

## FEATURE: ESTATE PLANNING & TAXATION



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# A Guide to Trust Decanting

When to consider this strategy and the potential tax consequences

**D**ecanting is the act of distributing the assets of an old trust to a new one with more desirable terms. It provides an easy method for correcting errors or ambiguities, adapting a trust to changes in a settlor's objectives or changes in a beneficiary's circumstances, taking advantage of new planning opportunities or adding flexibility to a trust.

### Reasons to Decant

Decanting can be used to improve a trust in numerous ways.

**Correcting drafting errors or clarifying ambiguities.** These are the most basic reasons for decanting. Older trusts without trust protectors are now easy to fix by decanting into a new trust with the desired provisions.

**Expanding the trustee's decision-making authority over principal and income.** Trust income that's retained by a trust is taxed to the trust, while income distributed to a beneficiary is deductible by the trust and taxable to the beneficiary.<sup>1</sup> Following recent tax rate increases and the enactment of the net investment income tax (NIIT), trust income in excess of \$12,300 could be subject to tax rates as high as 43.4 percent (39.6 percent top income tax rate + 3.8 percent NIIT). These changes make it more important than ever for trustees to be able to shift income to beneficiaries who may be in much lower tax brackets and/or might not be subject to the NIIT. Decanting to a

trust that authorizes the trustee to allocate capital gains to principal and gives the trustee greater discretion in making distributions of distributable net income (DNI) could save substantial amounts of tax.

**Extending the trust term.** Many trusts provide that principal must be distributed to beneficiaries at certain ages. For example, a trust might provide that a beneficiary is entitled to all trust principal on reaching age 35. Such a distribution may expose the trust assets to unnecessary estate taxes, creditors or divorcing spouses. These problems might be avoided by decanting into a dynasty trust that delays the mandatory distribution of principal.

**Changing trust situs.** Some states have much more favorable trust laws than others. State income tax rates on trust income range from 0 percent to as high as 13.3 percent.<sup>2</sup> Moreover, some states may also offer greater asset protection for a trust.

If a trust doesn't include a change-of-situs provision, the trustee should consider decanting to a trust in a state with more favorable trust laws. If the trust grants the power to change situs, but neither the governing instrument nor state law allows decanting, one can change the trust's situs to a state that allows decanting and then decant the trust from that state to the desired jurisdiction.

**Creating a basis step-up for trust assets.** Back when the applicable exclusion amount (unified credit) was much lower, many taxpayers with moderate wealth transferred assets to trusts designed to avoid estate tax. The transfers avoided estate tax, but heirs didn't receive a basis step-up in the assets because they weren't included in the gross estate. This was a favorable trade-off, however, because the estate tax rate was much higher than the capital gains rate.<sup>3</sup>

Because the applicable exclusion amount increased to \$5 million (indexed for inflation), many of the taxpayers who created these trusts no longer have a taxable

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estate. They're losing a basis step-up without any estate tax benefit. By decanting to a trust that gives the grantor a general power of appointment (POA) over the trust assets, these taxpayers can cause the trusts to be included in their gross estates and obtain a basis step-up.<sup>4</sup>

**Stretching out individual retirement account distributions.** Taxpayers often leave their IRAs to trusts. Although they may have important reasons for doing so, this strategy may limit the extent to which they can stretch out required minimum distributions (RMDs).<sup>5</sup> Assuming that all the trust beneficiaries are individuals, the measuring life for determining RMDs is that of the oldest beneficiary. Unfortunately, trusts often have

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contingent beneficiaries who are much older than the primary beneficiaries, increasing RMDs, shortening the deferral period and reducing the amount of wealth that can be accumulated for the family.<sup>6</sup> It may be possible to decant such a trust into a new trust that eliminates these unfavorable beneficiaries, makes a younger beneficiary the measuring life and extends the deferral period.

**Combining trusts.** Taxpayers often create several irrevocable trusts with very similar provisions. It may be possible to decant these trusts into a single trust to simplify administration and save costs.

