



Decanting an Irrevocable Trust in Need of Change

Over time, the terms of an irrevocable trust may no longer be applicable to an individual or family's current situation. While irrevocable trusts are typically created with the intent of remaining unchanged, trustees may also have the option of decanting a trust when it makes sense. To decant a trust, a trustee distributes assets from one irrevocable trust into a new irrevocable trust that contains modified terms. This may be beneficial for when the terms of a trust have become outdated.

There are several circumstances where decanting may be a favorable option. While each situation will vary, and an expert with the knowledge of the specific facts should be consulted, some of the considerations are:

- **To extend the term of the trust.** A trust might have the beneficiary receiving the assets of the trust at one particular age, or at various ages throughout their lifetime. Decanting the trust allows for modifications where multiple generations can receive creditor, divorce, and bankruptcy protection. Extending the terms may also be a good option since the assets will not be includable in the estates of the beneficiaries.
- **To convert a support trust into a discretionary trust.** Support trusts are typically designed to provide distributions to cover support, education, health, and maintenance for the beneficiary. However, in some states, support trusts are not protected from the claims of the beneficiaries' creditors. Decanting a support trust into a discretionary trust allows distributions to be under the discretion of the trustee, therefore protecting the assets of the trust from the beneficiaries' creditors.
- **To fix drafting errors and make ambiguous terms clear.** If a trust lacks a clause that allows for correcting errors or clarifying terms, decanting will permit the trustee to make these changes.
- **To move the trust to a state with more favorable laws.** It is possible to decant a trust that was established in one state into a new trust based in a different state. This may be advantageous when the initial trust's state has high income taxes or poor creditor protection statutes.
- **To change trustee provisions.** Decanting may enable the amending of the terms of a trust to allow for the succession of trustees or for a list of people who can name successors. This is useful in circumstances when the settlor desires changes to the originally chosen trustees.
- **To combine multiple trusts.** Over time, a settlor may have established several trusts for the same beneficiaries. Through decanting, these trusts can be combined into a single trust, therefore limiting tax filing requirements and administrative expenses.

- **To divide a trust with multiple beneficiaries.** When there are conflicts between beneficiaries about handling or investing the assets of a trust, decanting may allow the trust to be divided. This way, each beneficiary has a separate trust and the decision-making can be tailored to the needs of each trust's beneficiary.
- **To establish a special needs trust.** If a beneficiary has special needs, it is possible to decant a trust into a special needs trust. A special needs trust allows the beneficiary to receive the benefit of the trusts' assets, without jeopardizing his/her eligibility to receive governmental benefits.
- **To qualify the trust to own stock in an S-Corporation.** A trust agreement must contain a provision allowing the trust to own shares of an S-Corporation. If this clause is not present in the original trust agreement, the trust can be decanted into a new trust, where this provision can be included, therefore allowing the trust to be a shareholder of a family business.

Decanting may be an advantageous option in each circumstance in order to make the terms of the trust relevant. Another key consideration is to consider the state in which the trust was established. Decanting must be allowed under state law. Trustees who desire to decant need to look closely at the state statutes to determine the appropriate path to take.

Trustees also need to consider the most appropriate timing for decanting a trust. It may be desirable to decant a trust when a beneficiary is reaching legal age and the trust is set to terminate. This allows the trustee to make changes that are more suitable to the current situation. Decanting is also a good option in instances of divorce or to protect someone who has a substance abuse or addiction problem, as those factors can impact decisions as well. If a family business is in a trust, decanting may be a favorable option for bankruptcy protection. This could potentially protect the assets of the family business from being pulled into bankruptcy proceedings.

Speaking to an advisor who understands the intricacies of the family's dynamics is a key factor to help with deciding the best path to take. To determine whether decanting is worth pursuing, contact your Anchin relationship partner or Shiri Factor, a member of Anchin Private Client, at 212.840.3456 or info@anchin.com.



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