

The What, Why, When and How of Trust Decanting

Trust decanting, as its name would suggest, is an estate planning technique through which a trustee transfers assets from one trust to a second trust. In New York State, decanting is specifically authorized by statute (EPTL § 10-6.6).

While irrevocable trusts have a variety of uses in estate planning, they lack flexibility. Because irrevocable trust agreements generally cannot be amended, modified or revoked, unforeseen future events or a change in a client's estate planning objectives may cause the terms of an existing irrevocable trust to become stale or obsolete.

Decanting is a solution to this problem. If a trustee has the power to invade an existing trust's principal, the trustee may use the authority given to him or her under New York's decanting statute to transfer the trust's assets to a second trust with terms that are more aligned with a client's current circumstances or goals. The second trust may have new administrative provisions (such as giving a trustee the power to appoint his or her successor or specific authority to administer a closely-held business) or even dispositive provisions that are different from the first trust. Decanting is, therefore, a de facto method of modifying or amending an irrevocable trust, and is an important tool in allowing a trustee of an irrevocable trust to adapt to changing circumstances.

Let's look at some useful applications of the decanting statute. Two concerns that often arise some years after a parent has created an irrevocable trust for his or her children are: (a) a child is too immature to properly manage large sums of money that will be paid out from the trust; and (b) a child has potential creditor or matrimonial issues. Pursuant to authority granted under EPTL 10-6.6(e), the trustee of the irrevocable trust may address these concerns by decanting the existing trust's assets to a second trust that has a longer term. The duration of the second trust can last for the lifetime of the child with ultimate distribution to grandchildren. The following examples illustrate how decanting may address the client's concerns:

- **Example 1:** George B. established an irrevocable life insurance trust for his youngest child, Buster. Upon the death of George, the trust provides that Buster is to receive lump sum distributions of principal at ages 25 and 30. While the trust is being administered, the trustee has authority to invade principal for Buster's health, education, maintenance, and support. In the years following the creation of the trust, Buster demonstrates that he is far too immature to handle large sums of money at those ages. Pursuant to EPTL 10-6.6(e), the trustee may transfer the trust's assets to a second trust in which the lump sum distributions are delayed to ages at which it is expected that Buster will be able to better handle large sums of money (e.g., 40 and 45).

- Example 2: Same facts as Example 1, except Buster is in a tumultuous marriage. George is concerned about divorce and wants to ensure that trust assets cannot be reached by Buster's spouse in a divorce settlement. Pursuant to EPTL 10-6.6(e), the trustee may transfer the trust's assets to a second trust that holds the trust's assets in trust for Buster's lifetime with ultimate distribution to Buster's children. Because Buster will never own the trust's assets outright, they cannot be reached by his creditors.

An additional benefit of decanting is to address the anxiety clients have with the following fact pattern:

- a) Child inherits significant sums from his parents.
- b) Child dies and daughter-in-law or son-in-law inherits those assets.
- c) Daughter-in-law or son-in-law remarries.
- d) Daughter-in-law or son-in-law may or may not leave those assets to grandchildren.

Decanting to a generation- skipping trust will provide some level of comfort that the inherited assets will remain in the immediate family.

Furthermore, pursuant to EPTL 10-6.6(n)(1), a trustee may transfer an existing irrevocable trust's assets to a supplemental needs trust. In the event that a trust beneficiary develops an illness or suffers an injury that renders the beneficiary disabled after an irrevocable trust has been created, the trustee can transfer assets of the trust beneficiary's trust to a second trust that contains the requisite supplemental needs provisions. Such a transfer could allow the beneficiary to qualify for public assistance while simultaneously protecting the trust's assets from government creditors.

While decanting gives a trustee broad discretion to amend the terms of an existing trust, the power to decant does have some limitations. The most significant limitation with decanting is that the new trust cannot include beneficiaries that were not beneficiaries of the first trust – i.e., the trustee cannot add beneficiaries. In addition, a trustee exercising the power to decant has a fiduciary obligation to the beneficiaries of the first trust and an exercise of decanting must be in the best interests of one or more of the beneficiaries of the first trust.

As you can see, decanting has many potential uses, and any trustee should consider decanting when it appears an existing irrevocable trust can no longer accomplish the estate planning goals of its settlor. This has only been a brief summary of the potential benefits of the trust decanting, and there are many other potential applications of decanting. There are also potential income, gift, estate and generation-skipping tax ramifications of decanting that should be examined before a trustee exercises the power to decant.

Contact:

Christopher Miehle, Esq.

914.948.1556 ext. 8034

cmiehle@dmlawyers.com