**Splitting trusts.** Many families have a single pot trust to provide for all family members. If the various family members have different investment philosophies or different financial needs or goals, the trustee should consider decanting into separate trusts tailored to the needs of the different beneficiaries.

**Adding trustee powers.** Investment diversification requirements under a state's prudent investor statute might prevent a trustee from investing in the most

favorable assets for the trust. Decanting to a new trust that allows the trustee to disregard the diversification requirement might be a good solution. The new trust might also increase the trust's ability to adapt to changed circumstances by adding a trust protector.

**Qualifying a trust to own S corporation stock.** Taxpayers may wish to transfer S corporation stock to a trust, but the trust isn't drafted to be an eligible S corporation shareholder. If the trust doesn't have a trust protector, the trustee might be able to decant the trust into one that qualifies as a grantor trust, an Internal Revenue Code Section 678 trust, a qualified subchapter S trust (QSST) or an electing small business trust.

**Changing a support trust into a discretionary trust.** In most states, creditors can reach trust assets to the maximum extent a beneficiary could compel distributions. Thus, they could reach assets in a trust with an ascertainable standard,<sup>7</sup> but not in a trust giving the trustee absolute discretion over distributions. Thus, to increase asset protection, it might be possible to decant a trust with an ascertainable standard to a trust with a wholly discretionary standard.

**Other reasons.** These include:

1. Modifying or removing POAs in the first trust;
2. Adding or removing a spendthrift clause;
3. Creating a special needs trust;
4. Converting a grantor trust to a non-grantor trust, or vice versa;
5. Changing provisions for appointing or removing a trustee;
6. Reducing a beneficiary's distribution rights so the beneficiary can qualify for Medicare;
7. Increasing trustee powers to give the trustee greater ability to deal with changing circumstances;
8. Separating risky assets from other assets;
9. Protecting the tax treatment of a trust;
10. Changing trustee compensation;
11. Converting a domestic trust to a foreign trust or vice versa; and
12. Limiting distributions to beneficiaries with substance abuse problems.

Note that whether a particular improvement is possible may depend on the applicable state statute and on how the federal tax issues discussed below are eventually resolved.



## Authority to Decant

Trustees must have authority to decant a trust, so not all trusts are eligible. There are three possible sources of authority: (1) the trust's governing instrument, (2) common law, or (3) a state statute.<sup>8</sup>

**Governing instrument.** A trust may expressly authorize the trustee to decant. Typically, however, the governing instrument is either silent or ambiguous with respect to decanting, and one of the other sources of authority must be used.

**Common law.** The question of whether a trustee has a common law power to decant first arose in *Phipps v. Palm Beach Trust Company*,<sup>9</sup> which held that if a trustee has the power to distribute principal to beneficiaries, the trustee also has the power to distribute principal in further trust.<sup>10</sup> The rationale underlying the decision was that the power of a trustee to transfer property outright to a beneficiary includes the power to transfer a lesser interest (that is, an interest in further trust). The American College of Trust and Estate Counsel (ACTEC) noted that if this rationale is sound, the common law of every other state confers a decanting power on all trustees who have a power to invade corpus for beneficiaries unless the trust instrument clearly indicates a contrary intent.<sup>11</sup>

**State statutes.** Notwithstanding the favorable decision in *Phipps*, estate planners in most states were unwilling to advise trustees to decant without specific statutory authority. To address this concern, states began enacting decanting statutes, beginning with New York in 1992.<sup>12</sup> As of Feb. 15, 2015, the following 22 states had decanting statutes: Alaska,<sup>13</sup> Arizona,<sup>14</sup> Delaware,<sup>15</sup> Florida,<sup>16</sup> Illinois,<sup>17</sup> Indiana,<sup>18</sup> Kentucky,<sup>19</sup> Michigan,<sup>20</sup> Missouri,<sup>21</sup> Nevada,<sup>22</sup> New Hampshire,<sup>23</sup> New York,<sup>24</sup> North Carolina,<sup>25</sup> Ohio,<sup>26</sup> Rhode Island,<sup>27</sup> South Carolina,<sup>28</sup> South Dakota,<sup>29</sup> Tennessee,<sup>30</sup> Texas,<sup>31</sup> Virginia,<sup>32</sup> Wisconsin<sup>33</sup> and Wyoming.<sup>34</sup>

