

DECANTING MORE THAN JUST WINE: REVOCABILITY IN IRREVOCABLE TEXAS TRUSTS

Comment

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I. INTRODUCTION

The process of decanting wine is based on the need to filter the sediments out of an otherwise decadent bottle of wine, as many wines produce a significant amount of sediment as they age.¹ Decanting a bottle of wine allows removal of these sediments while keeping the flavor and texture of the wine intact.² Decanting a bottle of wine also allows it to breathe, bringing life to an older, sophisticated wine.³ To decant, one pours wine from the bottle into a decanter—a container with a special design that allows the wine to separate from the sediment.⁴ Aerating a bottle of wine—the act of pouring the wine into a decanter—also stimulates the oxidation process, allowing the flavor of the wine to develop and increasing the desirability of the wine.⁵ Decanting not only allows the flavor to develop, but may also smooth or soften some of the harshness that comes with some wines.⁶

Similarly, decanting a trust allows a trustee to pour assets from one trust into another trust, often for the purpose of breathing life into the previous irrevocable trust.⁷ Decanting a trust may be used to remove sediments—tax problems or old laws that were useful when the settlor first created the original trust but are no longer beneficial—while keeping the purpose of the trust intact.⁸ More and more, the term “irrevocable” in a trust context does not mean the trust absolutely cannot be changed.⁹ Instead, concepts such as decanting greatly increase the flexibility of all trusts, including so-called irrevocable trusts.¹⁰

While several states have previously enacted decanting statutes, Texas only recently enacted this kind of statute.¹¹ Because this statute and its concepts are fairly new, especially to Texas attorneys, it is imperative that attorneys know and understand how to use this new statute to best serve their clients. This statute can make creating and working with irrevocable trusts

1. See KAREN MACNEIL, *THE WINE BIBLE* 93–94 (Workman Publ'g 2001).

2. See *id.* at 94.

3. See *id.* at 93.

4. See *id.* at 93–94.

5. See *id.* at 93.

6. See *id.* at 93–94.

7. See Melissa J. Willms, *Decanting with Benefits*, Presented at the State Bar of Texas 37th Annual Advanced Estate Planning and Probate Course (June 26–28, 2013), available at http://materials.legalspan.com/txbar/epp_74372/30_Guthrie.pdf.

8. See *id.*

9. See Adam O. Kirwan, *The Flexible Irrevocable Trust: Far More Powerful Than You May Have Imagined*, KIRWAN L. FIRM (2012), <http://www.kirwanlawfirm.com/page1/page2/page5/>.

10. See *id.*

11. TEX. PROP. CODE ANN. §§ 112.071–.087 (West 2013). These sections were added to the Property Code by the 2013 legislature and became effective on September 1, 2013. *Id.*

easier for practitioners to do what is best for their clients. Many attorneys may be unaware of the statute; therefore, practitioners may lean towards modification of irrevocable trusts when decanting could be just as beneficial.

This comment will address the history of decanting a trust as well as Texas's new decanting statute. First, background information will be presented in order to develop a strong foundation as to what an irrevocable trust is, how to create one, and what flexibility, if any, the trustee or beneficiaries have in administering an irrevocable trust.¹² Next, an overview of modification and termination of a trust will demonstrate how a settlor, trustee, or beneficiary can officially modify a trust.¹³ Then, an exploration of decanting in other states, as well as in common law, will show the history and rationales behind decanting.¹⁴ Finally, a discussion of the practicality of the Texas statute will follow.¹⁵

II. A BRIEF OVERVIEW OF IRREVOCABLE TRUSTS

An overview of what an irrevocable trust is and the ways to modify a current trust will help in understanding the use for decanting statutes, and determining how modification and decanting a trust differ. A settlor generally uses trusts, including irrevocable trusts, as one of the most useful estate planning tools.¹⁶ This is because the requirements for establishing a trust are fairly simple.¹⁷

The Texas Property Code regulates the creation, operation, and termination of trusts in Texas.¹⁸ One method in which a settlor can create a trust is by transferring the property "to another person as trustee for a third person," either through an *inter vivos* transfer or a testamentary transfer.¹⁹ From there, the settlor can easily create an irrevocable trust.²⁰ While the settlor does not need to include any specific language to create an irrevocable trust, the settlor must clearly show an intent to create an irrevocable trust within the trust instrument, which is usually done by using express language to that degree.²¹ By including this language in the trust instrument, the settlor may enjoy the benefits that accompany an irrevocable trust.²²

12. See *infra* Part II.

13. See *infra* Part II.C.

14. See *infra* Part III.B–C.

15. See *infra* Part IV.

16. ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 8 (3d ed. 2003).

17. See *id.* The essential elements of a trust include: (1) the intention to create a trust, (2) property for the trust, (3) a trustee to hold the property of the trust, and (4) at least one beneficiary of the trust. *Id.*

18. TEX. PROP. CODE ANN. §§ 111.001–117.012 (West 2013).

19. *Id.* § 112.001(2)–(3). An *inter vivos* transfer occurs during the life of the settlor while a testamentary transfer occurs upon the death of the settlor. *Id.*

20. *Id.* § 112.051(a).

21. *Id.*; see *Vela v. GRC Land Holdings, Ltd.*, 383 S.W.3d 248, 250–51 (Tex. App.—San Antonio 2012, no pet.).

22. PROP. § 112.051(a).

A. Why Use an Irrevocable Trust?

There are four categories of irrevocable trusts, which are used for different purposes.²³ The first category includes trusts that delay the enjoyment of the property for a specified period of time.²⁴ These trusts are usually designated as children's trusts and are paid out when the child reaches a certain age.²⁵ Until the child reaches the specified age, the income is accumulated.²⁶ A couple who wants to provide for their minor children if they pass away may use this category of trusts.²⁷

The second category includes trusts that are broken into a life estate with the remainder to another person.²⁸ A Clifford Trust—a trust in which an income-producing asset is transferred to the trust so the beneficiary may receive the income at a lower tax rate than the donor—is a popular example of this type of trust.²⁹ In such trusts, the donor may also maintain a reversionary interest.³⁰

The third category includes trusts used in business transactions.³¹ For example, a settlor's "interest in a business [may be] transferred to a trust for the benefit of [others]" with the ultimate purpose of conferring taxable rights away from the one individual who may be required to pay higher taxes.³²

The last category of irrevocable trusts includes "trusts that give the trustee discretion to spread income among" the beneficiaries.³³ These trusts are commonly used in testamentary planning and educational trusts.³⁴ Such discretionary trusts are also the types of trusts that open themselves up to decanting.³⁵

By placing assets into an irrevocable trust, the settlor may also obtain benefits that do not come with revocable trusts.³⁶ Irrevocable trusts may allow for the avoidance of probate upon the death of the settlor.³⁷ A person can either transfer wealth and property into a trust upon the individual's death or during their life.³⁸ Either way, the assets in the trust are not subject to the probate

23. GEORGE M. TURNER, IRREVOCABLE TRUSTS § 2:19(1) (3d ed. 2013).

24. *Id.*

25. *Id.*

26. *Id.*

27. *See* ANDERSEN, *supra* note 16.

28. TURNER, *supra* note 23, § 2:19(2).

29. *See id.*

30. *See id.*

31. *Id.* § 2:19(3).

32. *Id.*

33. *Id.* § 2:19(4).

34. *Id.*

35. *See generally id.* (demonstrating the discretionary qualities of the trust).

36. *Id.*

37. ANDERSEN, *supra* note 16, at 7.

38. *See id.* at 8. A testamentary trust is a trust that is created by a will, and a person's property and income is transferred to the trust at the time of his death. *Id.* An *inter vivos* trust is created while the settlor is still alive, and property is transferred to the trust as the settlor grants. *Id.*

system; therefore, they are also not subject to an estate tax.³⁹ Irrevocable trusts remove the value from property so that the property cannot be subject to estate taxes when the settlor dies.⁴⁰ In other words, the settlor no longer owns the trust assets, as the trustee holds legal title, and, therefore, the settlor's estate becomes nontaxable when the settlor dies.⁴¹

Asset protection serves as a big benefit to settlors when they decide to place their assets in an irrevocable trust.⁴² Revocable trusts, while still a useful tool in estate planning, do not provide asset protection for any of the parties involved.⁴³ Asset protection works in the same way as the estate tax situation mentioned above—by putting assets into a trust, the individual no longer owns or controls the assets, which places them out of reach of creditors.⁴⁴ The settlor can still list his family as beneficiaries, providing financial support for the family while the assets remain protected.⁴⁵ Irrevocable trusts ensure that assets pass to beneficiaries in a way that protects assets from creditors, divorcing spouses, and possibly even themselves.⁴⁶ Spendthrift clauses are also commonly used in trusts to limit a beneficiary's ability to transfer, sell, or give away their rights.⁴⁷ Essentially, spendthrift clauses assure that assets in a trust remain protected from a beneficiary's creditors.⁴⁸ While these benefits may appeal to a settlor's wishes when creating a trust, the word "irrevocable" may not seem as appealing.⁴⁹

B. Flexibility in Irrevocable Trusts

Many people believe that placing assets into an irrevocable trust means the trust cannot be terminated or altered at all.⁵⁰ This is not true; in fact, an irrevocable trust simply means that the settlor cannot directly terminate or revoke the trust without court approval.⁵¹ A settlor still preserves the ability to maintain quite a bit of flexibility and control over the trust and the included assets.⁵² The settlor can also serve as the trustee and hold the power to manage assets, invest cash, or buy and sell real property.⁵³ However, as the trustee, the

39. See *id.* at 8; Julie Garber, *Revocable vs. Irrevocable Trusts: To Change or Not to Change*, ABOUT, <http://wills.about.com/od/overviewoftrusts/a/revvtrvs.htm> (last visited Feb. 6, 2014).

40. Garber, *supra* note 39.

41. *Id.*

42. See *id.*

43. Kirwan, *supra* note 9.

44. Garber, *supra* note 39.

45. *Id.*

46. See Kirwan, *supra* note 9.

47. *Id.*; TEX. PROP. CODE ANN. § 112.035 (West 2013).

