



## **Uniform Trust Decanting Act: Another Option To Modify The Terms Of An Irrevocable Trust**

Under California law, a trustee is required to administer a trust in accordance with its terms. However, a trustee may find that while administering a trust, its terms are no longer appropriate in light of the current circumstances. In September 2018, California enacted the Uniform Trust Decanting Act (the “statute”), which allows a trustee the limited power to change the terms of a trust without court approval or the consent of the beneficiaries.

Decanting involves the transfer of assets from an existing trust (the “first trust”) to a new or modified trust (the “second trust”) with terms that better fit the current circumstances of the beneficiaries and trustees. Not all trusts may be decanted; for instance, a trust that is held solely for charitable purposes or specifically prohibits decanting, may not be decanted.

The changes a trustee may make to a trust through decanting depend on the trustee’s power to make distributions in the first trust. If a trustee may only make distributions for a beneficiary’s health, education, maintenance and support, the trustee is deemed to have “limited distributive discretion;” however, if the trustee has the power to make distributions in his or her unlimited discretion, the trustee is deemed to have “expanded distributive discretion.”

A trustee with limited distributive discretion may only change the administrative provisions of the trust, such as the trustee succession and powers of the trustee and cannot materially alter a beneficiary’s interest in the trust. A trustee with expanded distributive discretion may change the administrative provisions as well as certain dispositive provisions, such as eliminating a beneficiary, changing the distribution standard, granting a power of appointment to a beneficiary, or extending the duration of the trust. Regardless of whether the trustee has limited or expanded distributive discretion, a trustee must act in accordance with his or her fiduciary duties and the purposes of the first trust when exercising the decanting power.

The statute includes a significant carve out that allows a trustee to create a special needs trust for a beneficiary with a disability, even if the trustee only has limited distributive discretion. This carve out is intended to protect a disabled beneficiary’s public benefits, such as Medi-Cal and Supplemental Security Income (SSI).

Regardless of the trustee’s distributive discretion, the statute prohibits the trustee from making the following changes in the second trust:

- Including as a current beneficiary a person who is not a current beneficiary of the first trust; Including as a remainder beneficiary a person who is not a current beneficiary or a remainder beneficiary of the first trust;
- Reducing or eliminating a beneficiary’s interest that has vested; or
- Any change that would disqualify a marital or charitable deduction of the first trust.



Under the statute a trustee may decant a trust without court approval or the consent of the beneficiaries, but prior to decanting, the trustee must give notice to the following persons: the trustor, any beneficiary entitled to income or principal, any holder of a power of appointment, any person who has the power to remove or replace the trustee, the trustees of the first trust and second trust, and the Attorney General, if the trust contains certain charitable interests. The trustee's notice must include specific details that are outlined in the statute.

While the statute allows a trustee to change the terms of an existing trust without going to court, the changes that can be made to the first trust are limited. In many circumstances, going to court to modify an existing trust may still be the better alternative. If you are a trustee of a California trust that you believe has terms that need to be updated, please contact us to discuss the potential changes.