These statutes vary considerably. The main areas of difference concern whether:<sup>35</sup>

- a trust with an ascertainable standard can be decanted. Some states allow decanting only if a trustee has an absolute right to invade principal, while others allow decanting even if the trustee's invasion power is subject to an ascertainable standard.
- a trust with an ascertainable standard can be

decanted into a discretionary trust. Some states generally allow decanting a trust with an ascertainable standard but don't allow the new trust to have a discretionary standard.

- the receiving trust can eliminate a mandatory distribution right. Can decanting eliminate a beneficiary's income, annuity or unitrust interest?
- the receiving trust can eliminate a mandatory withdrawal right. Can decanting eliminate a beneficiary's right to withdraw corpus from the trust (for example, a right to withdraw 50 percent of the corpus at age 35)?
- the interests of remaindermen can be accelerated. Can decanting immediately make a remainder beneficiary a current beneficiary?
- the old and new trusts must have the same distribution standards. Can the new trust have a different discretionary distribution standard than the old trust?
- the trustee can grant a POA to a beneficiary of the new trust. Can a trustee with unlimited discretion to make distributions grant a POA to a beneficiary of the new trust? Can a trustee with limited discretion to make distributions grant a POA to a beneficiary of the new trust?
- the statute prohibits decanting that would cause the old trust not to qualify for federal tax benefits. Does the statute prohibit decanting that would cause the old trust not to qualify for a marital deduction, charitable deduction, gift tax annual exclusion or generation-skipping transfer (GST) tax annual exclusion or result in adverse estate or gift tax consequences?
- trustees can decant if they're beneficiaries. Are trustees who are beneficiaries prohibited from decanting or subject to special limitations?
- notice must be given to interested parties prior to decanting. To what extent must notice of decanting be given to beneficiaries?
- decanting can be used to increase trustee fees, limit a trustee's liability, exonerate a trustee or eliminate a trustee remover. Does the statute include express prohibitions on the trustee's ability to improve its own interests?

See "The Rankings," p. 19, which compares the provisions in the various state statutes and ranks the statutes on how favorable they are to trustees.



## Potential Tax Issues

Because trust decanting is a relatively new strategy, its tax consequences haven't yet been established. The Internal Revenue Service is considering ways to address these uncertainties and, in Notice 2011-101, asked for comments from the public. ACTEC laid out the potential income, gift and estate and GST tax issues suggested by Notice 2011-101, along with its proposed answers. The proposed answers to many of the key tax questions are summarized below.<sup>36</sup>

## Income Tax Questions

- 1. Does a decanting distribution from a non-grantor trust to another non-grantor trust result in gain recognition by the transferor trust under IRC Section 1001?** Decanting generally doesn't result in a realization event for the distributing trust if the decanting is authorized by either the trust's governing instrument or state law.<sup>37</sup> If the decanting is non-pro rata, the governing instrument or state law must authorize decanting on a non-pro rata basis.<sup>38</sup> Decanting could be a taxable exchange if it's not authorized by the governing instrument or applicable state law, however.<sup>39</sup>
- 2. Does decanting from a grantor trust to a non-grantor trust result in gain recognition by the transferor trust?** When grantor trust status terminates during the grantor's life, there's a deemed disposition of the trust assets from a grantor trust to a non-grantor trust. Gain is recognized to the extent that the liabilities of the transferred assets exceed the trust's basis in the assets.<sup>40</sup>
- 3. Does decanting from a grantor trust to a non-grantor trust result in gain recognition by the transferor trust?** There's no deemed transfer and no income recognition on a decanting from a non-grantor trust to a grantor trust.<sup>41</sup>
- 4. Does decanting from a grantor trust to another grantor trust result in gain recognition by the transferor trust?** There can be no gain recognition because transactions between a grantor and a grantor trust or between two grantor trusts are treated as non-events for federal income tax purposes. The two trusts are treated as the same taxpayer.<sup>42</sup>
- 5. Does a decanting distribution result in gain recognition by any trust beneficiary under Section 1001?** The basic rule is that a taxpayer only real-

