Trust Modification, Decanting and Premature Termination

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Presents

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By

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A. Introduction

The commonly understood definition of "irrevocable" is: unchangeable, unalterable, immutable, cast in stone, not able to be revoked. *See* Merriam Webster's Collegiate Dictionary, Eleventh Edition (2003).

During the past couple of decades, however, the term "irrevocable," as used in estate planning, has taken on a new, counter-intuitive meaning. In the 21st century, a trust that is said to be irrevocable is, in truth, often nothing of the sort. Numerous legal mechanisms have evolved to facilitate reformation, modification, rescission, termination and decanting of irrevocable trusts. Of particular note are the following:

- Thirty jurisdictions - Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming - have enacted the Uniform Trust Code ("UTC") with various state-specific modifications. The legislatures of Minnesota and New Jersey are considering enactment.

- UTC § 111 allows interested persons to enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust so long as a material purpose of the trust is not thereby violated. Presumably, to invoke UTC § 111, there must be a matter that requires resolution, but that would appear to be an easily surmountable challenge.

- UTC § 411(a) authorizes the settlor and all beneficiaries to modify or terminate a noncharitable irrevocable trust, even if the modification or termination is inconsistent with a material purpose of the trust. An alternative version of UTC § 411(a) requires the court to approve such a modification or termination where the court finds that the settlor and all beneficiaries have consented to it.

- UTC § 411(b) provides that the court may order a modification or termination of a noncharitable irrevocable trust if all beneficiaries consent to the modification or termination and the court concludes that, in the case of modification, such action is not inconsistent with a material purpose of the trust or, in the case of termination, continuance of the trust is not necessary to achieve any material

purpose of the trust. Material purposes are not readily to be inferred. RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d. This principle is referenced favorably in the Comment on UTC § 411 provided by The National Conference of Commissioners on Uniform State Laws.

- Under UTC § 412(a), the court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust.

- UTC § 415 allows the court to reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence what the settlor's intention was and that the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

- UTC § 416 states that, to achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention.

- Twenty-two states - Alaska, Arizona, Delaware, Florida, Illinois, Indiana, Kentucky, Michigan, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin and Wyoming - have enacted "decanting" statutes, which, to various extents, allow a Trustee having a discretionary distribution power to exercise that power by distributing to a new trust rather than outright to the beneficiary to or for whom the Trustee is empowered to distribute. Depending on the state, the new trust, as compared to the trust out of which the distribution was made, may have different standards for distribution, may permit or direct distributions at a different time or times, may create a new power of appointment and may include different beneficiaries.

- Idaho and Washington have enacted the Trust and Estate Dispute Resolution Act ("TEDRA"). Wash. Rev. Code § 11.96A.010 et. seq.; Idaho Code § 15-8-101 et. seq. Under TEDRA, all interested parties can enter into a binding agreement to resolve any "matter" involving a trust or an estate. The term "matter" is defined very broadly and includes construction of wills and trusts and the grant to a Trustee of any necessary or desirable power. If the agreement is filed with the proper court, it is deemed approved by the court and is equivalent to a final court order having binding effect on all interested persons.

B. Changing a Trust's Situs and Governing Law

1. Governing Law of a Trust

Even if a trust's situs is moved, a change in the governing law is a separate question. The difference between the governing law of a trust and the situs of a trust is that the governing law is the particular legal system governing the validity, construction and effect of the trust instrument, while situs usually refers to the state in which trust assets are physically located or where the trust is "grounded" or has its "foundation" or the principal place of its administration and may also refer to the state in which the trust is deemed to exist apart from the location of the trust assets or the respective domiciles of the Trustee and the beneficiaries. The law of the situs generally governs trust administration matters (*e.g.*, Trustee liability, trust accountings, characterizing of beneficial interests and compensation). *See* Bogert, et al., BOGERT'S TRUSTS AND TRUSTEES (3d ed. 2009) §§ 291, 295, 296, 297 (hereinafter, Bogert); *see also* Uniform Trust Code ("UTC") §§ 107 & Cmt., 108 & Cmt., 403 & Cmt.

