

Beneficial Reasons to Decant a Trust

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Decanting can help improve a current irrevocable trust by allowing the Trustee to distribute all of the assets to a new trust that will better meet the client's, trustee's or beneficiaries' needs. Not all trusts are eligible for this technique.

The trust agreement must allow the trustee to exercise discretion over the principal. The agreement cannot be limited to discretion over income distributions only. The "decant" is the process of the principal being distributed from the old trust to a new one with updated provisions.

1. Change trustee provisions.

Adding the liability protection for the trustee to the trust, particularly for Delaware trusts, and eliminating the liability in the event that there is a distribution advisor and an investment advisor can be done by decanting the trust, adding procedure for appointing a successor trustee or resignation procedures or for adding other advisors to the trust may also be useful.

2. Convert a support trust into a discretionary trust.

Support trusts allow beneficiaries to receive distributions for their support, education, health and maintenance. However, depending on state statutes (Delaware allows for asset protection trusts) and case law, those trusts are available to certain creditors. Decanting into a discretionary trust grants absolute discretion over distributions to the trustee (or distribution advisor or committee), protecting trust assets from creditors.

3. Fix drafting errors or make ambiguous terms clear.

Trusts may have errors or ambiguities that can be corrected in a newly decanted trust. In addition, it may be beneficial to add language into the new trust to permit trust protectors or independent trustees.

4. Moving the trust to a state with more favorable laws.

A trust may have been established in a location with state income taxes or without creditor protection statutes. The trust can be decanted to a new trust to include a change of situs provision to a state that has more favorable income tax and creditor protection statutes and case law (Delaware).

5. Add/adjust powers of appointment.

Some trusts do not include powers of appointment. Decanting can grant those powers to a beneficiary. With today's estate tax exemption at high levels thereby causing no worries about the power including the asset in the beneficiary's estate, a power of appointment granted to the beneficiary over certain trust assets can allow those assets to receive a new income tax basis once that individual dies.

6. Extend the trust's term.

Many existing trusts are set up to make mandatory distributions to the beneficiaries at staggered ages. This may not always be the best manner of distribution; for instance it could expose the assets to unnecessary estate taxes, as well as creditors. Instead, The Trustee may determine that it makes sense for the family to move the principal to a new trust drafted as a dynasty trust. Some states have abolished perpetuity laws, (Delaware).

7. Combine multiple trusts.

Clients may set up different trusts with different law firms and/or different terms. They can be combined by decanting one trust into the other or by decanting a group of trusts into a newly formed trust.

8. Separate trusts.

Beneficiaries may have different needs and different ideas about how to invest. Decant the large trust into separate trusts for each beneficiary, so they oversee their own pots as they see fit.

9. Add a special-needs trust

A special-needs trust allows a disabled beneficiary to use trust assets without hurting their eligibility for Medicaid and Social Security. The client can decant a trust to add these provisions in the new trust.

10. Qualify the trust to own stock in an S corporation.

A trust can be decanted, with the new trust permitting S corporation stock ownership, if the old trust agreement did not empower the trust protector or independent trustee to add such a provision.

11. Make a trust silent.

Adding a notice recipient will allow the grantor to keep the trust silent from its beneficiaries until such time as the notice recipient determines it is appropriate.