

The Weekly Scenario: Trust Decanting

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What is trust decanting?

Trust decanting is the act of distributing assets from one trust to a new trust with different terms for one or more beneficiaries of the first trust. As I have heard some practitioners say, 'just as you can decant wine by pouring it from its original bottle into a new bottle, leaving the 'unwanted' sediment in the original bottle, the distribution trustee can pour the assets from one trust into a new trust, leaving the unwanted terms in the original trust.'

For years, practitioners have struggled to find ways to change the terms of an irrevocable trust. However, through the decanting statutes that have been enacted in many jurisdictions, it is now possible to modify an irrevocable trust by having the trustee distribute the trust assets into a new or different irrevocable trust for one or more of the same beneficiaries of the first trust.

Not all states allow decanting through their own state statutes. There are 31 states that have decanting statutes. Some states have laws with respect to decanting that offer more flexibility than others. There are rankings that are published to this end (feel free to reach out to me if you would like me to provide you a state ranking chart).

So, what if the trust is in a non-decanting jurisdiction? Do you throw in the towel?

No! We first look into the trust agreement to see if it has decanting language. Since decanting is a relatively recent phenomenon, it likely does not have such a statute. However, if it does, then one can likely utilize decanting through the authority granted in the trust agreement.

Assuming no decanting language is in the trust, the trust may give the trustee the power to change the trust situs. If it does, then we can often move the trust to a new situs that allows decanting.

If the trust does not give anybody the power to change the situs, then we look at the current situs statutes to see if there is a nonjudicial settlement agreement statute. If there is, we may be able to change the situs using that statute and then decant it under the new situs statute. Typically, clients are comfortable changing the trust via a nonjudicial settlement agreement statute, however, since the statute requires all interest parties to agree, it doesn't always work.

As a final remedy, we can petition the court for a trust reformation. Taking a case through the judicial system however, may be the most costly alternative.

As always, if you have any questions or would like to learn more, please contact Steve Shane at sshane@offitkurman.com or 301.575.0313.