Language in the trust instrument stating the governing law of the trust will usually be honored. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268-270, 277. If the trust instrument contains a provision establishing the governing law for the trust but does not contain a provision regarding the Trustee's changing of the governing law, the Trustee usually will have to commence a court proceeding to change the governing law. Thus, the practitioner must analyze the local law to determine how to obtain a ruling changing the governing law. Courts will consider the settlor's intent and also require a showing of sufficient contacts with the new state and a showing of benefits to the administration of the trust from the change. Finally, a court may make its order granting transfer contingent on the new state's accepting jurisdiction. Bogert § 297; Nenno, "The Trust From Hell, Can it be Moved to a Celestial Jurisdiction?" Prob. & Prop., May/June 2008, at 60.

It may be beneficial for the trust instrument to specify that, if there is a change in situs, the laws of the transferee state will apply. If situs is transferred and the governing law is not transferred, if such a provision is not included, a conflict-of-laws analysis must be applied, which will depend on whether the issue involves a matter of trust validity, construction or administration; whether the trust is an *inter vivos* or testamentary trust; and whether real property or personal property is involved. The primary factors in these determinations are often the jurisdiction designated in the trust instrument, the trust's connections with such jurisdiction and the location of any real property. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 267-282; *see* Nenno, "Choosing and Rechoosing the Jurisdiction for a Trust," 40 Philip E. Heckerling Institute on Estate Planning (2006) (hereinafter "Nenno, Choosing and Rechoosing"); Sparks, "Here Today, Gone Tomorrow: Trust Law Situs and Jurisdiction Considerations," AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, 2006 Fall Meeting.

2. Non-Tax Situs and Governing Law Issues

a. <u>Relevant Uniform Trust Code Provisions</u>. The UTC provides for a trust's change of its "principal place of administration," which is defined as the Trustee's principal place of business or residence or the place where all or part of the trust's administration takes place. UTC § 108(a). UTC § 108(b) imposes a duty upon the Trustee to administer the trust "at a place appropriate to its purposes, its administration, and the interests of the beneficiaries." A Trustee has the power to move a trust, but such power may be subject to court approval. The Trustee must also provide qualified beneficiaries sixty days' notice of the proposed transfer. Such notice must state, among other items, the reason for the proposed transfer. The Trustee's power under this section to transfer the trust's principal place of administration terminates if a qualified beneficiary objects to the proposed transfer within the time period stated in the notice. UTC § 108(c)-(e). The Comment to this Section explains that the transfer of the principal place of administration will usually change the governing law as well, but only with respect to administrative matters and not with respect to the validity of the trust and the construction of its dispositive provisions. *See also* 5A Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS, Section 615 (5th ed. 2008).

In some instances, selected statutes of the state to which a trust's principal place of administration has been transferred are explicitly made available to be used by such trust. *See, e.g.*, Alaska Stat. § 13.36.157(b).

The Comment to UTC § 108 also explains that "[d]esignating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms, as authorized by Section 107." UTC § 107 allows a settlor to designate the governing law for the meaning and effect of the trust provisions unless the law selected is contrary to a "strong public policy of the jurisdiction having the most significant relationship to the matter at issue." *See, e.g.*, *Dahl v. Dahl*, 013015 UTSC, 20100683, 205 UT 231 (2015) (choice of law provision in trust instrument disregarded because of Utah's public policy regarding the equitable distribution of assets upon divorce). The Comment to UTC § 107 states that "[t]he jurisdiction selected need not have any other connection to the trust."

When the settlor's intent is not expressed or when there is the potential that the chosen state will be rejected on public policy grounds, the Comment to UTC § 107 establishes the following guidelines for determining which state has the most significant relationship to a trust and therefore will constitute its governing law:

Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the Trustee, and the beneficiaries. Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result.