48. See Kirwan, *supra* note 9.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

settlor may not retain the asset protection that accompanies irrevocable trusts.⁵⁴ Additionally, a settlor may also name himself as a beneficiary and may retain the ability to gain access to trust assets for sustainability.⁵⁵ Regardless, an irrevocable trust is designed to guarantee a settlor's wishes, despite whether one or more of the beneficiaries object to the disposition.⁵⁶

One way to increase flexibility in irrevocable trusts, while maintaining the benefits, is for the settlor to create a power of appointment in the trust document.⁵⁷ A power of appointment allows a trust to adapt over time.⁵⁸ A power of appointment will give the specified beneficiary the ability to allocate trust property after the trust's creation.⁵⁹ This becomes especially useful if a trust could potentially last several generations.⁶⁰ The settlor may not know the circumstances that the beneficiaries a couple of generations down the line may face after creating the trust.⁶¹ Thus, the settlor may grant a power of appointment to allow decisions about disposition of the property to be made at a future date.⁶² A power of appointment allows a beneficiary to examine the situation at a certain time and determine whether to change distribution of trust principal to suit the pending needs of the beneficiaries.⁶³ For example, imagine Sue is the beneficiary of a trust with a power of appointment and Sue has two children, also beneficiaries. One of the children has a serious and costly medical condition. If Sue has a power of appointment, she could exercise that power to allow her child with a medical condition to have a 75% share, while the other child will receive a 25% share.

A settlor may also retain a special testamentary power of appointment.⁶⁴ This allows the settlor to transfer assets to the trust but, upon the settlor's death, he or she will retain the power to determine or change the beneficiaries of the trust, the amount each beneficiary will receive, and the way the beneficiaries will receive the amount due to them.⁶⁵ If a settlor holds a special testamentary power of appointment and needs to make changes before the settlor dies, a "trust protector" may be appointed to do so.⁶⁶ A trust protector may add or remove beneficiaries and make other changes to the trust during the settlor's

54. *Id.* In this situation, the settlor as trustee still holds legal title to the property and, therefore, still owns the assets. Garber, *supra* note 39.

55. Kirwan, *supra* note 9.

56. Tatiana Serafin, *How to Bust a Trust*, BARRON'S (Mar. 2, 2013), http://online.barrons.com/article/SB50001424052748704103204578315990055294954.html?link=SM_tax_es_sum#articleTabs_article%3D1.

57. *See* ANDERSEN, *supra* note 16, at 213.

58. *Id.*

59. TEX. PROP. CODE ANN. § 181.082 (West 2013); *see id.*

60. *See* ANDERSEN, *supra* note 16, at 213.

61. *See id.*

62. *See id.* at 214.

63. *See id.*

64. *See* Kirwan, *supra* note 9.

65. *Id.*

66. *Id.*; UNIF. TRUST CODE § 808 (2000). A "trust protector" has been recognized in a Texas court. *See* Head v. State, 299 S.W.3d 414, 423 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd) (finding evidence sufficient to show appointment of a trust protector).

life while the settlor maintains veto power.⁶⁷ A trust protector is usually a close friend or family member.⁶⁸ If a trust does not mention a power of appointment or a trust protector then other more difficult methods of maintaining flexibility can be obtained, like setting up a limited liability company.⁶⁹

C. Modification, Termination, and Mergers of Trusts

In the not so distant past, if a trustee or settlor wanted to modify or terminate an irrevocable trust, there were few ways to do so.⁷⁰ A costly and lengthy court order may have been the only way.⁷¹ Even then, the process could get even more complicated if a beneficiary decided not to cooperate because he or she did not think a modification was in the best interest of one or more of the beneficiaries.⁷²

The court may authorize deviation from the terms of a trust if, due to circumstances not known or anticipated by the settlor, compliance with the terms of the trust as they are would defeat the purpose of the trust.⁷³ This is known under the common law as “equitable deviation.”⁷⁴ This includes circumstances that make the purpose of the trust impossible or illegal to accomplish.⁷⁵ The Restatement gives an example of a trust that provides for the maintenance of a house.⁷⁶ If a fire destroys the house, the purpose of the trust has become impossible to fulfill and, therefore, must be modified or terminated in order to further the purpose of providing for the house.⁷⁷ Equitable deviation also includes unforeseen circumstances, such as a change in the law or economy that defeats or substantially impairs the trustee’s ability to accomplish the purpose of the trust.⁷⁸

1. Modification

Texas codified the doctrine of equitable deviation by allowing for court-supervised modifications of irrevocable trusts in certain circumstances.⁷⁹ A court may order any of the following options below:

67. See Kirwan, *supra* note 9.

68. *Id.*

69. *Id.*

70. See Serafin, *supra* note 56.

71. *Id.*

72. *Id.*

73. See RESTATEMENT (THIRD) OF TRUSTS § 66 (2003).

74. *Id.* § 66 cmt. a.

75. *Id.* § 66 cmt. c.

76. RESTATEMENT (SECOND) OF TRUSTS § 335 cmt. a (1959).

77. *Id.*

78. See RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. c.

79. See TEX. PROP. CODE ANN. § 112.054 (West 2013).

order that the trustee be changed, that the terms of the trust be modified, that the trustee be directed or permitted to do acts that are not authorized or that are forbidden by the terms of the trust, that the trustee be prohibited from performing acts required by the terms of the trust, or that the trust be terminated in whole or in part.⁸⁰

However, in order for any of the above to occur, a trustee or beneficiary must petition the court for such modification.⁸¹ Along with petitioning the court, the petitioner must also prove that any of the following criteria are met:

- (1) the purposes of the trust have been fulfilled or have become illegal or impossible to fulfill;
- (2) because of circumstances not known to or anticipated by the settlor, the order will further the purposes of the trust;
- (3) modification of administrative, nondispositive terms of the trust is necessary or appropriate to prevent waste or avoid impairment of the trust's administration;
- (4) the order is necessary or appropriate to achieve the settlor's tax objectives and is not contrary to the settlor's intentions; or
- (5) . . . (A) continuance of the trust is not necessary to achieve any material purpose of the trust [and the beneficiaries have consented to the order]; or (B) the order is not inconsistent with a material purpose of the trust [and the beneficiaries have consented to the order].⁸²

The court must also conform "as nearly as possible to the probable intention of the settlor" when ordering a modification or termination.⁸³

Even if the trustee can prove the required elements and, assuming a best-case scenario, all the beneficiaries agree to the modification, a court hearing can still be fairly complicated, lengthy, and costly.⁸⁴ Because a court must only act to further the purpose of the trust in accordance with the settlor's intentions, the court may still decline to modify the trust, wasting time and money.⁸⁵

2. Termination

A trustee may also petition the court for the termination of a trust following the same procedure above.⁸⁶ A trustee may wish to terminate a trust that has become uneconomical due to its small size "if the trustee concludes after considering the purpose of the trust and the nature of the trust assets that

80. *Id.* § 112.054(a).

81. *Id.*

82. *Id.* § 112.054(a)(1)–(5), (d).

83. *Id.* § 112.054(b).

84. Serafin, *supra* note 56.

85. TEX. PROP. CODE ANN. § 112.059(b) (West 2013).

86. *See supra* Part II.C.1.

the value of the trust property is insufficient to justify the continued cost of administration.”⁸⁷ The trust property must have a total value of less than \$50,000 in order to terminate an uneconomical trust.⁸⁸ However, a court may still choose to deny a termination if the court determines that the termination does not further the purpose of the initial trust.⁸⁹ If the court grants the termination, the trustee must distribute any remaining assets, conforming to the purpose of the trust as closely as possible.⁹⁰

3. Merger and Division

Another way to increase flexibility in a trust is to merge two trusts or divide one trust into two trusts.⁹¹ In Texas, a trustee can divide a trust or combine multiple trusts without a court order, so long as it furthers the purpose of a trust and does not impair the rights of a beneficiary.⁹² If a trust has administrative terms that are problematic but has acceptable substantive terms, the trustee may merge the trust with another trust having similar substantive terms but different administrative terms.⁹³ The reverse is true as well—a trust can be divided into two trusts.⁹⁴ Prior to 2005, the trusts that the trustee planned to merge or divide must have had identical terms, and the trustee could only act if merger would cause significant tax savings.⁹⁵ In 2005, the Texas Property Code broadened the trustee’s authority to allow a merger or division of trusts “for any reason, as long as the rights of the beneficiaries are not impaired and the achievement of trust purposes is not adversely affected.”⁹⁶ A merger may be performed without the consent of the beneficiaries, but the person requesting a merger must give notice to the beneficiaries at least thirty days prior to the effective date of the merger.⁹⁷

A merger must not “impair the rights of any beneficiary or adversely affect achievement of the purposes of one of the separate trusts.”⁹⁸ This language in the Texas statute is derived from the Uniform Trust Code. While neither the statute nor the Uniform Trust Code defines what impairing the rights of a beneficiary means, the commentary to the Uniform Trust Code may provide insight into the meaning of this phrase.⁹⁹ Typically, the trusts to be merged

87. PROP. § 112.059(a).

88. *Id.*

89. *Id.* § 112.059(b).

90. *Id.*

91. *Id.* § 112.057(a), (c).

92. *Id.*

93. *Id.* § 112.057(c).

94. *Id.* § 112.057(a).

95. *See id.* § 112.057(a), (c); GERRY W. BEYER, BEYER’S TEXAS PROPERTY CODE ANNOTATED 689 (Thomson Reuters, 2013 ed. 2013).

96. PROP. § 112.057(a), (c); BEYER, *supra* note 95.

97. PROP. § 112.057(c)(1).

98. *Id.* § 112.057(a), (c).

