

Trust Decanting Statute Provides Trustees a New Method to Modify Irrevocable Trusts

By: Steven Weiser

The use of irrevocable trusts are very often necessary and useful elements of individual estate plans. The most seasoned estate planners work to create trust agreements that are often flexible to adapt to a variety of changing circumstances. Such techniques include the use of formula provisions in trust agreements, the appointment and use of trust protectors, limited retained rights to settlors (creators of trusts) for certain types of trusts, expanded trustee powers, etc. Still, it isn't entirely infrequent for someone to either become disenchanted with the original terms of their trust or find an old trust no longer fits current circumstances.

Where the structure of the trust agreement itself simply isn't flexible enough for current circumstances it may still be possible to modify a trust agreement, including by way of judicial reformation or modification of the agreement. Unfortunately, judicial reformation provides no guarantee that a trust agreement will be revised as desired, if at all, and can be an expensive process.

On August 10, 2016 the Colorado Uniform Trust Decanting Act (the "Act") took effect. Decanting itself is based on a trustee's discretion to make principal distributions for the benefit of trust beneficiaries and offers the trustee another method for modifying the trust agreement, causing a division of the trust, or even consolidating multiple trusts, all without court approval. More specifically the Act allows the trustee to:

- fix administrative provisions of the trust agreement;
- revise the successor trustee provisions of the trust agreement;
- divide a trust into multiple and separate trusts;
- amend tax provisions of the trust agreement;
- merge similar trusts for purposes of easing administration;
- change trust situs; and
- convert the trust into a special needs trust for a beneficiary with a disability.

The Act only applies to a trust that has its principal place of administration in Colorado or that is governed by the laws of the State of Colorado. The trust must be irrevocable (or revocable only with the consent of the trustee or a person holding an adverse interest) and not held solely for charitable purposes.

The discretionary distribution standards granted to the trustee in the trust agreement will dictate the extent of the modifications a trustee may make under the Act. Most trust

agreements limit the trustee's distributions to those necessary for a beneficiary's health, education, maintenance and support. In these instances, the trustee has the power to decant, but the beneficiaries must receive interests in the resulting modified trust or trusts beneficial interests that are similar to the original trust. If the trustee's original discretionary distribution standards are more broad the trustee is not subject to the requirement that beneficial interests in the modified trust(s) must be substantially similar to the original trust.

Procedurally, decanting is achieved either by modifying the original trust or creating a new trust to which the assets of the first trust will be transferred. Notice of the decanting is required to be provided to specified persons including the settlor of the trust, certain beneficiaries of the trust, and other trust fiduciaries. The notice must describe the decanting to occur, the effective date, and copies of all relevant trust instruments. For beneficiaries that are minors, incapacitated or even unborn, the Act includes provisions addressing the appointment of a representative to act on behalf of these beneficiaries. Notice of the proposed decanting must be provided at least 63 days before the proposed effective date, however, notice can be waived in writing by the person entitled to notice.

After the notice period has passed the trustee may exercise his or her decanting power without court approval.

Trust decanting often provides clients and trustees with a more affordable option for purposes of modifying existing irrevocable trusts than other options historically available. Please feel free to contact me if you would like to discuss how you or your trustee may be able to take advantage of Colorado's decanting statutes.