As with many provisions of the UTC, several states have made significant changes to both UTC §§ 107 and 108. New Hampshire and Tennessee modified UTC § 108(e) to require a majority of the qualified beneficiaries to object, if there are multiple qualified beneficiaries, to terminate the authority of the Trustee to transfer the place of administration. N.H. Rev. Stat. § 564-B:1-108; T.C.A. § 35-15-108. Oregon modified UTC § 108(a) to state that the principal place of administration as stated in the trust instrument is valid if "[o]ther means exist for establishing a sufficient connection with the designated state, county or other jurisdiction." O.R.S. § 130.022. Nebraska, concerned that the law of another state would be used to determine the governing law of real estate located in Nebraska, states in its version of UTC § 107 that "[t]he meaning and effect of the terms of a trust that pertain to title to Nebraska real estate are determined by the law of Nebraska." NE Stat. § 30-3807; Lindsay, "The Nebraska Uniform Trust Code From the Trenches: A Practitioner's Guide to Understanding Nebraska's New Uniform Trust Code," 37 Creighton L. Rev. 93 (2003). South Carolina's statute provides that the governing law is determined by the governing law designated in the trust instrument, apparently without regard to whether it is contrary to the strong public policy of a jurisdiction having the most significant relationship to the matter at issue. S.C. Code § 62-7-107. Finally, Utah's statute provides for a completely different governing law provision, stating that the determination of the governing law for a trust primarily depends upon whether the trust is administered in Utah. U.C.A. § 75-7-107.

b. Aspects of Trust Administration Affected by Situs and Governing Law. A trust's situs and governing law affects many additional important issues that arise in estate planning, such as the following:

(i) Rule Against Perpetuities. Which states have abolished the rule against perpetuities has a significant impact on dynastic planning. Several states have abolished the rule, including South Dakota (S.D.C.L. § 43-5-8), Idaho (Idaho C. § 55-111) and Delaware (25 Del. C. § 503). A client should be able to designate a trust's governing law for purposes of avoiding any rule against perpetuities problems without any risk of such designation's not being respected. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. d & f.

(ii) Privacy. States also differ in the privacy protections of trust instruments. A South Dakota statute, for example, allows a Trustee, settlor or beneficiary to petition a court to seal trust instruments and related documents. Upon the filing of the petition, the statute requires these documents to be sealed. S.D.C.L. § 21-22-28.

(iii) Asset Protection. Asset protection is another common client objective that can vary from state to state. The practitioner should determine whether and to what extent spendthrift provisions are valid and, if valid, the extent to which they will protect trust interests from the claims of creditors under the law of the state of administration of the trust. In general, the law that determines whether or not creditors may reach a beneficiary's interest in a trust is the law designated by the trust instrument. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 273.

State laws vary on their protection of assets from creditors such as retirement benefits and life insurance proceeds. *See, e.g.*, NY EP&TL § 7-3.1; FSA § 222.13; Sparks, *supra*. In addition, 16 states permit domestic asset protection trusts, while the vast majority of states, including most of those that have enacted the UTC, do not allow them. UTC § 505(a)(2), Rubin, "Hawaii's Permitted Transfers in Trust Act," LISI Asset Protection Planning Newsletter #159 (July 28, 2010). Trustees might have an obligation to explore moving a trust to a jurisdiction that provides improved asset protection. *See, e.g., In re Joseph Heller Inter Vivos Trust*, 613 NYS2d 809 (1994).

(iv) Delegation. The settlor should also consider establishing a trust in a state that permits the Trustee completely to delegate distribution, investment and/or administrative responsibilities among advisors, trust protectors, investment managers, etc. RESTATEMENT (SECOND) OF TRUSTS § 185 relieves a delegating Trustee from liability for such delegation, and several states have enacted statutes allowing such delegation. *See, e.g.*, Tex. Prop. Code Ann. § 114.003 (relieving Trustees from liability when they are acting at the direction of an advisor unless the direction is manifestly contrary to the terms of the trust instrument or the Trustee knows that the direction constitutes a breach of fiduciary duty); UTC § 808; *see also* King & McDowell, "Delegated Vs. Directed Trusts," TRUSTS & ESTATES, July 2006, at 26.