izes gain or loss when the taxpayer sells or disposes of property in exchange for property that's "materially different."<sup>43</sup> *Cottage Savings v. Commissioner*<sup>44</sup> concluded that property is materially different if its owners have legal entitlements that differ in kind or extent. Thus, a distribution from one trust to another might be a taxable exchange of an interest in the old trust for an interest in the new trust if the two interests are significantly different.<sup>45</sup> There's probably no gain recognition, however, if the decanting is authorized by the governing instrument of the distributing trust or under state law.<sup>46</sup>

- 6. Does a distribution of property from one trust to another get treated as a distribution for purposes of IRC Sections 661 and 662?** Decanting could be considered either a continuation or modification of an existing trust. If the terms of the new trust are essentially the same as those of the old trust, the decanting should be treated as a continuation. The original trust and the new trust would be treated as the same trust for income tax purposes, there would be no distribution and no DNI would be carried out of the trust.<sup>47</sup> If the terms of the new trust were significantly different, the decanting should be treated as a modification. The transfer of assets should carry out DNI, resulting in income to the receiving trust under Section 662(a). However, there would be a corresponding distribution deduction for the distributing trust under Section 661(a).
- 7. What effect does decanting have on the original trust's tax attributes?** The IRC and Treasury regulations provide that if a trust is terminated, its unused net operating losses and capital loss carryovers pass on to the trust's beneficiaries (in this case, the receiving trust).<sup>48</sup>

There's no specific authority on whether beneficiaries succeed to a terminated trust's other tax attributes. However, if the second trust has similar terms and is treated as a continuation of the first trust, there should be carryover.<sup>49</sup> Even if there are significant differences, the tax attributes might carry over under general tax principles—like they do for corporate attributes under IRC Section 381.
- 8. Does a decanting power prevent a trust from qualifying as a QSST?** One of the requirements for a QSST is that it have only one income beneficiary.<sup>50</sup> Decanting is generally allowed only pursuant to a



## The Rankings

How states compare with one another on decanting

Rank	State	Has Decanting Statute? (60% weight)	Can Decant With Ascent Standard? (7.5% Weight)	Notice to Beneficiaries Required? (7.5% Weight)	Can Decant Trust With Ascertainable Standard Into Discretionary Trust? (7.5% Weight)	Can Remove Mandatory Income Interest? (2.5% Weight)	Allow Power of Appointment In Second Trust to Benefit From Non-Beneficiary? (2.5% Weight)	Can Accelerate Remainder Beneficiary's Interest? (2.5% Weight)	Dynasty Trust State Ranking (7.5% Weight)*	Domestic Asset Protection Trust State Ranking (2.5% Weight)**	Total Score***
1	SD	Yes	Yes	No	Yes	Yes	Yes	Yes	Ranked #1	Ranked #2	99.5
2	NV	Yes	Yes	No	Yes	No	Yes	Silent	Ranked #2	Ranked #1	94.5
3	TN	Yes	Yes	No	Yes	No	Yes	Silent	Ranked #4	Ranked #3 (tie)	93.5
4	NH	Yes	Yes	No, except charitable trusts	Yes	No	Yes	Silent	Ranked #8	Ranked #9	90.5
5	DE	Yes	Yes	No	No	Yes	Yes	No	Ranked #7	Ranked #7	86.0
6	OH	Yes	Yes	Yes	No	Yes	Yes	No	Ranked #6	Ranked #3 (tie)	79.5
7	AK	Yes	Yes	Yes	No, except after the first trust would have ended	No	Yes	No	Ranked #3	Ranked #5	78.5
8 (tie)	AZ	Yes (short provisions)	Yes	No	Yes	No	Silent	Silent	Unranked	Not allowed	77.5
8 (tie)	VA	Yes	Yes	Yes	No, except if court approval	No	Yes	No	Unranked	Ranked #13	77.5
10	IL	Yes	Yes	Yes	No	No	Yes	Silent	Ranked #9	Not allowed	76.5
11 (tie)	MO	Yes	Yes	Yes, only to beneficiaries of second trust	No	Yes	Silent	Yes	Unranked	Ranked #8	76.0
11 (tie)	WY	Yes (very short provisions)	Yes	No	Yes	Silent	Silent	Silent	Ranked #5	Ranked #6	76.0
13	IN	Yes	Yes	Yes	Yes	No	Silent	Silent	Unranked	Not allowed	75.0
14	SC	Yes	Yes	Yes	No	Yes	Yes	No	Unranked	Not allowed	72.5
15 (tie)	KY	Yes	Yes	Yes	No	No	Yes	No	Unranked	Not allowed	70.0
15 (tie)	MI	Yes	No	Yes	No	No	Yes	Silent	Unranked	Not allowed	70.0
15 (tie)	NC	Yes	Yes	Yes	No	No	Yes	No	Unranked	Not allowed	70.0
15 (tie)	TX	Yes	Yes	Yes	No	No	Yes	Silent	Unranked	Not allowed	70.0
19 (tie)	FL	Yes	No	Yes	No	No	Silent	Silent	Ranked #10	Not allowed	69.0
19 (tie)	RI	Yes	Yes	Yes	Silent	No	Silent	No	Unranked	Ranked #11	69.0
21	NY	Yes	Yes	Yes	No	No	No	No	Unranked	Not allowed	67.5
22	WI	Yes	Yes	Yes	No	No	Silent	No	Unranked	Not allowed	67.5

