DANZIGER & MARKHOFF LLP

Attorneys at Law

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Westchester Office:
1133 Westchester Avenue
Suite N208
White Plains, NY 10604
914.948.1556

Long Island Office:
135 Pinelawn Road
Suite 245 South
Melville, NY 11747
631.501.9800

danzigermarkhoff.com

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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

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New York State Attorney General Weighs in on Non-Compete Agreements

Last month the New York State Attorney General issued a FAQ release regarding non-compete agreements. In addition to describing in plain English the various features of such agreements and the issues related to their enforceability, for the first time the AG invited employees to report to its Labor Bureau instances where an employee believed he was being asked to sign an unreasonable non-compete agreement. In addition, the AG noted that it has proposed legislation which would impose a blanket prohibition on non-compete agreements for workers earning less than $75,000 per year, which legislation is pending. Currently in New York, non-competes are prohibited by law only in the broadcast industry.

For more information, please contact Joshua S. Levine, Esq. at 914.948.1556 ext. 8003 or jlevine@dmlawyers.com

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 able to 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.

To learn more about trust decanting as an estate planning technique, please contact Christopher Miehl, Esq. at 914-948-1556 ext. 8034 or by email at cmiehl@dmlawyers.com

Cash Balance Plans: the smart way to Increase Your Tax-Deductible Plan Contributions

A "Cash Balance Plan" is an integral component of retirement plan design which allows you to make substantially larger tax-deductible contributions than those permitted under profit-sharing and similar defined contribution plans (DC Plans). Cash Balance Plans use easily understandable individual account balances not available under a traditional defined benefit pension plan. Each plan participant has his or her own account balance that is credited annually with a contribution and a specified rate of return.

Ideal candidates for Cash Balance Plans are successful businesses with two or more owners. In a Cash Balance Plan, similar or varying contributions can be made on behalf of each owner, and each owner will know the exact amount of the contribution attributable to him.

Naturally, Cash Balance Plans can be successfully implemented for a sole proprietorship that produces substantial profits. When a Cash Balance Plan is combined with a DC Plan, the combination of the two plans gives the business both an increased tax deduction and substantial flexibility for each year's contributions.

The Table below illustrates how you can make an additional tax-deductible plan contribution to a Cash Balance Plan (see Row D) even after contributing the maximum $55,000 to a DC Plan (Row A plus Row B equals the maximum $55,000).

The Table shows one example of an allocation maximized for the owner; the assumption is that the staff contribution will be as low as IRS rules permit, and the owner's compensation is at least $275,000.

The most important factor is to ensure that the cost for covering the staff does not outweigh the benefit of the plan to the business owners. A thorough analysis of employee data, combined with creative planning concepts, often result in a successful outcome for the business owners. Obviously, it would be imprudent for a business owner to think of proceeding without the benefit of such an in-depth analysis.

If you want to make a plan contribution for yourself in excess of $55,000, a Cash Balance Plan is the answer.

To learn more about Cash Balance Plans, please contact Andrew E. Roth, Esq. at 914-948-1556 ext. 8033 or by email at aroth@dmlawyers.com

	Type of Plan or Plan Feature	**2018 Contribution Amount for Owner**
A.	Profit-Sharing Plan – Employer Discretionary Contribution	$ 36,500.
B.	401 (k) Salary Reduction Plan - Employee Discretionary Contribution	$ 18,500.
C.	Additional "Catch-Up": Owner Age 50 or older	$ 6,000.
D.	Cash Balance "Add-on" Plan [On top of Employer's DC Plan]	$ 48,750.*
E.	Total Contribution: Owner under Age 50 [A+B+D]	$ 103,750.
F.	Total Contribution: Owner Age 50 or older [A+B+C+D]	**$** 109,750.

*Note also that depending upon the level of staff compensation, and the age of the owner, the amount that can be contributed for the owner may be substantially larger.

IRS Pre-Approved 403(b) Plans

While IRS requires not-for-profit organizations and educational institutions that maintain a 403(b) arrangement to have a written plan document, until recently there was no way to get IRS approval for a 403(b) plan. This has just changed! IRS now pre-approves prototype 403(b) plans, similar to its approval of prototype 401(k), pension and other qualified plans. Under the 403(b) plan program, ***if a plan sponsor timely adopts a pre-approved plan, any defects in the previous plan document will be deemed corrected and the plan document will be considered to be in compliance as far back as January 1, 2010.*** This is a powerful incentive for plan sponsors to move their plan onto a pre-approved plan.

Many insurance companies and other 403(b) plan providers have gotten their own pre-approved plan. If you are an employer that has a 403(b) plan, you should check with your provider to make sure it is moving onto a pre-approved plan. Similarly, if you advise not-for-profits, you should check with your clients. We at Danziger & Markhoff LLP also have an IRS pre-approved plan that you or your client can adopt.

If you have any questions relating to a 403(b), 457(b) or other benefit plan for a tax-exempt employer, please feel free to contact us.

Jay Fenster, Esq., *jfenster@dmlawyers.com, **914.948.1556 ext 8005; Andrew E. Roth, Esq.***, *aroth@dmlawyers.com*, **914-948-1556 ext 8033** ; ***Mark Hamilton, Esq.***, *mhamilton@dmlawyers.com*, ***914-948-1556 ext 8038***

In Our Firm

We want to share with you that our firm has recently received the following honors. We thank our clients and colleagues for their continued loyalty and for helping us achieve these honors.

Best Law Firm:

Danziger & Markhoff LLP has been included in the 2019 *U.S. News – Best Lawyers*® "Best Law Firms" list for the **eighth** consecutive year. The firm received a Metropolitan Tier 1 ranking in the area of Trusts & Estates Law.

The Best Lawyers in America:

Harris Markhoff, Michael Markhoff and Joshua S. Levine have been selected for inclusion in ***The Best Lawyers*® in America 2019**. Harris was selected in the areas of Corporate Law and Trusts & Estates , Michael was selected in the area of Trusts & Estates and Josh was selected in the area of Health Care Law.

New York Super Lawyers:

Michael Markhoff has been selected for inclusion in 2018 New York Metro *Super Lawyers*. Michael was selected in the area of Estate Planning and Probate. Each year, only 5% of the attorneys practicing in New York received this honor.