➔ **Planning Point**: The determination of a trust's situs and governing law will usually begin with a consideration of the client's objectives. Many clients wish to prevent diversification of a certain holding of stock, control the disposition of small business interests, keep the trust assets (or even knowledge of the trust) away from certain beneficiaries until they reach a certain age, etc. The practitioner must always ensure that the situs and governing law will respect these objectives. Delaware, therefore, will often be a favorable jurisdiction because trust provisions regarding those matters will be respected more often in Delaware than in most other states. 12 Del. C. § 3303(a). In contrast, as mentioned above, UTC jurisdictions and certain other states allow beneficiaries to amend or terminate trusts in certain circumstances. *See, e.g.*, UTC § 411(b); Wash. Rev. Code § 11.96A.210-250. Once the client chooses a favorable situs and governing law and designates it in the trust instrument, the client may wish to include additional language that would prevent a change in situs or governing law that would be contrary to the client's objectives. Nenno, Choosing and Rechoosing, supra.

3. Mechanics of Moving The Situs of A Trust

To change a trust's situs from one jurisdiction to another, the practitioner must analyze the rules and procedures regarding trust situs in both jurisdictions. The steps that must be taken will be based on which characteristics of the trust need to be changed to fall outside the reach of the initial jurisdiction.

The transfer of a trust's situs might be accomplished through a provision in the trust instrument, by statute or a court petition. A detailed provision setting forth a procedure for the removal and replacement of a Trustee without a court proceeding may be all that is needed effectively to change the trust's situs. However, the situs with respect to real estate held by the trust may not be affected by this change. The trust instrument should also allow Co-Trustees to be appointed for the purpose of administering property that will be subject to the laws of another state. Nenno, Celestial Jurisdiction, *supra*. If the trust instrument does not contain sufficient provisions regarding the removal and replacement of Trustees, or appointment of a Co-Trustee, to effect a change in trust situs, the Trustee may need to seek approval from a court to replace the Trustee or to appoint a Co-Trustee. This may be a difficult task (where a replacement Trustee is needed) if the only way in which to remove the Trustee under applicable state law is to prove that the Trustee breached a fiduciary duty. Some states, however, allow for a court to remove a Trustee for broader reasons, such as hostility between the Trustee and the beneficiaries. *See, e.g.*, 12 Del C. § 3327.

If the governing instrument provides one or more beneficiaries with powers of appointment, the powers may be exercised in a manner that will move trust's situs without court intervention. Sparks, *supra*.

If the parties need to move a trust's tangible personal property out of state, the Trustee may need court approval beforehand. Michaels & Twomey, "How, Why, and When to Transfer the Situs of A Trust," EST. PLN., Jan. 2004, at 28.

If the settlor has designated a particular trust situs or the law of a particular state to govern the trust, courts have often denied requests for the transfer of a trust situs. If no provision in the trust instrument prohibits the transfer, however, a court will usually grant the transfer of situs as long as the transfer will facilitate trust administration and will be in the beneficiaries' best interests. *See, e.g.*, *Estate of McComas*, 630 N.Y.S.2d 895 (1995); Bogert § 861; *but see Harold J. Allen Trust Number Three v. Brook*, 728 N.W.2d 60 (Iowa App. 2006) (trust provision allowing change of situs not upheld by court because allowing the attempted situs change to Canada in this case would frustrate grantor's overall intent).

➔ **Planning Point:** A change of situs and governing law may be part of a modification of the trust's terms. For example, a Trustee may be able to take advantage of the more liberal decanting rules of another state. In New York, a Trustee is prohibited from altering a fixed income interest through a decanting. NY EP&TL § 10-6.6(b). If a Trustee of a New York trust wishes to reduce a fixed income interest, the Trustee can decant the trust so that the trust will be governed by South Dakota law, which does allow a Trustee to decant a trust to reduce a fixed income interest. S.D.C.L. § 55-2-15 (as long as the fixed income interest is not part of a marital deduction trust, a charitable remainder trust or a grantor retained annuity trust). A second decanting can then take place to accomplish the

Trustee's objective. U.S. Trust, Bank of America Private Wealth Management, "State 'Decanting' Statutes," Practical Drafting (Jan. 2008).

