



# Top Ten Reasons to Decant an Irrevocable Trust

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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.

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".

Following are ten reasons to consider decanting an irrevocable trust:

## **Reason #1: Extending the term of the trust.**

Many trusts are drafted to make mandatory distributions to the beneficiaries at staggered ages. This can open the trust assets up to unnecessary estate taxes, creditors and divorcing spouses. The trustee should consider decanting the trust into a long-term Dynasty Trust that lasts for multiple generations.

## **Reason #2: Changing a support trust into a discretionary trust.**

Many trusts are drafted to give the trustee the power to make distributions to the beneficiaries for their health, education, maintenance and support. These trusts are often

called support trusts. Depending upon state statutes and case law, support trusts are often available to certain classes of creditors, including divorcing spouses. A discretionary trust, on the other hand, gives the trustee absolute discretion over distributions and thus generally protects the assets from all classes of creditors. Thus, decanting a support trust into a discretionary trust can be a valuable strategy.

## **Reason #3: Correcting drafting errors or ambiguous terms.**

Many trusts have drafting errors or ambiguous terms that need to be fixed. Some trusts give a trust protector or independent trustee the power to fix these types of errors, while others do not. Decanting the trust into a new trust can cure these problems.

## **Reason #4: Changing the governing law of the trust.**

Many trusts were established in a jurisdiction with a state income tax that can be avoided or bad creditor protection statutes or case law that can also be avoided. While many of these trusts have a provision allowing the trustee to move the trust to a different situs, many of them do not. This is easily solved by decanting the trust into a trust domiciled in a superior trust jurisdiction. This also includes the ability to decant a Dynasty Trust or Domestic Asset Protection Trust from one state to a state with superior laws.

## **Reason #5: Modifying powers of appointment.**

Many trusts do not contain powers of appointment which would enable a person to change the succeeding interests of the beneficiaries and how they receive the assets. In today's planning world where the estate tax exemption is much higher than it had been in the past and in which income tax reduction

has been so much more important, it is often also useful to be able to give a beneficiary a general power of appointment over certain trust assets in order to achieve a new income tax basis at that person's death. This can be accomplished through decanting.

**Reason #6: Changing trustee provisions.**

Many trustee provisions do not allow for a succession of trustees or for a list of people who can name successors, while other trusts have a succession of trustees who the settlor may have wanted at the time the trust was established, but who would now not be selected by the settlor if the settlor could redo the trust today. This can be changed through decanting.

**Reason #7: Combining trusts for greater efficiencies.**

Many of our clients set up trusts at different times, and sometimes with different law firms over the years. Ultimately, the family has more trusts than are needed. If the trusts aren't sufficiently similar enough to merge them, then they can be combined through decanting one trust into another or by decanting multiple trusts into a newly formed trust.

**Reason #8: Separating trusts.**

Many trusts have been drafted so the entire family benefits from one large pot trust. Although this sometimes makes sense in certain situations, more often than not it creates problems because different beneficiaries have different needs and different investment philosophies. A large pot trust can be decanted into separate trusts for each beneficiary so the beneficiaries have their own autonomy.

**Reason #9: Creating a special needs trust.**

It may not have been contemplated when the initial trust was drafted that there would be a beneficiary that has special needs and will require a trust that preserves eligibility for public benefits. A trust can be decanted to add this language.

**Reason #10: Qualifying a trust to own S corporation stock.**

Many trusts have been drafted without the trust scrivener contemplating the possibility that the trust would need to be able to own S corporation stock at some point. This includes other forms of business entities that elect to be taxed as an S corporation. If the trust agreement doesn't give a trust protector or independent trustee the power to

add such provisions, the trust can be decanted to add the provisions.

This list is not intended to be exhaustive. There are other reasons one may want to decant a trust. Decanting is perhaps the most underused tool in the estate planning industry in relation to the benefits and flexibilities it provides and likely will become more popular as more practitioners become aware of these opportunities.

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