\* The Dynasty Trust State Ranking column is based on the 3rd Annual Dynasty Trust State Rankings Chart created in October 2014 at [www.oshins.com/images/Dynasty\\_Trust\\_Rankings.pdf](http://www.oshins.com/images/Dynasty_Trust_Rankings.pdf).

\*\* The Domestic Asset Protection Trust State Ranking column is based on the 5th Annual Domestic Asset Protection Trust State Rankings Chart (updated) created in July 2014 at [www.oshins.com/images/DAPT\\_Rankings.pdf](http://www.oshins.com/images/DAPT_Rankings.pdf).

\*\*\* This Rankings Chart was created in January 2015 and updated in February 2015. The original Trust Decanting State Rankings Chart was created in January 2014.

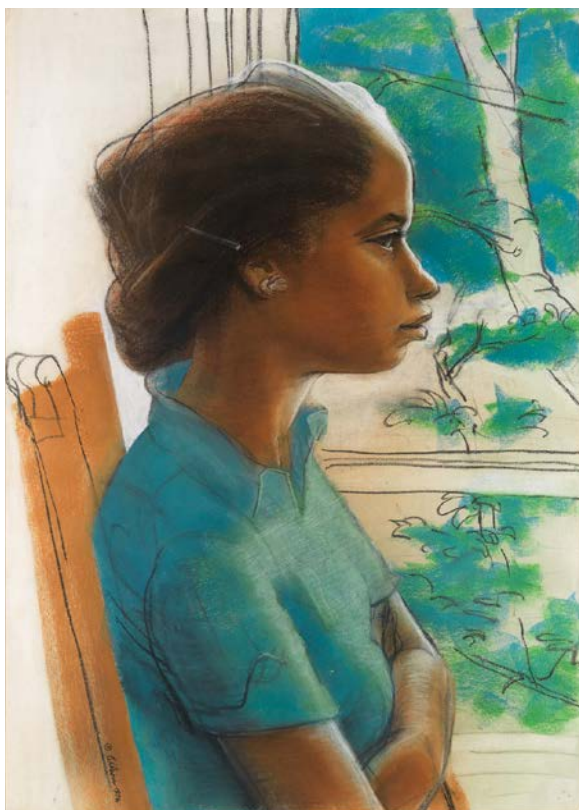
— Steven J. Oshins



trustee's power to invade corpus of the distributing trust, and the trustee of a QSST could invade corpus only for the benefit of the single income beneficiary. Thus, a distributing trust that was a QSST could only be decanted to a receiving trust for the exclusive benefit of the income beneficiary of the distributing trust, avoiding any violation of the QSST qualification requirements.