99. *See* Eric G. Reis, *Irrevocable or Not? Modifications to Trusts*, THOMPSON & KNIGHT 4 (June 10–

must be created by different members of the same family and vary on insignificant details; the more the dispositive provisions differ from each other, the more likely the merger would impair a beneficiary's interest and the less likely the court would approve the merger.¹⁰⁰ Mergers of trusts may provide more efficient administration and an alternative to terminating an uneconomical trust.¹⁰¹

Divisions of trusts can be a useful option for taking advantage of exemptions available under the federal generation-skipping tax.¹⁰² The terms of the trust continue to remain the same when dividing a trust; however, divisions can permit different investment objectives and allow discretionary distributions to transfer from one trust and not another.¹⁰³

While all of the above methods of modification and termination help increase flexibility of irrevocable trusts, these methods may be lengthy and costly.¹⁰⁴ Decanting allows a trustee to modify the terms of the trust, possibly without court intervention.¹⁰⁵

III. DECANTING

Decanting is the exercise of a trustee's discretionary authority to distribute all or part of trust property for the beneficiaries by distributing the assets from one trust to another.¹⁰⁶ Essentially, decanting requires a trustee to rewrite the trust instrument to create a more workable document.¹⁰⁷ Many times, the client will instruct their estate planning attorney to design the trust instrument to last multiple generations, and although nobody, including the attorney or the settlor, knows what the future will hold, these trusts may become impossible or practically impossible to administer.¹⁰⁸ By decanting a trust, a trustee has the ability to rework old trusts that are outdated or obsolete.¹⁰⁹ Desired changes in irrevocable trusts, such as requesting a modification, can prove costly and time consuming; decanting, on the other hand, can provide a simpler method of

12, 2009), <http://www.tklaw.com/files/Publication/e5d85861-ebbd-4b45-a0a8-d116d8a17409/Presentation/PublicationAttachment/2b16c64f-a6d0-4c5b-9f67-0d7c8a7aa21e/Irrevocable%20or%20Note%20SBOT%202009.pdf> (presented at the State Bar of Texas 33rd Annual Advanced Estate Planning and Probate Course); UNIF. TRUST CODE § 417 (2000).

100. *Id.* (citing UNIF. TRUST CODE § 417 cmt.).

101. *Id.*

102. *Id.*

103. *Id.*

104. *See id.*

105. Willms, *supra* note 7, at 1.

106. *Id.*

107. Serafin, *supra* note 56, at 1.

108. Willms, *supra* note 7, at 1.

109. Serafin, *supra* note 56, at 1.

making such changes.¹¹⁰ Like decanting a bottle of wine, pouring the assets of an old trust into a new trust breathes life into an outdated trust.¹¹¹

A. Why Decant an Irrevocable Trust
“Times change, needs change, laws change.”¹¹²

Decanting a trust allows a trustee to modify a trust, possibly without the cost and time of obtaining a court order required to obtain a modification.¹¹³ While many reasons exist as to why a trustee may wish to decant, the three common reasons include: updating, modernizing, or amending provisions of the trust instrument that have become outdated or unworkable, including administrative changes, addressing changed circumstances of the beneficiaries, or reducing or eliminating federal or state estate taxes.¹¹⁴ While this article does not address tax issues regarding trust decanting, trustees and attorneys should consider the tax benefits and consequences of decanting before they make the decision to decant.¹¹⁵

Today, many trust instruments may lack flexibility.¹¹⁶ However, drafting techniques have emerged in past years that allow for more flexibility in trust instruments.¹¹⁷ Today, a trustee can modernize the administration of a trust by decanting an older trust into a newer trust instrument governed by modern administrative terms and laws.¹¹⁸ Another more common use for decanting may be to correct drafting errors that were not caught until after the trust was filed and already in effect.¹¹⁹ Instead of obtaining a court order to change a mistake or clarify ambiguities in the original document, a trustee may decant the original trust in order to make the change or clarification, but only to the extent that the change reflects the settlor’s intent.¹²⁰

Decanting a trust can provide a means to reflect changes in federal or state laws that governs the instrument.¹²¹ If a relevant state or federal law changes or a new law becomes enacted after a trust has already taken effect, a trustee or settlor can decant the trust in order to take advantage of the changed law or a

110. See Willms, *supra* note 7, at 1–2.

111. Serafin, *supra* note 56, at 1.

112. Willms, *supra* note 7, at 2.

113. Serafin, *supra* note 56, at 1.

114. William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 13–15 (Spring 2010); see Willms, *supra* note 7.

115. See Culp & Mellen, *supra* note 114; Melissa J. Willms, *Decanting Irrevocable Trusts*, 40 TEX. TAX LAW., No. 1, Fall 2012, at 16–24.

116. Anne Marie Levin & Todd A. Flubacher, *Put Decanting to Work to Give Breath to Trust Purpose*, 38 EST. PLAN. 3, 8 (2011).

117. *Id.* These techniques include modifying, terminating, and merging or dividing trusts mentioned above. See *supra* Parts II.C.1–3.

118. Levin & Flubacher, *supra* note 116.

119. *Id.* at 9.

120. *Id.*; Culp & Mellen, *supra* note 114.

121. Culp & Mellen, *supra* note 114.

new law.¹²² For example, Texas's decanting statutes allow a trustee to appoint trust property further in trust unless explicitly mentioned otherwise.¹²³ A settlor may not want the trustee to decant his trust into a second trust after he passes away.¹²⁴ In order for him to insert a provision disallowing the trustee to decant the trust into a new trust instrument, the settlor may decant the entire trust into a separate trust that includes such a provision.¹²⁵ Decanting allows a settlor to make simple changes without the lengthy process of a judicial modification.¹²⁶

A trustee may decant a trust to address a beneficiary's change in circumstances.¹²⁷ Addressing changed circumstances may include modifying the distribution schedule of trust principal to a beneficiary for any reason, including substance or alcohol abuse, creditor problems, or marital problems.¹²⁸ For example, consider a client who wants to provide for his two children by placing all of his property into a testamentary irrevocable trust. So as to be fair, the settlor provides that each child shall receive equal monthly distributions of the trust principal. After his passing, one of his children, Blake, becomes addicted to controlled substances while his other child, Cara, suffers from a chronic disease that substantially increases her living and medical expenses. The trustee may choose to decant so that Cara will receive larger distributions from the trust to pay for her medical expenses while Blake receives smaller distributions. This distribution scheme would further the settlor's purpose of providing for his children while still taking the beneficiaries' circumstances into account.¹²⁹

Another example of decanting to address changed circumstances would be if your client, Jim, put all of his property and assets into an irrevocable trust set to expire when his only child, Dawn, turns thirty. Jim's purpose in doing so is because he believes that she will be financially responsible at that time. When Jim passes away, Dawn is twenty-eight years old. She soon begins spending all of her money and purchasing everything on credit, knowing that when she turns thirty she will have the funds to pay everything off while maintaining her luxurious lifestyle. In order to limit Dawn's spending, the trustee may decant Jim's original trust into a trust that provides for smaller payments over multiple years.¹³⁰

Finally, an individual may decant to make administrative changes, such as clarifying the law or trust instrument, provide for a fiduciary advisor to make investment decisions, provide for a successor trustee or co-trustee, or combine

122. *Id.*

123. *See* TEX. PROP. CODE ANN. §§ 112.072-.085 (West 2013).

124. *See id.* § 112.084.

125. *See generally* Culp & Mellen, *supra* note 114 (illustrating that previously, in order to insert this provision, the settlor would have had to obtain a court order by proceeding with a modification).

126. *See* Serafin, *supra* note 56.

127. Willms, *supra* note 7, at 2.

128. *See id.*

129. *Id.*

130. *Id.*

multiple similar trusts to reduce administrative costs.¹³¹ For example, imagine a family with two dynasty trusts, both holding large positions in a single stock.¹³² The beneficiaries want to keep the stock even though the trustee of the second trust constantly wants to sell the stock.¹³³ The beneficiaries would have the ability to decant the trusts into a newer trust that includes a provision disallowing the trustee to sell the stock.¹³⁴ The beneficiaries can alternatively request that the trustee appoint a financial advisor to provide advice as to handling the stock.¹³⁵ Previously, the beneficiaries or the trustee had to petition the court for approval of a modification in order to insert a single provision into a trust instrument; however, with the decanting statute, the beneficiaries or trustee can copy the original trust instrument and add the new provision to create a new trust.¹³⁶

The above-mentioned examples highlight just a few of the reasons a trustee may wish to take advantage of decanting a trust. A modification of a trust that only needs a small, simple modification may be costly and lengthy; decanting such a trust would allow for a quicker and cheaper result. While the idea of decanting may seem new, the concept of decanting a trust has been around for quite a few years.¹³⁷

B. Decanting Before It Became Popular

Decanting is not a new concept despite the growing number of states beginning to adopt decanting statutes.¹³⁸ Decanting has been recognized under common law since at least 1940.¹³⁹ Because many states have case law regarding decanting, whether they use the term decant or not, a trustee may have the ability to decant under common law, despite the lack of a decanting statute.¹⁴⁰

131. See Culp & Mellen, *supra* note 114.

132. Serafin, *supra* note 56.

133. *Id.*

134. *Id.*

135. See *id.*

136. See *id.*

137. See *Phipps v. Palm Beach Trust Co.*, 196 So. 299, 301 (Fla. 1940).

138. See *id.* (approving the transfer of trust property from one trust to another with similar provisions); see also *In re Estate of Spencer*, 232 N.W.2d 491 (Iowa 1975) (ruling that a trustee's exercise of a special power of appointment may be used in order to create a new trust); *Wiedenmayer v. Johnson*, 254 A.2d 534, 536 (N.J. Super. Ct. App. Div. 1969) (authorizing a trustee's power to include the power to distribute property to a trust when the trustee's power is in the best interest of the beneficiary); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 (1986); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 (2003).

139. See *Phipps*, 196 So. at 299 (approving the transfer of trust property from one trust to another with similar provisions). The Florida Supreme Court ruled that when a trustee has the ability to create an estate in fee then the trustee may create an estate in less than fee, unless a settlor clearly states otherwise. *Id.*; see also *Spencer*, 232 N.W.2d at 491 (ruling that a trustee's exercise of a special power of appointment may be used in order to create a new trust); *Wiedenmayer*, 254 A.2d at 534 (authorizing a trustee's power to include the power to distribute property to a trust when the trustee's power is in the best interest of the beneficiary).

