

NIESAR & VESTAL LLP

Law Alert

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California now authorizes trust decanting

Following a number of other states which enacted trust decanting laws, California now has done the same. On September 14, 2018, Governor Brown signed Senate Bill 909, the Uniform Trust Decanting Act. This Act became effective on January 1, 2019; Probate Code section 19501 et seq.

The word “decanting” is generally associated with wine - pouring wine from one bottle into a carafe to remove sediment and allow it to breathe, in order to improve the quality of the wine. Similarly, the new law allows a trustee to distribute the assets of the original trust to a second trust in accordance with a decanting agreement that cures any deficiencies of the original.

Purpose and advantages of decanting

Irrevocable trusts generally cannot be revoked or amended after their creation. The same is true for revocable family trusts, when one of the spouses dies. When that occurs, part of the trust becomes irrevocable. Most people who have family trusts will face this situation.

Irrevocable trusts can only be terminated or changed under certain circumstances if authorized by the trust instrument or applicable state law. The new law provides an important tool for modifying an irrevocable trust by decanting.

A *Forbes* article written on March 9, 2012 states very clearly the [generic advantages of decanting](#):

- “- Update or modify trust provisions.
- Improve trust administration or management.
- Correct drafting errors.
- Address changed circumstances.
- Remove unworkable restrictions.
- Change provisions relating to trust powers and trustee succession.
- Achieve tax savings.
- Change trust situs.
- Combine or divide trusts.
- GST (Generation-Skipping Tax) Planning.”

Although not mentioned in the article, decanting may be potentially used to change the applicable law of the trust.

Possible modifications of the trust through decanting

The new statute distinguishes two different sets of rules regarding what can be modified through decanting: (1) the rules that apply to trustees with “limited distributive discretion” and (2) the rules that apply to trustees with “expanded distributive discretion.”

A trustee with expanded distributive discretion is defined as one who has discretion to distribute trust principal that is not limited to an ascertainable or reasonable support standard. When a trustee is granted such discretion, it could be implied that the settlor intended to rely on the trustee's judgment and discretion in making distributions. Such a trustee could exercise the decanting power to modify both the administrative provisions and certain dispositive provisions of the trust; eliminate a beneficiary; change the standard for distributions; and grant a power of appointment or extend the duration of the trust.

On the other hand, a trustee with limited distributive discretion is defined as one who has discretion to distribute trust principal that is limited to an ascertainable standard. Although a trustee with limited distributive discretion may exercise the decanting power to modify administrative provisions of the trust, the trustee may not materially change the dispositive provisions of the trust.

Limitations restricting the possible modifications of the trust provisions

Although the California Probate Code authorizes decanting, the power to decant is not absolute. The statute contains several limitations restricting the possible modifications of the trust provisions, among which are:

- Decanting does not apply to charitable trusts. Also, if the original trust contains a charitable interest, the second trust may not diminish it or alter the charitable purpose of the original trust.
- The second trust may not increase the fiduciary's compensation.
- Decanting cannot be exercised in any way that would jeopardize the tax benefits of the original trust.

Also, although it is not a real limitation, it is important to note that there is a 60-day notice requirement associated with the exercise of the decanting power to designated people.

Dealing with the limitations of the statute

As discussed above, the power to decant is not absolute. The settlor should consider including a specific decanting power when setting up an irrevocable trust or a revocable trust that becomes irrevocable upon death; and may consider decanting an existing irrevocable trust to cure any deficiencies or to make desired changes.

If you have questions concerning the new provisions related to trust decanting, please feel free to contact Alan Seher (aseher@nvlawllp.com).

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