### Gift and Estate Tax Questions

#### 1. Does a beneficiary whose interests in a trust are



### SPOT LIGHT

**Daydreaming**  
"Sherry" (30 in. by 20 in.) by John Wilson, sold for \$15,000 at Swann Auction Galleries' recent Ascension: A Century of African-American Art Sale in New York on April 2, 2015. Known for his large-scale figurative works and social realism, Boston's John Wilson passed away in January of this year at the age of 92.

**reduced by decanting make a taxable gift?** Treas. Regs. Section 25.2512-8 suggests that when a beneficiary consents to or acquiesces in a decanting that reduces the beneficiary's interest, the beneficiary has made a taxable gift. This conclusion is consistent with Revenue Ruling 81-264, which holds that a taxable gift can occur when a taxpayer allows legal rights to expire.

On the other hand, regulations under IRC Section 2511 require a voluntary act of transfer to have a taxable gift.<sup>51</sup> Thus, a taxable gift should occur only if the beneficiary has a legal right to object to the exercise of authority to decant. Under the law of most states, beneficiaries would have no such right, so generally there should be no gift, but the IRS refuses to rule on the issue.<sup>52</sup>

- 2. **Does decanting result in gift tax for a trustee/beneficiary?** If the trustee has absolute discretion to distribute to herself, she'd be treated as having a general POA under IRC Sections 2514 and 2041. If decanting reduces a trustee/beneficiary's presently exercisable general POA, it could cause the beneficiary to incur gift tax.<sup>53</sup> If the beneficiary's general POA isn't presently exercisable, however, it shouldn't cause a taxable gift under Section 2514. A trustee/beneficiary might also make a taxable gift even if he only has the power to make distributions to others.<sup>54</sup>

There should be no taxable gift, however, if distributions by the trustee/beneficiary are subject to an ascertainable standard, but there are private letter rulings that arguably suggest otherwise.<sup>55</sup>

- 3. **Does a beneficiary whose interests in a trust are reduced by decanting make an IRC Section 2036 or Section 2038 transfer?** Decanting could result in estate inclusion if a beneficiary was deemed to make a gift, but the gift was incomplete (for example, because the beneficiary retained a limited POA). If the power wasn't exercised during life, the gift would be completed at death and the property included in the gross estate under IRC Sections 2036(a)(2) or 2038. Again, however, the beneficiary would likely need to have the ability to object to the decanting.

### GST Issues

- 1. **Does a GST grandfathered trust that receives decanted property lose its grandfathered status?** A trust can be GST exempt either because it's a



pre-Sept. 25, 1985 grandfathered trust or because it allocates sufficient GST tax exemption to the trust. Regulations provide that a grandfathered GST tax-exempt trust retains its exempt status following a decanting if it qualifies under either a discretionary distribution safe harbor<sup>56</sup> or a trust modification safe harbor.<sup>57</sup>

The IRS hasn't issued guidance on when decanting from a trust, exempt from the GST because of exemption allocation, loses its exempt status. The IRS has suggested in rulings, however, that the same two safe harbor tests should apply.<sup>58</sup>

**2. Does decanted property have the same GST inclusion ratio in the transferee trust that it had in the transferor trust?** There's no law directly on point. It appears that the receiving trust should have the same inclusion ratio as the transferor trust under IRC Section 2654(b), provided that the receiving trust doesn't extend the time for vesting or shift beneficial interests to a lower generation.

**3. Does decanted trust property continue to have the same transferor for GST tax purposes following decanting to a new trust?** For GST tax purposes, IRC Section 2652(a) defines the transferor as: (1) in the case of a transfer subject to estate tax, the decedent, and (2) in the case of a transfer subject to gift tax, the donor. Treas. Regs. Section 26.2652-1(a) similarly provides that the individual with respect to whom property was most recently subject to gift or estate tax is the transferor for GST tax purposes. Thus, if a decanting is subject to gift or estate tax, the transferor can change for GST tax purposes.