140. Steve R. Akers, *Estate Planning Current Developments and Hot Topics*, BESSEMER TRUST 52 (Dec.

The rationale behind the process of decanting is that a trustee should have a special power of appointment.¹⁴¹ This stems from the belief that if a trustee has the discretionary power to distribute property to, or for the benefit of, one or more current beneficiaries then the trustee, in effect, has a special power of appointment.¹⁴² This special power of appointment should enable the trustee to distribute the property from the original trust to a second trust for the benefit of the same beneficiaries.¹⁴³ This rationale originated in the Second and Third Restatements of Property.¹⁴⁴

1. Restatement (Second) of Property

The Second Restatement of Property was the first to mention the idea of a trustee's special power of appointment.¹⁴⁵ A power of appointment gives the holder authority "to designate [recipients of] beneficial interests in property other than as an incident of the beneficial ownership of property."¹⁴⁶ Because a trustee has only legal title to the principal of the trust, the trustee does not have a beneficial interest in the property of a trust; however, the trustee has discretionary power to invade and distribute the trust principal to determine who has a beneficial interest in the property.¹⁴⁷ This appoints the trustee as holder of a special power of appointment over the trust property.¹⁴⁸ The trustee's power is special because the trustee is able to transfer all or some of the property title under the trust agreement.¹⁴⁹ Unless the settlor expressly states otherwise, the powerholder trustee has the same rights as if the powerholder was the owner of the property and gifted it outright to the beneficiary.¹⁵⁰ Because the trustee can transfer full legal title as if he were the owner of the principal, it follows that the trustee should have the power to transfer less than full legal title by transferring the property into another trust for a beneficiary because the interests will still transfer to that beneficiary.¹⁵¹ While the Second Restatement does not mention whether this special power of

2012), http://www.bessemertrust.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Advisor/Presentation/Print%20PDFs/Hot%20Topics%20Current%20Developments%20_FINAL.pdf.

141. Culp & Mellen, *supra* note 114.

142. *Id.*

143. *Id.*

144. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 (1986); see also RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 (2003).

145. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1.

146. *Id.* § 11.1 cmt. c.

147. Willms, *supra* note 115.

148. *Id.*

149. *Id.* (citing RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1).

150. *Id.* (citing RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 19.3).

151. *Id.* (citing RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 19.3).

appointment is held in a fiduciary capacity, the law presumes the power is held in a fiduciary capacity because the trustee exercises the power.¹⁵²

2. *Restatement (Third) of Property: Wills & Other Donative Transfers*

The Third Restatement elaborates on the idea of a trustee holding a power of appointment but also makes an important differentiation.¹⁵³ In the Third Restatement, a discretionary power of appointment, as laid out in the Second Restatement, remains distinguishable from a fiduciary distributive power.¹⁵⁴ If the powerholder possesses a discretionary power of appointment, the powerholder may exercise the power arbitrarily, and the power will lapse upon the death of the powerholder if not exercised before then.¹⁵⁵ A fiduciary distributive power does not lapse but continues on to a successor fiduciary.¹⁵⁶

In the Third Restatement, the drafters describe decanting as a power of appointment subject to fiduciary standards instead of simply a power of appointment, as mentioned in the Second Restatement.¹⁵⁷ A fiduciary distributive power is subject to generally the same rules as a power of appointment.¹⁵⁸ While a trustee may not exercise either a discretionary power of appointment or a fiduciary distributive power in favor of a nonpermissible appointee under the trust instrument, a trustee may exercise a discretionary power of appointment in a nonfiduciary capacity, while a trustee must exercise a fiduciary distributive power in a fiduciary capacity.¹⁵⁹ Because the trustee must act in a fiduciary capacity if the trustee is going to appoint principal from one trust to another, it is important that the trustee know all of the fiduciary duties applicable to a trustee when deciding whether to decant.¹⁶⁰ Once again, if the settlor does not want the holder of a special power of appointment to appoint principal in further trust, the settlor should expressly state so in the trust instrument.¹⁶¹

While the Restatements and the common law mentioned special powers of appointment and powers of appointment subject to fiduciary duties, the first state did not codify decanting until 1992.¹⁶² Since then, multiple states codified

152. *Id.*

153. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 (2003).

154. *Id.*

155. *Id.* § 17.1 cmt. b, g. A nondiscretionary power of appointment is usually held by a beneficiary of a trust while a fiduciary distributive power is usually held by the trustee. *Id.*

156. *Id.* § 17.1 cmt. g.

157. Willms, *supra* note 115.

158. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 cmt. g.

159. *Id.* § 17.1 cmt. b, g.

160. Willms, *supra* note 115. Although the fiduciary duties of trustees are beyond the scope of this article, attorneys should inform trustees about the fiduciary responsibilities they should consider when decanting a trust. RESTATEMENT (THIRD) OF TRUSTS § 86 (2007).

161. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.14.

162. See N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(d) (McKinney 2013).

the idea of a power of appointment subject to fiduciary standards in their respective decanting statutes.¹⁶³

C. Statutory Decanting in Other States

Although Texas only recently enacted a decanting statute, several states have previously enacted decanting statutes.¹⁶⁴ Currently twenty states, including Texas, have decanting statutes.¹⁶⁵ While some statutes may be similar, others have different rules as to what and how settlors may decant.¹⁶⁶ While an exhaustive discussion of each individual statute is beyond the scope of this article, the following analysis is given to show a general overview of the decanting statutes.

1. The Trustee's Position

Some states require that a trustee wanting to decant have absolute discretion in order to decant for reasons other than administrative changes.¹⁶⁷ However, most states with decanting statutes that put limitations on trustees only require the trustee to have the ability to invade the principal of the first trust in order to decant the property to a second trust.¹⁶⁸ South Dakota will only

163. See ALASKA STAT. ANN. § 13.36.157 (West 2013); ARIZ. REV. STAT. ANN. § 14-10819 (2013); DEL. CODE ANN. tit.12, § 3528 (West 2013); FLA. STAT. ANN. § 736.04117 (West 2013); 760 ILL. COMP. STAT. ANN. 5/16.4 (West 2013); IND. CODE ANN. § 30-4-3-36 (West 2013); KY. REV. STAT. ANN. § 386.175 (West 2013); MICH. COMP. LAWS ANN. §§ 700.7820a, 556.115a, 700.7103 (West 2013); MO. ANN. STAT. § 456.4-419 (West 2013); NEV. REV. STAT. ANN. § 163.556 (West 2013); N.H. REV. STAT. ANN. § 564-B:4-418 (2013); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)-(s); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(7) (West 2013); OHIO REV. CODE ANN. § 5808.18 (West 2013); R.I. GEN. LAWS ANN. § 18-4-31 (West 2013); S.D. CODIFIED LAWS §§ 55-2-15 to 55-2-21 (2013); TENN. CODE ANN. § 35-15-816(b)(27) (West 2013); VA. CODE ANN. § 64.2-778.1 (West 2013); WYO. STAT. ANN. § 4-10-816(a)(xxviii) (West 2013).

164. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 cmt. c (1986); TEX. PROP. CODE ANN. §§ 112.071-.087 (West 2013). The Texas Legislature enacted the decanting statute on September 1, 2013. *Id.*

165. See ALASKA STAT. ANN. § 13.36.157; ARIZ. REV. STAT. ANN. § 14-10819; DEL. CODE ANN. tit.12, § 3528; FLA. STAT. ANN. § 736.04117; 760 ILL. COMP. STAT. ANN. 5/16.4; IND. CODE ANN. 30-4-3-36; KY. REV. STAT. ANN. § 386.175; MICH. COMP. LAWS ANN. §§ 700.7820a, 556.115a, 700.7103; MO. ANN. STAT. § 456.4-419; NEV. REV. STAT. ANN. § 163.556; N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(7); N.H. REV. STAT. ANN. § 564-B:4-418; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)-(s); OHIO REV. CODE ANN. § 5808.18; R.I. GEN. LAWS ANN. § 18-4-31; S.D. CODIFIED LAWS §§ 55-2-15 to 55-2-21; TENN. CODE ANN. § 35-15-816(b)(27); TEX. PROP. CODE ANN. §§ 112.071-.089; VA. CODE ANN. § 64.2-778.1; WYO. STAT. ANN. § 4-10-816(a)(xxviii).

166. Serafin, *supra* note 56.

167. See FLA. STAT. ANN. § 736.04117(1)(a); IND. CODE ANN. § 30-4-3-36(a); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1); OHIO REV. CODE ANN. § 5808.18(A)(1); R.I. GEN. LAWS ANN. § 18-4-31. A trustee who has absolute discretion is not limited by any standard, ascertainable or unascertainable, to distribute trust property. FLA. STAT. ANN. § 736.04117(1)(a); IND. CODE ANN. § 30-4-3-36(a); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1); OHIO REV. CODE ANN. § 5808.18(A)(1); R.I. GEN. LAWS ANN. § 18-4-31.

168. See ALASKA STAT. ANN. § 13.36.157(a); ARIZ. REV. STAT. ANN. § 14-10819(A); DEL. CODE ANN. tit.12, § 3528(a); NEV. REV. STAT. ANN. § 163.556; N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(7); N.H. REV. STAT. ANN. § 564-B:4-418(a); TENN. CODE ANN. § 35-15-816(b)(27)(A).

allow distribution after the trustee determines that decanting is necessary or desirable; in order to make such a determination, the trustee must look at the purpose of the first trust, the conditions of the second trust, and all consequences of distribution.¹⁶⁹ Some states completely prohibit a trustee from having the ability to decant if the trustee is also a beneficiary.¹⁷⁰ A number of statutes include language stating that an interpreter of the statute should not construe the statute as to “abridge the right of any trustee who has a power of invasion to appoint property in further trust under the terms of the first trust or under any other section of this code or under another provision of law or under common law” or other similar language.¹⁷¹ If a trust instrument provides that the trustee can decant a certain way that the statute may not allow, the trustee may still decant according to the terms of the trust.¹⁷²

2. Substantive Requirements

The substantive requirements of distributing a trust vary from state to state; however, similarities may be found throughout the states. Certain states require that the new trust have a distribution standard at least as restrictive as the original trust.¹⁷³ Almost all states require the beneficiaries of the second trust to be similar—either one, more than one, or all of the beneficiaries of the first trust must be beneficiaries of the second trust.¹⁷⁴ Some states even expressly provide that the second trust may not include a beneficiary who is not a beneficiary of the first trust.¹⁷⁵ In other words, in these states, a person cannot be a beneficiary of the second trust if that person is not already a beneficiary of the first trust.¹⁷⁶ A few states use the phrase “proper objects of the exercise of

169. S.D. CODIFIED LAWS § 55-2-15(2).

170. See MO. ANN. STAT. § 456.4-419(2)(2); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(7); N.H. REV. STAT. ANN. § 564-B:4-418(c); S.D. CODIFIED LAWS § 55-2-15(2); VA. CODE ANN. § 64.2-778.1(D).

