that, although the Court could divide the assets while they were held in the 1983 Trust, it could not reach them once they were moved into the 2011 Trust – the decanting was successful in removing the assets from division.

However, the Court noted that, although the trial court could not consider the assets decanted to the 2011 trust for equitable distribution purposes, it could and did consider Husband's ability to earn additional income when creating its alimony orders. The trial court found that the trust funds had routinely supported Husband's investments. Notably, the trial court ordered Husband to pay Wife $300,000 in alimony annually, despite the fact that, when the action was commenced, he had been earning only $200,000 annually.

Some Further Thoughts About Decanting

Note that about half the states provide statutory authority to decant. Most states require that notice be given to beneficiaries. It was important in the Ferri case that the decanting occurred without the Husband's permission, knowledge or consent. Query if the same result would follow if a beneficiary was given notice of the decanting, or whether notice alone would not alter the Connecticut Supreme Court's holding that Husband took "no *active* role in planning, funding or creating the 2011 Trust" (emphasis added). Including decanting provisions in trust instruments may maximize flexibility

without having to rely on state default law.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Sharon L. Klein

CITE AS:

LISI Estate Planning Newsletter #2578 (September 6, 2017) at http://www.leimbergservices.com.

CITES:

Ferri v. Powell-Ferri, 476 Mass. 651 (2017), *Ferri v. Powell-Ferri*, SC19432, SC19433, *Powell-Ferri v. Ferri*, SC19434, *Morse v. Kraft*, 466 Mass. 92 (2013).