

The Private Decanting: A Do-Over Trust With Your Privacy Intact

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

What is Trust Decanting?

For many years, practitioners have struggled to find ways to change the terms of an irrevocable trust. 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.

Most [but not all] Jurisdictions Require Notice to the Beneficiaries

There will be 25 states with decanting statutes as of August 10, 2016. Of the 25 decanting jurisdictions, 18 of them require notice to be given to the trust beneficiaries before a decanting can be done.

Arizona, Delaware, New Hampshire (notice required only for charitable trusts), Nevada, South Dakota, Tennessee and Wyoming are the only decanting jurisdictions that do not require notice to be sent to beneficiaries.

Our Clients want Privacy

People value their privacy. We go out of our way to maintain the attorney/client relationship in order to shield our clients’



private matters not only from outsiders, but also from their own family members. As spectacular as the idea of decanting may sound to a client, the moment you inform them that all of the beneficiaries must receive a copy of the trust, the room seems to get very quiet and the excitement wears off very quickly.

Following is an example of a decanting notice statute from one of the 18 states that requires notice:

“(g) To effect the exercise of the power to appoint principal or income under subsection (a) of this section, all of the following apply:

(1) The exercise of the power to appoint must be made by an instrument in writing, signed and acknowledged by the trustee, setting forth the manner of the exercise of the power, including the terms of the second trust, and the effective date of the exercise of the power. The instrument must be filed with the records of the original trust.

(2) The trustee shall give written notice to all qualified

beneficiaries of the original trust, at least ninety days prior to the effective date of the exercise of the power to appoint, of the trustee's intention to exercise the power. The notice must include a copy of the instrument described in item (1) of this subsection.

(3) If all qualified beneficiaries waive the notice period by a signed written instrument delivered to the trustee, the trustee's power to appoint principal or income is exercisable after notice is waived by all qualified beneficiaries, notwithstanding the effective date of the exercise of the power."

Avoiding the Notice Problem

Assume that the trust isn't situated under the laws of Arizona, Delaware, New Hampshire, Nevada, South Dakota, Tennessee or Wyoming where there is no notice requirement. Does this mean that there are no options and your client is simply going to choose not to decant the trust simply because of privacy concerns?

Take a look at the trust agreement to see if there is a change of situs provision. Very often, the trust agreement will allow the trustee or a trust protector to change the situs simply by adding a co-trustee in that jurisdiction. Thus, by thinking two moves ahead, notice can be avoided. First, change the situs to the non-notice jurisdiction. Then decant the trust. Therefore, the client's privacy is maintained through this private decanting.

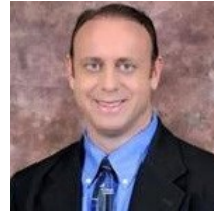
Summary

Decanting is a wonderful tool and arguably the most important planning concept of the 21st century. But too many of our clients become frustrated by the notice requirements that the large majority of the decanting jurisdictions require. This article highlights the seven jurisdictions - Arizona, Delaware, New Hampshire, Nevada, South Dakota, Tennessee and Wyoming – that do not require notice for a decanting. For those estate planning who thought that decanting had to be a family affair, this article opens up a new strategy called a private decanting.

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