171. FLA. STAT. ANN. § 736.04117(7); IND. CODE ANN. § 30-4-3-36(h); MICH. COMP. LAWS ANN. § 700.7820a(9); NEV. REV. STAT. ANN. § 163.556(9); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(k); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(7); OHIO REV. CODE ANN. § 5808.18(N); R.I. GEN. LAWS ANN. § 18-4-31(h); S.D. CODIFIED LAWS § 55-2-21; TENN. CODE ANN. § 35-15-816(b)(27)(D).

172. FLA. STAT. ANN. § 736.04117(7); IND. CODE ANN. 30-4-3-36(h); MICH. COMP. LAWS ANN. § 700.7820a(9); NEV. REV. STAT. ANN. § 163.556(9); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(7); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(k); OHIO REV. CODE ANN. § 5808.18(N); R.I. GEN. LAWS ANN. § 18-4-31(h); S.D. CODIFIED LAWS § 55-2-21; TENN. CODE ANN. § 35-15-816(b)(27)(D).

173. See ALASKA STAT. ANN. § 13.36.157(a)(4); ARIZ. REV. STAT. ANN. § 14-10819(A)(4); KY. REV. STAT. ANN. § 386.175(4)(h) (West 2013); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(7); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(c)(1); S.D. CODIFIED LAWS § 55-2-15(2)(b); VA. CODE ANN. § 64.2-778.1(C)(2).

174. ALASKA STAT. ANN. § 13.36.157(d)(1); DEL. CODE ANN. tit.12, § 3528(a)(1); FLA. STAT. ANN. § 736.04117(1)(a)(1); 760 ILL. COMP. STAT. ANN. 5/16.4(c), (d); IND. CODE ANN. § 30-4-3-36(a)(1); KY. REV. STAT. ANN. § 386.175(4)(a); MO. ANN. STAT. § 456.4-419(2)(1); NEV. REV. STAT. ANN. § 163.556(2)(a); N.H. REV. STAT. ANN. § 564-B:4-418(b)(1); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b), (c); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(1); R.I. GEN. LAWS ANN. § 18-4-31(a)(1); S.D. CODIFIED LAWS § 55-2-15(1); TENN. CODE ANN. § 35-15-816(b)(27)(A)(ii); VA. CODE ANN. § 64.2-778.1(c)(1).

175. See NEV. REV. STAT. ANN. § 163.556(3)(a)(3); N.H. REV. STAT. ANN. § 564-B:4-418(c)(1)(a); N.C. GEN. STAT. ANN. § 36C-8-816.1(d).

176. ALASKA STAT. ANN. § 13.36.157(d)(1); DEL. CODE ANN. tit.12, § 3528(a)(1); FLA. STAT. ANN.

the power,” which presumably allows future and contingent beneficiaries of the first trust to be beneficiaries of the second trust.¹⁷⁷ Some states allow for a creation of a power of appointment in the second trust when there is not one in the first trust, allowing new beneficiaries to be added through the exercise of such power.¹⁷⁸ Most states also require that any income, annuity, or unitrust that any beneficiary is entitled to under the first trust may not be reduced when decanting the first trust to the second trust.¹⁷⁹ Last, some states limit decanting to trust property only while other states allow distribution of both trust property and income.¹⁸⁰

3. Procedures

Most states have the same procedural requirements when decanting a trust, requiring the decanting instrument to be written, signed, and acknowledged by the trustee and then filed with the court of proper jurisdiction.¹⁸¹ Before filing with the court, most states require the trustee to give notice to the beneficiaries, giving them an opportunity to object to the decanting.¹⁸² The beneficiaries may

§ 736.04117(1)(a)(1); 760 ILL. COMP. STAT. ANN. 5/16.4(c), (d); IND. CODE ANN. § 30-4-3-36(a)(1); KY. REV. STAT. ANN. § 386.175(4)(a); MO. ANN. STAT. § 456.4-419(2)(1); NEV. REV. STAT. ANN. § 163.556(2)(a); N.H. REV. STAT. ANN. § 564-B:4-418(b)(1); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b), (c); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(1); R.I. GEN. LAWS ANN. § 18-4-31(a)(1); S.D. CODIFIED LAWS § 55-2-15(1); TENN. CODE ANN. § 35-15-816(b)(27)(A)(ii); VA. CODE ANN. § 64.2-778.1(c)(1).

177. See DEL. CODE ANN. tit. 12, § 3528(a)(1); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b), (c); TENN. CODE ANN. § 35-15-816(b)(27)(A)(ii).

178. See ALASKA STAT. ANN. § 13.36.157(b); DEL. CODE ANN. tit. 12, § 3528(a); 760 ILL. COMP. STAT. ANN. 5/16.4(c)(1); KY. REV. STAT. ANN. § 386.175; MICH. COMP. LAWS ANN. § 700.7820a(2)(a); NEV. REV. STAT. ANN. § 163.556(6)(a); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(8); OHIO REV. CODE ANN. § 5808.18(3)(a); S.D. CODIFIED LAWS § 55-2-15; TENN. CODE ANN. § 35-15-816(b)(27)(F)(i); VA. CODE ANN. § 64.2-778.1(C)(8).

179. See ARIZ. REV. STAT. ANN. § 14-10819(A)(1)–(2) (2013); FLA. STAT. ANN. § 736.04117(1)(A)(2); 760 ILL. COMP. STAT. ANN. 5/16.4; IND. CODE ANN. 30-4-3-36(a)(2); KY. REV. STAT. ANN. § 386.175(c); MICH. COMP. LAWS ANN. § 556.115a(1)(c); MO. ANN. STAT. § 456.4-419(5); NEV. REV. STAT. ANN. § 163.556(2)(b), (c); N.H. REV. STAT. ANN. § 564-B:4-418(b)(2); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(n)(1); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(3); OHIO REV. CODE ANN. § 5808.18(c)(1)(a); R.I. GEN. LAWS ANN. § 18-4-31(a)(2); S.D. CODIFIED LAWS § 55-2-15(6); TENN. CODE ANN. § 35-15-816(b)(27)(A)(i); VA. CODE ANN. § 64.2-778.1(c)(4).

180. Compare ALASKA STAT. ANN. § 13.36.157(a); DEL. CODE ANN. tit. 12, § 3528(a); FLA. STAT. ANN. § 736.04117(1)(a); 760 ILL. COMP. STAT. ANN. 5/16.4(c), (d); IND. CODE ANN. § 30-4-3-36(a); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b); R.I. GEN. LAWS ANN. § 18-4-31(a); TENN. CODE ANN. § 35-15-816(b)(27)(A), with ARIZ. REV. STAT. ANN. § 14-10819(A); KY. REV. STAT. ANN. § 386.175(2); MICH. COMP. LAWS ANN. §§ 700.7820a, 556.115a; MO. ANN. STAT. § 456.4-419.1; NEV. REV. STAT. ANN. § 163.556(1); N.H. REV. STAT. ANN. § 564-B:4-418(a); N.C. GEN. STAT. ANN. § 36C-8-816.1(b); OHIO REV. CODE ANN. § 5808.18(A); S.D. CODIFIED LAWS § 55-2-15.

181. FLA. STAT. ANN. § 736.04117(2); 760 ILL. COMP. STAT. ANN. 5/16.4(r); IND. CODE ANN. § 30-4-3-36(c); KY. REV. STAT. ANN. § 386.175(7)(a); NEV. REV. STAT. ANN. § 163.556(7); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(j); N.C. GEN. STAT. ANN. § 36C-8-816.1(f)(1); OHIO REV. CODE ANN. § 5808.18(D); R.I. GEN. LAWS ANN. § 18-4-31(b); S.D. CODIFIED LAWS § 55-2-18; TENN. CODE ANN. § 35-15-816(b)(27)(B); VA. CODE ANN. § 64.2-778.1.

182. FLA. STAT. ANN. § 736.04117(4); 760 ILL. COMP. STAT. ANN. 5/16.4(e); IND. CODE ANN. § 30-4-3-36(e); KY. REV. STAT. ANN. § 386.175(7)(b); MICH. COMP. LAWS ANN. § 700.7820a(7) (demonstrating that

then object to the decanting or petition the court for approval or denial of the decanting.¹⁸³ Alternatively, the beneficiaries may waive the requirement of notice.¹⁸⁴

4. Beneficiary Consent or Court Approval

Although most states require a trustee to give the beneficiaries notice, most states do not require beneficiary consent or court approval.¹⁸⁵ The only state that requires court approval is Ohio, and only in narrow circumstances.¹⁸⁶ However, most states allow a beneficiary or a trustee to seek court approval if they so desire.¹⁸⁷

5. Tax Provisions

Although beyond the scope of the article, it is common to find tax savings provisions in many of the state statutes. Most states allow for a marital deduction or charitable deduction that, at least, is not lower than the deduction permitted in the first trust.¹⁸⁸ A couple of states allow for distribution to be limited if S corporation stock is disqualified if the trust is decanted.¹⁸⁹

All states that have decanting statutes have similarities and differences. Because codification of decanting is only a recent development, states are still

notice may be waived by the beneficiaries); MO. ANN. STAT. § 456.4-419.3; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(j)(2); N.C. GEN. STAT. ANN. § 36C-8-816.1(f); OHIO REV. CODE ANN. § 5808.18(F); R.I. GEN. LAWS ANN. § 18-4-31(d); S.D. CODIFIED LAWS § 55-2-18; VA. CODE ANN. § 64.2-778.1(G).

