

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2313

Date: 16-Jun-15
From: Steve Leimberg's Estate Planning Newsletter
Subject: [Kristen Simmons on SB484: Nevada Legislature Allows for Greater Flexibility with Irrevocable Trusts](#)

“SB484 was approved by Nevada Governor Brian Sandoval on June 10, 2015 and becomes effective on October 1, 2015. Notably, SB484 allows Nevada irrevocable trusts greater flexibility by expanding the decanting laws and allowing for non-judicial settlement agreements.

SB484 enhances the flexibility of Nevada law, making Nevada law even more attractive to settlors and beneficiaries. By utilizing Nevada’s decanting laws or non-judicial settlement agreements, irrevocable trusts that lock up their assets in ways that frustrate the settlor’s overall intent or irrevocable trusts that contain terms which no longer meet a family’s needs because of changing circumstances can be altered and improved.”

Kristen Simmons provides members with important commentary that summarizes the material changes made by SB484 that increase the flexibility of Nevada irrevocable trusts.

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magazine in (1) Tax and in (2) Estate Planning & Probate. Kristen was admitted to the Nevada State Bar in 2004 and to The Florida Bar in 2005.

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Here is Kristen's commentary:

EXECUTIVE SUMMARY:

SB484 was approved by Nevada Governor Brian Sandoval on June 10, 2015 and updates several of Nevada's estate and trust laws. Particularly, SB484 allows Nevada irrevocable trusts greater flexibility by expanding the decanting laws and allowing for non-judicial settlement agreements. This commentary summarizes the changes made to the decanting laws and outlines Nevada's new, non-judicial settlement agreement statute.

COMMENT:

Decanting Updates: Top Three Changes to NRS 163.556

When a trust is decanted, the trustee of an existing trust distributes assets of the existing trust ("Original Trust") into a different trust ("Second Trust"), with different terms. A trust may be decanted for a variety of reasons. For example, it may be desirable to decant a trust that provides for staggered distributions of principal or allows distributions based on a support standard into a new trust that is fully discretionary, thereby providing the beneficiaries of the trust with a higher level of asset protection.

Twenty-two states have adopted statutes allowing a trust to be decanted. Not all state decanting statutes are created equal, however. For a comparison of the different decanting statutes, see Steve Oshins' [2nd Annual Trust Decanting State Rankings Chart](#). Notably, Nevada was already ranked second on the chart, and the changes made to Nevada's decanting statute through SB484 will likely raise Nevada's score. Here are the top three changes to Nevada's decanting statute:

1. Ability to Remove Certain Mandatory Income Interests

Prior to SB484, a trustee would not have been permitted to decant a Nevada trust into a Second Trust if the result of appointing the property from the Original Trust would reduce a current fixed income interest, annuity interest or unitrust interest of a beneficiary. For example, if a trust was established by parent for child and provided that child was to receive all income, the trustee of the Original Trust would be permitted to decant the property into a Second Trust that modified the terms as it relates to the principal, but the Second Trust would still have to require that all of the income be payable to the child.

SB484 modifies this restriction. Under the new Nevada law, a trustee is permitted to decant a Nevada trust into a Second Trust that removes the fixed income interest, so long as the Original Trust from which the trustee is decanting did not qualify for a marital deduction or charitable deduction, or was not one that paid a qualified interest pursuant to IRC § 2702. If the Original Trust that is being decanted did qualify for a marital or charitable deduction or is one that pays a qualified interest under IRC § 2702, the same limitation prior to the modification applies and the trust may be decanted, so long as the Second Trust does not reduce the income interest of an income beneficiary of the Original Trust.

As a result of SB484, the possibilities to modify an income interest in a trust expand the uses of decanting.

Most notably, an Original Trust that requires a mandatory distribution of income, exposing the income to the beneficiary's creditors and divorcing spouses, can now be decanted into a Second Trust that distributes income only in the discretion of a trustee, thereby protecting the undistributed income from the beneficiary's creditors and divorcing spouses.

Income tax savings may also now be achieved through decanting. Revisiting the example noted above, if the child that was to receive all of the income of the Original Trust is a resident of a state that imposes a high state income tax, the trustee could decant the Original Trust into a Second Trust that does not force out all of the income, instead holding the income and principal and

avoiding the state income taxation or sprinkling the income to beneficiaries who are in lower income tax brackets.

What if instead of being a resident of a high-taxing state, the beneficiary in the above example developed a drug addiction? The trustee of the Original Trust could now distribute the property of the Original Trust into a Second Trust that not only includes drug testing language, but also prevents the income from being distributed to the ailing beneficiary, who then trades it for his or her illegal substance of choice.

