

Asset Pouring

California Enacts New Decanting Statute

Trusts are a common estate planning tool in California to direct assets after someone's death. Assets held in a trust are still potentially subject to estate tax, depending upon the total estate value, but should avoid a probate proceeding for their disposition and management.

Most grantor trusts, treated as the taxpayer for tax purposes, are written such that they become irrevocable in whole or part at the "grantor's" death. Sophisticated estate planning also often utilizes irrevocable trusts to remove assets from the grantor's estate (for example, by making gifts to the trust) to avoid payment of estate tax on those assets.

Unfortunately, many people do not update their trusts to reflect current law or personal changes, and the irrevocability of these trusts can be problematic.

In California, changing such trusts before the new decanting law typically involved getting the consent of all beneficiaries, which might not be possible, or petitioning a court, which might result in an unfavorable outcome. Many estate planning attorneys routinely include "decanting" language in their trust documents, ensuring that the trust has built-in options that allow for change.

Many other states are more flexible with respect to such modification. While decanting statutes exist in many other states, California did not have one until it enacted the Uniform Trust Decanting Act in the fall. The act applies to all California trusts *unless the trust instrument expressly elects out*.

The Details of Decanting

Trust decanting provides a trustee the ability to modify or remove trust provisions from a trust, including an irrevocable trust. Such decanting takes place by "pouring" trust assets from an old trust into a new one, or by modifying the actual trust. In all cases, the trustor's original intent must be honored.

Unfortunately, the new statute is limited in scope; thus, only some trusts may be decanted or have certain provisions changed.



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Subject to restrictions, a trustee can also use the decanting powers to change a grantor trust to a non-grantor trust, or vice versa.

Two categories of modification, or decanting, are allowed: those relating to trustees with "limited distributive discretion" and those applicable to trustees with "expanded distributive discretion." The more discretion allowed to the trustee with respect to principal distributions, the greater the decanting modification options permissible.

Very often, a trust grants a trustee the power to distribute principal for the beneficiary's health, education, maintenance or reasonable support standard. Under the new decanting statute, a trustee that has such limited distributive discretion can now exercise the decanting power to modify only administrative trust provisions, including those governing successor trustee provisions or trustee powers.

The trustee still cannot materially change a trust's dispositive provisions, so assets must generally go to beneficiaries as planned.

A trustee with expanded discretion can distribute trust principal to beneficiaries beyond that granted under an ascertainable or reasonable support standard. These expanded standards provide greater creditor protection or are chosen for tax benefit reasons. Under this broader standard, a trust can grant a trustee sole discretion to make (or not make) distributions of principal to beneficiaries.

A trustee with such expanded distributive discretion can now utilize the decanting power

to revise both administrative provisions and select dispositive provisions of the trust.

The decanting power also allows for a modification in distribution standards, the ability to grant a power of appointment, to eliminate a beneficiary or to extend the duration of the trust. A trustee is still restricted with respect to adding a new beneficiary, though could potentially grant a power of

appointment to a beneficiary, thus indirectly creating a like outcome.

Ultimately, the decanting power as granted by California's new statute is not expansive, and the trustee cannot modify those trust provisions that address trustee liability, trustee compensation or the replacement or removal of a trustee. The decanting power also cannot be used such that certain benefits of the original trust are lost. "Savings" language in the statute avoids inadvertent negative tax consequences, which might arise after a decanting related change, including those related to the generation skipping tax, property that qualifies for a charitable deduction or the marital deduction.

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Changes to charitable interests are also restricted. A trust established solely for charitable purposes simply cannot be decanted. However, a trust containing a charitable interest can be decanted under the statute, assuming it otherwise qualifies. But, if the charitable interest is the ultimate named remainder beneficiary and all family members are deceased, the new trust cannot decrease any charitable interest and might not qualify to be decanted.

Notice must be given at least 60 days before the exercise of the decanting power. The recipient has 59 days from the date of the notice to bring a court order to contest the decanting. Such notice must be provided to the trustor and each qualified beneficiary, including those not yet born or unascertainable. Therefore, a guardian *ad litem* must be appointed by a court to receive notice for such beneficiaries, which is a substantial burden, especially given the notice timing required. Notice also must be given to those holding a

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presently exercisable power of appointment over the original trust, anyone with a current right to replace or remove the trustee, any other trustee of the original trust and any trustee of the new trust.

The California Attorney General also must be given notice if the original trust has a charitable interest. Detailed provisions include notice requirements for certain trusts established for the benefit of minors. The act provides guidelines for giving such notice, including warning language notifying recipients of their right to contest the decanting.

Overall, the California Uniform Trust Decanting Act makes changing existing irrevocable trusts easier in some situations, especially for older trusts that did not anticipate such a need or include the requisite decanting language already. But the actions allowed are limited and do not rival the flexibility possible under the decanting provisions of many other states.

Trustees with limited distributive discretion are constrained since only administrative provisions can be changed. Moreover, the strict notice provisions still will often require court intervention. California trusts (especially newly formed trusts) should continue to include more advantageous decanting language in the actual trust terms, as advisable before this statute's enactment. Other jurisdictions still offer trust law provisions that are more flexible—and perhaps more advantageous—than are those allowed under California law. 

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