Loss of grandfathered status, however, doesn't change the transferor for GST tax purposes.<sup>59</sup> The same rule should apply for loss of exempt status by a trust that's exempt by reason of allocating GST exemption amount.

### Use Caution When Warranted

Decanting is one of the most important developments in estate planning in a long time. For many of the trust improvements listed above, there appears to be no reason not to proceed with decanting, provided that the trustee has the proper authority. For more substantial changes like changing beneficiaries' interests or lengthening the term of a trust, planners may wish to wait until the tax consequences become clear. Caution may

also be advisable for GST trusts.



### Endnotes

- Internal Revenue Code Sections 661 and 662.
- California had the top 13.3 percent rate for 2014, followed by Hawaii (11 percent), Oregon (9.9 percent), Minnesota (9.85 percent), Iowa (8.98 percent) and New Jersey (8.97 percent). By contrast, Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming have no state income tax.
- There was also a time-value of money advantage because the estate tax had to be paid when the decedent died, but there would be no capital gains tax until the assets were sold.
- IRC Section 2042.
- The individual retirement account owner may wish to maintain some control over how the assets are managed after the owner's death or be concerned that the beneficiary lacks investment skills, is a spendthrift or has alcohol or drug problems.
- Note that lengthening the deferral period is only an advantage if the beneficiaries don't need the money.
- The trustee would typically be directed to make distributions necessary for the beneficiary's health, education, maintenance and support standard.
- Note that an express prohibition on decanting in the trust instrument trumps any authorization for decanting.
- Phipps v. Palm Beach Trust Company*, 142 Fla. 782 (1940).
- Courts in other states reached similar conclusions. See, for example, *Wiedenmayer v. Johnson*, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969); *In re Estate of Spencer*, 232 N.W.2d 491 (Iowa 1975); *Matter of Estate of Mayer*, 176 Misc.2d 562 (Sur. Ct. 1998).
- Comments of The American College of Trust and Estate Counsel (ACTEC) on Transfers by a Trustee from an Irrevocable Trust to Another Irrevocable Trust (Sometimes called "Decanting") (Notice 2011-101) (released Dec. 21, 2011).
- N.Y.E.P.T.L Section 10.6.6.
- Alaska Stat. Section 13.36.157 through Section 13.36.159; Section 13.36.215 (definitions).
- Ariz. Rev. Stat. Ann. Section 14-10819.
- Del. Code Ann. tit. 12, Section 3528.
- Fla. Stat. Section 736.0411716.
- 760 ILCS 5/16.4.
- Ind. Code Section 30-4-3-36.
- Ky. Rev. Stat. Ann. Section 386.175.
- Mich. Comp. Laws Section 700.7820a.
- Mo. Rev. Stat. Section 456.4-419.
- Nev. Rev. Stat. Section 163.556.
- N.H. Rev. Stat. Ann. Section 564-B:4-418.
- N.Y. Est. Powers & Trusts Section 10-6.6
- N.C. Gen. Stat. Section 36C-8-816.1.
- Ohio Rev. Code Ann. Section 5808.18.
- R.I. Gen. Laws Section 18-4-31.