183. FLA. STAT. ANN. § 736.04117(4); 760 ILL. COMP. STAT. ANN. 5/16.4(e); IND. CODE ANN. § 30-4-3-36(e); KY. REV. STAT. ANN. § 386.175(7)(b); MICH. COMP. LAWS ANN. § 700.7820a(7); MO. ANN. STAT. § 456.4-419.3; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(j)(2); N.C. GEN. STAT. ANN. § 36C-8-816.1(f); OHIO REV. CODE ANN. § 5808.18(F); R.I. GEN. LAWS ANN. § 18-4-31(d); S.D. CODIFIED LAWS § 55-2-18; VA. CODE ANN. § 64.2-778.1(G).

184. FLA. STAT. ANN. § 736.04117(4); 760 ILL. COMP. STAT. ANN. 5/16.4(e); IND. CODE ANN. § 30-4-3-36(e); KY. REV. STAT. ANN. § 386.175(7)(b); MICH. COMP. LAWS ANN. § 700.7820a(7); MO. ANN. STAT. § 456.4-419.3; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(j)(2); N.C. GEN. STAT. ANN. § 36C-8-816.1(f); OHIO REV. CODE ANN. § 5808.18(F); R.I. GEN. LAWS ANN. § 18-4-31(d); S.D. CODIFIED LAWS § 55-2-18; VA. CODE ANN. § 64.2-778.1(G). This is particularly useful when the beneficiaries want the decanting because it saves money and time. Willms, *supra* note 7.

185. ARIZ. REV. STAT. ANN. § 14-10819(D) (the trustee may request the court's approval of the statutory decanting power); 760 ILL. COMP. STAT. ANN. 5/16.4(K); NEV. REV. STAT. ANN. § 163.556; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(2); N.C. GEN. STAT. ANN. § 36C-8-816.1(h).

186. OHIO REV. CODE ANN. § 5808.18(K).

187. ARIZ. REV. STAT. ANN. § 14-10819(D); 760 ILL. COMP. STAT. ANN. 5/16.4(K); NEV. REV. STAT. ANN. § 163.556; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(2); N.C. GEN. STAT. ANN. § 36C-8-816.1(h).

188. FLA. STAT. ANN. § 736.04117(1)(a)(3); 760 ILL. COMP. STAT. ANN. 5/16.4(p); IND. CODE ANN. § 30-4-3-36(a)(3); KY. REV. STAT. ANN. § 386.175(4)(d); MICH. COMP. LAWS ANN. § 556.115a(1)(c); NEV. REV. STAT. ANN. § 163.556(2)(c); N.H. REV. STAT. ANN. § 564-B:4-418(B)(3); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(n)(5); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(4); OHIO REV. CODE ANN. § 5808.18(C)(2); R.I. GEN. LAWS ANN. § 18-4-31(a)(iii); VA. CODE ANN. § 64.2-778.1(C)(5).

189. 760 ILL. COMP. STAT. ANN. 5/16.4(p)(2); KY. REV. STAT. ANN. § 386.175(g); OHIO REV. CODE ANN. § 5808.18(C)(4).

working on the details that each individual state prefers. Similarly, Texas just enacted their decanting statute so there are some issues to work out, but the start of a process may prove very useful to attorneys and trustees.¹⁹⁰

IV. STATUTORY DECANTING IN TEXAS

In 2003, the Texas legislature began modernizing Texas's trust law with the enactment of the Uniform Prudent Investor Act and the Uniform Principal and Income Act.¹⁹¹ However, decanting seemed to exist under common law in Texas.¹⁹² While Texas's decanting statute only applies to trusts that settlors created on or after September 1, 2013, the Texas Legislature intended the decanting provisions of the statute to "codif[y] . . . the common law of this state [that was] in effect before the effective date of this Act"; thus, the legislature allows a trustee to possibly decant a preexisting trust under common law.¹⁹³ While the legislature cannot say what the law previously was, this may support the argument that decanting did in fact exist under common law in Texas.¹⁹⁴ Because there were no statutory decanting provisions under prior law and decanting under common law may create a dispute as to whether a trustee can actually decant, a settlor could expressly provide for decanting by stating the method a trustee could use in order to achieve the same result.¹⁹⁵ Under current statutory law, a settlor can expressly allow or disallow decanting in the trust instrument.¹⁹⁶ Knowing that this and other provisions are in Texas's decanting statute, as well as knowing how to use the statute, allows attorneys to not only decide if decanting is right for their client's trust but also have the ability to create effective trusts based on whether the client wants the ability to decant the trust at a later date.¹⁹⁷ Because the statute is new there may be some issues that arise while using the statute that will be worked out with time.¹⁹⁸ Until then, the ability to modernize a trust without the cost and time of a court-approved modification may still prove to be valuable regardless of any issues that come up.¹⁹⁹

190. TEX. PROP. CODE ANN. §§ 112.071–.088 (West 2013).

191. Glenn M. Karisch, *Decanting*, TEX. PROB. (Sept. 4, 2013), <http://texasprobate.com/index/2013/9/4/decanting.html>.

192. *Id.*

193. *Id.*; Tex. H.B. 2913, 83rd Leg., R.S. (2013)

194. Karisch, *supra* note 191.

195. *Id.*

196. *Id.*

197. *See generally* TEX. PROP. CODE ANN. §§ 112.071–.087 (West 2013) (explaining the decanting process).

198. *See id.*

199. *See supra* Part III.

A. Definitions

The Texas decanting statute begins with a definition section, which helps the reader parse through the statute.²⁰⁰ The statute differentiates between a full discretion trust and a limited discretion trust.²⁰¹ While the definitions of full discretion and limited discretion will be discussed in more detail later, the main difference between the two types of discretion lies in the restrictions of the trustee's power to distribute principal.²⁰² The principal of a trust is property that the trustee will distribute to the remainder beneficiary when the trust ends and may also include any income that the trustee may withhold at the trustee's discretion when making distributions.²⁰³ An authorized trustee is a trustee who has the authority to distribute the trust's principal to current beneficiaries.²⁰⁴ A current beneficiary is any beneficiary who is receiving or is eligible to receive distributions from the trust on the date the trustee decants the first trust.²⁰⁵ A presumptive remainder beneficiary is a beneficiary of a trust who is eligible to receive a distribution if the trust terminated on a certain date or if the interests of all current beneficiaries ended on a certain date while the trust is still in effect.²⁰⁶ When determining the presumptive remainder beneficiaries, a trustee must ignore any power of appointments that the beneficiaries may have but that the beneficiaries have not exercised as of the date of decanting.²⁰⁷ A successor beneficiary is any beneficiary who is not a current or presumptive remainder beneficiary, ignoring any potential appointees under a power of appointment that the beneficiaries have not exercised at the time of the decanting.²⁰⁸

For example, assume your client walked into your office and told you he is the trustee to a trust that reads, "To my daughter Sarah for her life, and then to Sarah's daughter, my granddaughter, Tiffany, for life, and then to Sarah's then living descendants." Also assume that Sarah has one child, Tiffany, and Tiffany has two children. Under the Texas statute, if Sarah is alive at the time of decanting, Sarah is the current beneficiary and Tiffany is the presumptive remainder beneficiary; this is because if Sarah's interests were to end before the trust expires, Tiffany would be eligible to receive a distribution.²⁰⁹ Tiffany's children would also be presumptive remainder beneficiaries because if Tiffany's interest and Sarah's interest ended before the trust expired, then

200. PROP. § 112.071.

201. *Id.* § 112.071(5), (6).

202. *Id.*; *see infra* Parts IV.B.1–2.

203. PROP. § 112.071(8).

204. *Id.* § 112.071(6).

205. *Id.* § 112.071(3).

206. *Id.* § 112.071(7).

207. *Id.*

208. *Id.* § 112.071(10). The differences between successor beneficiaries, presumptive remainder beneficiaries, and current beneficiaries are crucial to understanding how the decanting statute works and what trust assets can be decanted to whom. *See id.*

209. *See generally id.* § 112.071(3), (7) (demonstrating the effect of the decanting provision).

Tiffany's children would be entitled to a distribution of the trust income.²¹⁰ Further, in this example, if the settlor gave Sarah a power of appointment listing Sarah's cousins as potential appointees and Sarah does not exercise the power of appointment, Sarah's cousins are not considered beneficiaries of any kind, according to the Texas statute, as they will not be entitled to a distribution of the trust principal.²¹¹

B. Procedure

The following fact pattern will be used to illustrate the practical aspects of the statute. Tina, your client, walks into your law office and she is a trustee. The settlor of the trust has recently passed away. The beneficiaries of the trust are the settlor's three children: Sam, Joe, and Mary. The trust also appoints Mary with a general power of appointment. The settlor set up the trust such that the trustee is to distribute the trust principal to the three children once they each individually turn the ages of twenty-one, thirty, and forty. The settlor did not include a spendthrift clause within the trust.

In deciding whether to decant, an attorney must first determine whether the trustee has full discretion or limited discretion to distribute the trust principal.²¹² Texas has two different provisions for decanting trusts—one requiring full discretion and the other requiring only limited discretion.²¹³ Regardless of whether the trustee has full discretion or limited discretion to distribute trust property, the trustee is required to act in good faith and in accordance with the terms and purposes of the first trust, as well as in the best interest of the beneficiaries.²¹⁴

1. Full Discretion

With full discretion, a trustee has:

[T]he power to distribute principal to or for the benefit of one or more of the beneficiaries of a trust that is not limited or modified by the terms of the trust in any way, including by restrictions that limit distributions to purposes such as the best interests, welfare, or happiness of the beneficiaries.²¹⁵

In other words, a trustee with full discretion does not need any standards, ascertainable or unascertainable (such as happiness, best interest, or welfare), to make distributions.²¹⁶ In the example with Tina, she has an ascertainable

210. See *id.* § 112.071(7).

211. See *id.* § 112.071(3), (7), (10).

212. See generally *id.* (explaining when decanting is possible and practical).

213. *Id.* §§ 112.072, 112.073.

