

What is Trust Decanting? by Courtney Kelley

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Decanting” is the act of pouring the assets of one trust into another trust. Think: wine. Like decanting wine, trust decanting can be a useful strategy for removing the old, unfavorable terms of a trust by allowing the trustee to transfer assets to a new trust. But concerns do exist, primarily regarding trustor intent and the wide discretion granted to trustees.

In 2015, the Uniform Law Commission completed the Uniform Trust Decanting Act (“UTDA”). Two states – Colorado and New Mexico – have since adopted the UTDA and four states – Illinois, Nevada, Virginia, and Washington – have introduced the UTDA for the 2017 legislative session. The UTDA allows a trustee to reform an irrevocable trust within reasonable limits that ensure the trust will achieve the settlor’s original intent. The act prevents decanting when it would defeat a charitable or tax-related purpose of the settlor.

But the UTDA is not the exclusive way to decant a trust. The terms of the trust instrument or state law may grant a fiduciary the power to decant. For instance, a settlor could expressly provide for decanting by stating the method a trustee could use in order to achieve the same result. Twenty-four states have adopted decanting statutes, demonstrating the desire for the availability of decanting as a trust administration tool. Two states, Iowa and New Jersey, purport to have common law decanting.

Decanting statutes vary state to state. The Texas decanting statute distinguishes between “full discretion trusts” and “limited discretion trusts.” Under the Texas statute, the trustee may distribute principal from a full discretion trust to another trust for the benefit of one or more of the current beneficiaries of the first trust. In order to decant from a limited discretion trust, however, the current beneficiaries of both trusts must be the same, the successor and remainder beneficiaries of both trusts must be the same, and the distribution standard of both trusts must be the same. South Dakota’s decanting statute allows for broad authority for decanting a trust, requiring only that a trustee have “discretionary authority.” Thus, any trustee discretion over income or principal is sufficient.

Oklahoma does not have a decanting statute, and current Oklahoma trust law raises issues with

enacting the same. But there are benefits to be gained by reforming current Oklahoma trust law to allow decanting. Upon closer examination, the benefits of trust decanting likely outweigh its faults.

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