

Decanting an Irrevocable Trust – The Process

By Steven J. Oshins Esq., AEP (Distinguished)

Our clients often set up and fund an irrevocable trust and then come back to us wanting to change the trust terms. This even sometimes happens within a matter of days of funding the trust. Human nature is such that people often change their minds. And it is also likely that circumstances will change after the trust has been funded.

We also often review our clients' and prospects' existing trusts and find that they weren't drafted very well. Just as our clients often want to change their irrevocable trusts, advisors do as well since it opens up a plethora of possibilities and enhancements for our clients.

What is Decanting?

For many years, practitioners have struggled to find ways to change the terms of an irrevocable trust. Although some states have statutes that permit modification by agreement of the trustor, trustee and all beneficiaries, this is often difficult to obtain and sometimes requires going into court for approval. However, through common law and through the decanting statutes that have been enacted in many jurisdictions, it is now possible to modify an irrevocable trust. The rationale for allowing such a modification is that a trustee who has the power to distribute the trust property to or for the benefit of one or more beneficiaries should be able to make the distribution to them in trust and dictate the terms of that trust. Decanting is essentially a "do-over".

Trust decanting is the act of distributing assets from one trust to a new trust with different terms. Just as one can decant wine by pouring it from its original bottle into a new bottle, leaving the unwanted sediment in the original bottle, one can pour the assets from one trust into a new trust, leaving the unwanted terms in the original trust.



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The Decanting Process

First Step: Check the Decanting Statute Relevant to the Trust's State Law

Does the applicable state have a decanting statute? If not, then one option is to decant under the "common law" authority to decant. However, that is risky because of the uncertainty since there are no state guidelines. Therefore, this option is not recommended. If the applicable state does have a decanting statute, then does that statute allow the trustee to make the desired changes? If so, then the trust can be decanted using that state law and you can skip to the Third Step below. But if not, then does another state offer a decanting statute that will allow the changes to be made?

Second Step: Move the Trust

Assuming the trust's existing jurisdiction either has no decanting statute (and the planner wants more certainty than attempting to decant under a "common law" theory) or its decanting statute does not allow the desired modifications or has a user unfriendly statute, the next step is to look at the existing irrevocable trust to see if it can be moved to a different jurisdiction. If the trust agreement allows the trustee or trust protector to move the trust to a different jurisdiction, then the attorney can draft the appropriate documentation to move the trust to the new jurisdiction, including adding a trustee or co-trustee based in that jurisdiction, in order to take advantage of that jurisdiction's more favorable laws. If the trust agreement does not allow the jurisdiction to be changed, then the planner can check local law or otherwise petition the local court for approval to move the trust, or even use local decanting laws to add a provision allowing the trust jurisdiction to be changed.

Third Step: Decant the Trust

The next step is for the attorney to prepare appropriate documents to decant the trust to change some or all of the terms by pouring the assets into a trust with different terms. This might include creating a new trust or otherwise might just use another pre-existing irrevocable trust as the recipient of the trust assets. The decanting documentation should refer to the state decanting statutes, tracing the statutory requirements in order to follow all of the applicable rules.

Fourth Step: Transfer the Assets

The final step is to transfer the assets from the original trust to the new trust. This is done with assignments, deeds, change of owner and beneficiary forms, setting up new accounts or whatever else is needed to effectuate the transfers.

Decanting is often an appropriate and doable option when you and your client wants to change an irrevocable trust.

RELATED EDUCATION & RESOURCES

Below you will find a few resources related to Decanting that you might be interested in:

- [Everything You Need to Know About Decanting an Irrevocable Trust – 2-Part Series](#)
- [2nd Annual Trust Decanting State Rankings Chart](#)

ABOUT THE AUTHOR

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