214. *Id.* § 112.073(f).

215. *Id.* § 112.071(5).

216. Karisch, *supra* note 191. A trust that permits the trustee to distribute property for the health,

standard (she is to distribute the trust principal when each beneficiary reaches a certain age) and, therefore, does not have full discretion.²¹⁷ However, for the purposes of this section only, assume that Tina does have full discretion as a trustee.

Under the full discretion standard, a trustee who exercises the power of distribution has many options as far as decanting the trust.²¹⁸ For example, a trustee may distribute some or all of the trust's principal to the trustee of a second trust, which must include one or more current beneficiaries of the first trust.²¹⁹ In Tina's example, Tina may take Mary's trust principal and decant it to a separate trust naming Mary as the sole beneficiary.²²⁰ The trustee of the first trust may also grant a power of appointment in the second trust to any of the first trust's beneficiaries, as long as that beneficiary is eligible to receive the principal outright under the terms of the first trust.²²¹ This ability to grant a power of appointment is wholly a discretionary power given to a trustee with full discretion.²²² Therefore, a trustee may add beneficiaries to a second trust, who were not beneficiaries of the first trust, by granting a power of appointment to a beneficiary of the first trust (with the potential appointees of the power including beneficiaries who were not beneficiaries under the first trust).²²³ In the example with Tina, suppose the settlor of the trust did not mention a power of appointment. Mary wants her cousin, Abby, to be able to receive distributions. Tina, as trustee with full discretion, may decant the trust principal to a new trust and appoint Mary with a power of appointment so that Mary can then appoint Abby as a beneficiary.²²⁴

Similar to other state statutes, if the beneficiaries of the first trust are a class of persons, a beneficiary who becomes a member of that class after the trustee has decanted the trust principal into a second trust may become a beneficiary of the second trust.²²⁵ This allows presumptive remainder beneficiaries and successor beneficiaries to be included as beneficiaries of the second trust.²²⁶ For example, suppose the trust that Tina is a trustee of states, "To my children and grandchildren." If the settlor did not have any grandchildren before Tina decanted the trust, any of the settlor's future grandchildren will remain beneficiaries of the second trust.²²⁷

education, maintenance, and support of the beneficiaries (HEMS trust) is a limited discretion trust; therefore, this section will not apply to such trusts. *Id.*

217. *See supra* Part IV.B.

218. *See* PROP. § 112.072.

219. *Id.* § 112.072(a). A trustee may decant a beneficiary's portion of the first trust to a second trust with that beneficiary as the sole beneficiary. *Id.*

220. *Id.* § 112.072.

221. *Id.* § 112.072(b).

222. *See* Karisch, *supra* note 191.

223. PROP. § 112.072(c).

224. *See id.*

225. *Id.* § 112.072(d).

226. *See id.*

227. *See id.*

Because many trusts contain at least one ascertainable standard that limits the distribution power of the trustee, the full discretion standard of decanting trusts may not be used by many attorneys.²²⁸ However, attorneys can use this section when planning and creating trusts.²²⁹ If the settlor would like the trustee to have the ability to decant, as mentioned in this section, an attorney would need to advise the settlor that the trustee would need to have full discretion in making distributions.²³⁰ Conversely, if a settlor wants the trustee to have full discretion in distribution, the attorney would need to advise the settlor that the trustee would have the ability to decant, as mentioned in this section.²³¹

2. Limited Discretion

A trustee with limited discretion has “a limited or modified power to distribute principal to or for the benefit of one or more beneficiaries of a trust.”²³² Similar to a trustee with full discretion, a trustee with limited discretion may distribute all or part of the first trust’s principal in favor of a second trust.²³³ However, the trustee must meet certain requirements before decanting the trust.²³⁴ The current, successor, and presumptive remainder beneficiaries of the second trust must be the same respective beneficiaries of the first trust.²³⁵ If the beneficiaries in the first trust are a part of a class, the beneficiaries of the second trust must include everyone who is or could be a member of that class.²³⁶ The distributive provisions of the second trust also must be the same as those in the first trust.²³⁷ Last, if the settlor of the first trust granted a power of appointment to a certain individual or group of individuals, the individual or group of individuals must retain the power of appointment in the second trust.²³⁸

In the example with Tina, she has limited discretion because the trust requires her to only give distributions when each of the children reach the respective ages.²³⁹ If Tina wants to decant the trust then Sam, Joe, and Mary, the beneficiaries of the first trust, must remain the same in the second trust.²⁴⁰ This means that Tina would not be able to decant into a second trust naming Mary as the sole beneficiary of the second trust, as Tina would have been able

228. See Karisch, *supra* note 191.

229. See PROP. § 112.072.

230. See *id.*

231. See *id.*

232. *Id.* § 112.071(6).

233. *Id.* § 112.073(a).

234. See *id.*

235. *Id.* § 112.073(b).

236. *Id.* § 112.073(d).

237. *Id.* § 112.073(c).

238. *Id.* § 112.073(e).

239. See *supra* Part IV.B.

240. See generally PROP. § 112.073 (illustrating the parameters of the Texas decanting statute).

to do if she had full discretion.²⁴¹ Assume that instead of listing the settlor's children as beneficiaries, the settlor stated that the beneficiaries were his children and grandchildren.²⁴² In this instance, Tina would have to maintain the same beneficiary language if she decanted the original trust to a second trust.²⁴³ Because Tina cannot change the distribution schedule of the first trust, she would not be able to change the ages the children would receive distributions.²⁴⁴ Tina would also not be able to take the power of appointment away from Mary.²⁴⁵ However, the statute does not mention whether Tina may grant a new power of appointment when she decants the first trust.²⁴⁶ Therefore, it may be possible for Tina to add beneficiaries by granting a new power of appointment to a current beneficiary and having that beneficiary appoint additional beneficiaries.²⁴⁷

Due to these limitations, it is likely that attorneys and trustees will only use this provision for administrative changes to a trust, such as how a successor trustee is appointed or how many votes it takes to act among co-trustees.²⁴⁸ Once a trustee knows what can be decanted and the restrictions on the decanting, the remainder of the provisions and requirements apply to a trustee regardless of whether the trustee has full or limited discretion.²⁴⁹

3. Trustee Provisions

If a trust has two trustees, one trustee with full discretion and another trustee with limited discretion, the trustee with full discretion may exercise his power to decant into a second trust under the full discretion provision of the Texas statute.²⁵⁰ An authorized trustee may exercise his power to decant regardless of whether there is a need to decant.²⁵¹ An "authorized trustee does not have a duty to inform beneficiaries about the availability" of distribution under this statute, nor does he have a duty to review the trust to decide whether decanting should be done, as long as the trustee is acting in good faith.²⁵²

241. *See generally id.*

242. *See generally id.*

243. *See generally id.*

244. *See generally id.*

245. *See generally id.*

246. *See id.*

247. *See id.*

248. Karisch, *supra* note 191.

249. *See* TEX. PROP. CODE ANN. §§ 112.074–.085 (West 2013).

250. *Id.* § 112.079. By doing so, the trustees are able to exercise more options when decanting an original trust. *See id.*

251. *Id.* § 112.082.

252. *See id.* § 112.083(b).

4. Drafting the Second Trust

After an attorney determines how much discretion a trustee has and, therefore, how the trustee can decant, the trustee may provide notice to the beneficiaries of the first trust.²⁵³ However, as part of giving notice to the beneficiaries, the trustee must draft and include the proposal of the second trust with the notice.²⁵⁴ When drafting the second trust, the trustee is required by the Texas statute to include some similarities between the first and second trust regardless of whether the trustee has full or limited discretion.²⁵⁵ The following discussion will examine the items that need to be in the second trust.

The settlor of the first trust is considered the settlor of the second trust to the extent that the property in the second trust is from the first trust.²⁵⁶ For example, if a husband and wife have two separate trusts in which they are the settlor of their respective trusts, the trustee may decide to merge property from the two trusts.²⁵⁷ Because the husband is only the settlor of his trust and not his wife's trust, then the husband is only considered the settlor of the property of the second trust that was distributed from his trust.²⁵⁸ When decanting, a trustee may not limit any rights of any beneficiary.²⁵⁹ Specifically, the trustee must not "reduce, limit, or modify a beneficiary's current, vested right to" receive a mandatory distribution under the first trust; receive a mandatory annuity or unitrust interest; or withdraw any value or a specified dollar amount from the trust.²⁶⁰ As in the example with Tina, she would not be able to limit the beneficiaries' right to receive their income because it is a mandatory distribution of property.²⁶¹ If, instead of being required to distribute trust principal at certain ages, Tina had to make small distributions when the children turned twenty-one years old and then thereafter make distributions based on happiness or welfare, Tina may be able to modify the distribution schedule but would not be able to modify the age at which the children were to receive the first distribution.²⁶²

When drafting the second trust, a trustee cannot change certain provisions regarding the trustee's role.²⁶³ For example, a trustee may not limit any of the trustee's fiduciary duties, whether mentioned in the first trust or under section 111.0035 of the Texas Property Code.²⁶⁴ The trustee also may not decant the first trust in order to decrease, exonerate, or indemnify the trustee

253. *Id.* § 112.074(a).

254. *Id.* § 112.074(f)(5).

255. *See id.* §§ 112.074-.083.

256. *Id.* § 112.077.

257. *See generally id.* (explaining that "the first trust is considered to be the settlor of the second trust").

258. *Id.* § 112.077(b).

259. *Id.* § 112.085(2).

260. *Id.* § 112.085(1)(A)-(D).

261. *See generally id.* (demonstrating that a trustee may not limit vested rights).

262. *Id.*

263. *See id.* § 112.085.