2. Ability to Accelerate or Postpone a Beneficiary's Interest in the Trust

As is the case with all 22 state decanting statutes, a trustee may not effectively add a beneficiary to a trust by appointing property from the Original Trust to a Second Trust that includes a beneficiary that was not a beneficiary of the Original Trust. SB484 gives greater flexibility to a trustee to modify the timing of a beneficiary's interest in the trust. Under the revised statute, the Second Trust into which an Original Trust is decanted may have as beneficiaries any current beneficiaries of the Original Trust, or any future beneficiaries of the Original Trust.

A prime example of the application of this revision is as follows: Assume that the Original Trust includes as a current beneficiary only the settlor's child, but not any of the child's descendants. The remainder beneficiaries of the trust are the child's descendants. The trustee of the Original Trust can now decant the Original Trust into a Second Trust that includes the child and all of the child's descendants as current beneficiaries. This way, the child can divert trust funds to his or her descendants directly from the trust where there are likely no gift tax ramifications, rather than taking funds from the trust and then gifting the funds to the descendant(s). Not only would this scenario save gift tax exemption for the child, but it may also be a way to divert income to junior generations that are in a lower income tax bracket than child.

3. Clarification of Application of Statute to Trusts Governed by, Situated in or Administered under the Laws of Nevada

SB484 clarifies that NRS 163.556 applies to any Original Trust that is governed by, situated in or administered under the laws of Nevada. The new language

of the statute specifically includes trusts that are initially governed by, situated in or administered under Nevada law pursuant to the terms of the trust instrument, and also to trusts that are moved to Nevada from another state or foreign jurisdiction. Many trusts are initially situated in or are moved to Nevada to make use of its favorable dynasty trust and asset protection trust laws. The decanting opportunities available in Nevada should increase the number of trusts that move to Nevada from another jurisdiction.

Non-Judicial Settlement Agreements

In addition to expanding a Trustee's ability to decant an Original Trust, SB484 also added the ability to resolve certain matters relating to a trust without court approval. In cases where decanting is not an option or is undesirable, a non-judicial settlement agreement may be used to modify one or more terms of the trust, transfer the principal place of administration of the trust, expand or restrict the trustee's powers or even terminate the trust. A complete list of the matters that may be addressed through a non-judicial settlement agreement (as outlined directly from SB484) are as follows:

- (a) The investment or use of trust assets;*
- (b) The lending or borrowing of money;*
- (c) The addition, deletion or modification of a term or condition of the trust;*
- (d) The interpretation or construction of a term of the trust;*
- (e) The designation or transfer of the principal place of administration of the trust;*
- (f) The approval of a trustee's report or accounting;*
- (g) The choice of law governing the construction of the trust instrument or administration of the trust, or both;*
- (h) Direction to a trustee to perform or refrain from performing a particular act;*

- (i) The granting of any necessary or desirable power to a trustee;*
- (j) The resignation or appointment of a trustee and the determination of a trustee's compensation;*
- (k) The merger or division of trusts;*
- (l) The granting of approval or authority, for a trustee to make charitable gifts from a noncharitable trust;*
- (m) The transfer of a trust's principal place of administration;*
- (n) Negating the liability of a trustee for an action relating to the trust and providing indemnification therefor; and*
- (o) The termination of the trust.*

In order for a non-judicial settlement agreement to be effective, it must be signed by all "indispensable parties." Generally, an indispensable party is one who would need to consent to the change proposed by the settlement agreement had the agreement instead been submitted to the court. The identity of the indispensable parties may vary depending upon the change proposed.

In cases where the original trust utilizes mediocre provisions or is vague, non-judicial settlement agreement is a viable option. It should be noted that decanting a trust under Nevada law does not require notice to the beneficiaries affected by the action of the trustee, whereas a non-judicial settlement agreement would require the beneficiaries' acknowledgement and consent if the beneficiary is an indispensable party.

Summary

Nevada remains on the leading edge of trust jurisdictions by modifying its statutes to make them more attractive to settlors and beneficiaries. By utilizing Nevada's decanting laws or non-judicial settlement agreements, irrevocable trusts that lock up their assets in ways that frustrate the settlor's overall intent or irrevocable trusts that contain terms which no longer meet a

family's needs because of changing circumstances can be altered and improved.

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

Kristen E. Simmons

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CITATIONS:

[Nevada Senate Bill 484](#)