## FEATURE: ESTATE PLANNING & TAXATION

28. Section 62-7-816A.
29. S.D. Codified Laws Sections 55-2-15 to 55-2-21.
30. Tenn. Code Ann. Section 35-15-816(b)(27).
31. Texas Property Code Section 112.071 - 112.087.
32. Va. Code. Ann. Section 64.2-778.1.
33. Wis. Stats. Section 701.0418.
34. W.S. 4-10-816(a)(xxviii).
35. For a comprehensive comparison of state decanting statutes, see the "ACTEC Summary of State Decanting Statutes," compiled by Susan T. Bart at [www.actec.org/public/Documents/Studies/Bart-State-Decanting-Statutes-08-22-14.pdf](http://www.actec.org/public/Documents/Studies/Bart-State-Decanting-Statutes-08-22-14.pdf), on which the list of factors presented here is based.
36. *Supra* note 11.
37. Treasury Regulations Section 1.1001-1(h); Private Letter Ruling 200743022 (July 19, 2007).
38. PLR 200810019 (Nov. 20, 2007).
39. Revenue Ruling 69-486. There are exceptions to the general rule. For example, gain is recognized on a transfer of negative basis assets (for example, limited liability company or partnership interests with a negative capital account or property with debt in excess of basis). Also, adding a power of appointment to the new trust might result in an exchange for materially different assets, triggering gain recognition under *Crane v. United States*, 331 U.S. 1 (1947).
40. *Madorin v. Commissioner*, 84 T.C. 667 (1985); Rev. Rul. 77-402; Treas. Regs. Section 1.1001-2(c), Example 5; *Crane, ibid.*
41. Chief Counsel Advice 20092303.
42. Rev. Rul. 85-13; PLR 200228019 (April 10, 2002).
43. Treas. Regs. Section 1.1001-1(a); *Cottage Savings v. Comm'r*, 499 U.S. 504 (1991).
44. *Cottage Savings, ibid.*
45. For example, in PLR 200231011 (May 6, 2002), the Internal Revenue Service took the position that a switch from annuity payments to unitrust payments triggered gain recognition when the change wasn't specifically authorized under state law. If the interests aren't materially different, however, no gain is recognized (See PLRs 201207001 (Oct. 26, 2011), 201136014 (June 7, 2011) and 199951028 (Sept. 28, 1999)).
46. Treas. Regs. Section 1.1001-1(h). The rationale is that the new property isn't materially different because the beneficiaries always had a right to it under either the governing instrument or under state law.
47. See PLRs 200527007 (March 24, 2005), 200607015 (Nov. 4, 2005) and 200723014 (Feb. 5, 2007).
48. IRC Section 642(h); Treas. Regs. Section 1.642(h)(3)(D).
49. PLR 200607015 (Nov. 4, 2005).
50. IRC Section 1361(d)(3).
51. Treas. Regs. Section 25.2511-1(a) and 25.2511-2(a).
52. Revenue Procedure 2013-3 Section 5.01(23).
53. IRC Section 2514(b), (e); Treas. Regs. Sections 25.2514-3(a), (c)(4).
54. Treas. Regs. Section 25.2511-1(g)(2).
55. See, e.g., PLRs 8905035 (Nov. 4, 1988), 8535020 (May 30, 1985), 201122007 (Feb. 24, 2011), 9451049 (Dec. 23, 1994) and 200243026 (July 24, 2002).
56. Treas. Regs. Section 26.2601-1(b)(4)(i)(A). A trust qualifies for the discretion-

ary distribution safe harbor if: (1) when the trust became irrevocable, either the terms of the trust instrument or local law (that is, common law or state statute) authorizes the trustee to make distributions to a new trust; (2) neither beneficiary consent nor court approval is required for the decanting; and (3) the new trust won't suspend or delay the vesting of an interest in trust beyond the federal perpetuities period.

57. Treas. Regs. Section 26-2601-1(b)(4)(i)(D)). A trust qualifies for the trust modification safe harbor if the modification doesn't: (1) shift a beneficial interest in the trust to a beneficiary occupying a lower generation than the person holding the interest under the original trust; and (2) extend the time for vesting of any beneficial interest in the trust beyond the period provided in the original trust.
58. PLRs 201134017 (May 26, 2011) and 200839025 (May 30, 2008).
59. PLR 9522032 (March 3, 1995).



### SPOT LIGHT

#### Rock the Vote

"1920s ... The Migrants Arrive and Cast Their Ballots" (32 in. by 24.5 in.) by Jacob Lawrence, sold for \$8,125 at Swann Auction Galleries' recent Ascension: A Century of African-American Art Sale in New York on April 2, 2015. Lawrence was 23 years old when he gained national recognition with his 60-panel *Migration Series*.