264. *Id.* § 112.085(3).

from liability for the trustee's potential failure to exercise reasonable care or diligence.²⁶⁵ The trustee may not eliminate a provision that grants another person the ability to remove or replace the trustee.²⁶⁶ Also, the trustee may not reduce, limit, or modify a perpetuities provision included in the first trust, unless the first trust expressly permits it.²⁶⁷ Thus, due to this provision and exception, a drafting tip for attorneys is: if there is a chance the trust will last long enough for the attorney to worry about a perpetuities period then, when drafting the initial trust, the attorney should include language expressly allowing the attorney to modify the trust through the perpetuities period by decanting.²⁶⁸

A problem may arise after decanting if property or income of the first trust is subsequently discovered; what should the trustee do with the property? When the trustee distributes all of the property belonging to the first trust into the second trust, any property that the trustee later discovers that should belong to the first trust will become property of the second trust.²⁶⁹ However, if the trustee only partially distributes the first trust, any subsequently discovered assets remain property of the first trust.²⁷⁰

5. Notice

A trustee can decant a trust in Texas without obtaining the consent of the settlor or beneficiaries and without court approval so long as the trustee gives written notice to all current and presumptive remainder beneficiaries of the trust.²⁷¹ Because the statute only requires the trustee to give notice without obtaining consent or approval, it follows that if the settlor approves or if the settlor is wishing to decant, a trustee does not have to give notice.²⁷² The trustee does not have to give notice to any beneficiary who waives the notice requirement in writing.²⁷³ This is particularly useful if the beneficiaries are requesting the decanting.²⁷⁴

When a trustee provides notice, the trustee must provide notice to all current and presumptive remainder beneficiaries of the first trust.²⁷⁵ These

265. *Id.* § 112.085(4).

266. *Id.* § 112.085(5).

267. *Id.* § 112.085(6).

268. Karisch, *supra* note 191.

269. TEX. PROP. CODE ANN. § 112.080(1) (West 2013). This includes principal paid to the first trust after distribution. *Id.*

270. *Id.* § 112.080(2). Any principal paid to the first trust after distribution will also remain property of the first trust. *Id.*

271. *Id.* § 112.074(a).

272. *See id.* However, the title of the section is "Notice Required" which may require the settlor to give notice as well. *Id.*

273. *Id.* § 112.074(e).

274. *See id.*

275. *Id.* § 112.074(a). All beneficiaries, including charities, entitled to notice under this statute are to be given notice in order to decant without court approval and consent of the settlor. *Id.*

beneficiaries include those that can be reasonably ascertained by the trustee as of the date that the notice is sent.²⁷⁶ If a beneficiary has a court-appointed guardian or conservator, the trustee must give that guardian or conservator notice instead of the beneficiary.²⁷⁷ Similarly, if the beneficiary is a minor child without a guardian or conservator, the trustee must send notice to the parent of the minor.²⁷⁸

If a charity is listed as a beneficiary, the trustee must give notice to the attorney general even if the charity is no longer in existence.²⁷⁹ Even if the trustee has the authority to make distributions to a charity but a charity is not officially named in the trust instrument, the trustee must still give notice to the attorney general's office.²⁸⁰ However, a trustee is not required to give notice to the following beneficiaries: any beneficiary who, although the trustee knows the beneficiary's identity, the trustee cannot locate after exercising reasonable diligence; any beneficiary who is not known to the trustee; and any beneficiary who is an heir of a beneficiary that the trustee has already given notice, as long as the beneficiary and the heir hold similar interests in the trust and do not appear to have a conflict of interest.²⁸¹

The notice must be in writing and must include: (1) a statement that the trustee intends to exercise the power to decant and that the beneficiary has the right to object; (2) a statement that the beneficiary has the right to petition a court to approve, modify, or deny the exercise of such power; (3) a description of the way in which the trustee intends to exercise the power to decant; (4) the date of distribution to the second trust (assuming the trustee does not receive an objection to the distribution), which must be at least thirty days from the date of notice; (5) the name and address of the trustee so the beneficiary may contact the trustee if the beneficiary has an objection or other question regarding distribution; and (6) a copy of the first trust as well as the proposal for the second trust.²⁸²

The trustee must send the notice "by registered or certified mail, return receipt requested, or [by personal delivery]."²⁸³ If a beneficiary does not object or petition the court for approval after thirty days then the trustee may decant the first trust by filing the written second trust, which is signed and acknowledged by the trustee.²⁸⁴ However, if the trustee does receive a timely

276. *Id.* § 112.074(b), (e).

277. *Id.* § 112.074(d).

278. *Id.*

279. *Id.* § 112.074(c)(1), (2).

280. *Id.* § 112.074(c)(3), (4). For example, a settlor may request that part of a trust be distributed to a charity that benefits sick children but may not list a specific charity; in this case, the trustee must give notice to the attorney general's office even if the trustee has not decided which charity to name as a beneficiary. *See id.*

281. *Id.* § 112.074(e).

282. *Id.* § 112.074(a), (f).

283. *Id.* § 112.074(f)(7).

284. *Id.* § 112.075.

objection, the statute is not completely clear as to whether the trustee may continue with the decanting.²⁸⁵

6. Court Intervention

A trustee may exercise the power to decant without having to petition a court for approval; however, the court can be involved upon request by a trustee or beneficiary.²⁸⁶ If the trustee receives a written objection by a beneficiary before the trustee is able to legally decant the trust, the statute only provides that the trustee *may* petition the court for approval, but is not required to do so.²⁸⁷ As a practical tip, an attorney may advise a trustee who receives a timely objection to petition the court for approval, as it may be cheaper to do so now instead of the objecting beneficiary suing the trustee after the trust has been decanted.²⁸⁸ On the other hand, a trustee *must* petition the court to approve or modify the distribution if the trustee receives a written objection from the attorney general not later than the thirtieth day after the date notice was received.²⁸⁹

A trustee can petition the court to approve a distribution without an objection from a beneficiary or the attorney general.²⁹⁰ A beneficiary may also petition the court to approve, modify, or deny the trustee's power to decant.²⁹¹ After a petition is filed, the trustee may present any reasons the trustee has for the distribution.²⁹² This includes, but is not limited to, whether the trustee believes that this change will help the trustee carry out the purpose of the trust more efficiently.²⁹³ The trustee has the burden of proving that the distribution will further the original purpose of the trust and "is in accordance with the terms of the trust, and is in the interests of the beneficiaries."²⁹⁴

C. Limitations

A trustee cannot arbitrarily decant a trust.²⁹⁵ The statute provides limitations to prevent the trustee from doing whatever he wants to with the trust

285. *Id.* § 112.078.

286. *Id.* §§ 112.074(a), 112.078.

287. *Id.* § 112.078(b) (emphasis added).

288. *See id.* § 112.078.

289. *Id.* § 112.078(c).

290. *Id.* § 112.078(a). A trustee may petition a court to make sure the decanting is done correctly and problems do not arise later. *See id.*

291. *See id.* § 112.078(b). An attorney may advise an objecting beneficiary to not only object in writing to the trustee but also to petition the court for approval. *See id.* This is because the trustee does not have to petition the court for approval if the trustee does not receive a timely objection. *See id.*

292. *See id.* § 112.078(d).

293. *See id.*

294. *See id.* § 112.078(e).

295. *See id.* §§ 112.084–.085.

principal.²⁹⁶ Even a trustee with full discretion has limitations when decanting a trust.²⁹⁷ While the decanting statute does not impose a duty to decant a trust, it also does not take away the trustee's fiduciary duties; meaning, a trustee cannot decant away his fiduciary duties.²⁹⁸ A spendthrift clause, a general prohibition of amendment or revocation of the trust, in the first trust does not preclude a trustee from exercising the power to decant under this statute.²⁹⁹ However, if the first trust expressly prohibits distribution into a second trust, the trustee may not exercise his power to decant.³⁰⁰ This lends itself to another drafting technique: if a settlor does not want the trust to be decanted, the settlor can expressly state so and the trustee will not be able to circumvent the settlor's wish by using this statute.³⁰¹

A trustee may not exercise the power to decant trust property solely to change the terms of the trust regarding the compensation of any trustee.³⁰² However, if the trustee decants the trust for a valid and reasonable purpose, the trustee may also change the terms regarding compensation.³⁰³ Otherwise, a trustee's compensation provisions from the first trust continue to apply in the second trust, regardless of whether the trustee of the second trust is the same as the first trust.³⁰⁴ A trustee may not receive compensation for decanting the first trust into the second trust.³⁰⁵ These limitations provide boundaries to the trustee's power to decant to ensure the trustee will act in good faith and in the interests of the beneficiaries.³⁰⁶

V. CONCLUSION

An irrevocable trust can be a valuable tool for many people to protect their assets.³⁰⁷ As time passes, the term "irrevocable" is no longer construed as permanent.³⁰⁸ Decanting a trust is one way in which a trustee can alter an irrevocable trust.³⁰⁹ In fact, decanting is rapidly becoming a term that attorneys need to familiarize themselves with due to its reference in the Restatement and in case law.³¹⁰ Knowing about the Texas decanting statute can help an attorney advise a settlor of a trust as to how to avoid the possibility of the trustee

296. *Id.* § 112.085.

297. *See id.* §§ 112.084–.085.

298. *See id.* § 112.085(3).

299. *See id.* § 112.084(b).

300. *See id.* § 112.084(a).

301. *See id.*

302. *See id.* § 112.087(a).

303. *See id.* § 112.087(b).

304. *See id.* § 112.087(c).

305. *See id.* § 112.087(d).

306. *See id.* § 112.073(f).

307. *See supra* Part II.A and accompanying notes.

308. *See* Kirwan, *supra* note 9.

309. *See supra* Parts II.C, III and accompanying notes.

310. *See supra* Part III.B and accompanying notes.

decanting if the settlor does not want the trustee to do so.³¹¹ Attorneys can also advise trustees as to whether decanting is something they should look into instead of a court-ordered modification.³¹² In either situation, attorneys need to advise their clients of not only the advantages of decanting a trust but also the legal ramifications of decanting a trust, such as tax consequences.³¹³ Just as an individual may decant wine, decanting a trust removes the sediments, which breathes life into an outdated trust and increases the desirability of the trust.³¹⁴

311. See TEX. PROP. CODE ANN. § 112.084(a) (West 2013).

312. See *supra* Part III and note 97.

313. See *supra* Part III.A and accompanying notes.

314. See *supra* Part I and accompanying notes.