C. Trustee Duties Regarding Trust Modifications or Decanting

1. Trust Modifications

Where a Trustee is involved in a judicial modification of a trust agreement, typically the finality and authority of a judicial decision will have the result of protecting the Trustee from liability regarding any claims challenging the validity of the modification. However, where the Trustee initiates or otherwise actively advocates in the modification proceedings, the Trustee may nevertheless be exposed to suits based on the propriety or effect of the modification (if, for example, the modification had adverse tax consequences on the trust itself, or the grantor or a beneficiary of the trust). The prudent Trustee will be alert to these potential sources of liability, which can be foreclosed with informed consents from interested parties or those with the ability to represent and bind one or more interested parties as described in UTC §§ 301-305.

In a nonjudicial modification pursuant to UTC § 111, the Trustee will want to ensure that all of the elements thereof are met. As these elements are not set forth as "safe harbors" but, rather, are fact-sensitive, a Trustee engaging in a nonjudicial modification might consider seeking judicial approval of the nonjudicial modification (as contemplated by UTC § 111(e)), especially if the Trustee perceives a potential conflict of interest between a representative and the party represented or if the Trustee is concerned that the representative will not adequately protect the interests of the party represented.

➔ **Planning Point:** The advisability of obtaining consents from all interested parties applies generally to all trust modifications, whether judicial, nonjudicial or pursuant to UTC § 111 or a similar statute or the common law. These consents should provide some extra degree of protection for the Trustee participating in a nonjudicial modification, even if the other requirements of a nonjudicial modification are ultimately determined to be defective in some way, based on general trust principles (and UTC § 1009), which generally provide that a Trustee is not liable to a beneficiary for a breach of trust where the beneficiary gave informed consent to the action constituting the breach. RESTATEMENT (SECOND) OF TRUSTS § 216, 4 Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, SCOTT AND ASCHER ON TRUSTS, Section 24.21 (5th ed. 2008). Because a consent is invalid if the beneficiary did not know the material facts related to the release, *see, e.g.*, UTC § 1009, the Trustee may want to attach all the relevant documents related the trust modification to the consent document. Flubacher, "Controlling From the Grave, Is Flexibility a Good Thing?" AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, 2015 Annual Meeting.

The extent of a Trustee's liability with respect to his, her or its participation in a trust modification may be affected if the trust to be modified is a "directed trust," *i.e.*, a trust the governing instrument of which provides that a third party (the "director") will direct one or more of a Trustee's responsibilities. The director has the power to direct the Trustee as to the matter under the third party's control, and usually the Trustee has no discretion over that particular area of administration. Therefore, if the trust to be modified is a directed trust, and the question of whether or not to engage in a trust modification is one that falls within the authority of the director, the Trustee presumably would be protected from liability for following the director's instructions with regard to the modification. However, it is important to remember that, although the concept of a directed trust is not new, states have only recently begun setting the statutory framework for the powers and duties of directed Trustees. Further, Trustee liability in the context of directed trusts is based in part on the extent to which a directed Trustee may or must follow directions from a third party. Liability may also arise from the inaction of a directed Trustee if that Trustee is under an obligation to monitor the director's actions. Given the relative novelty of state statutes specifically dealing with directed trusts, this area of law is relatively untested in the courts.

2. Decanting

a. Limitations on a Trustee's Liability Under the Decanting Statutes. Some decanting statutes specify that the Trustee is under no duty to complete a decanting. *See, e.g.*, O.R.C. § 5808.18(J); Ind. Code Ann. § 30-4-3-36(g). Some statutes also specify that a decanting may be completed whether or not there is a current need to distribute principal or income to a beneficiary. *See, e.g.*, N.C. Gen. Stat. § 36C-8-816.1(b). This provision anticipates an argument by a disgruntled beneficiary that a Trustee breached the Trustee's fiduciary duty by completing the decanting when, under the terms of the Trustee's discretionary distribution authority, there was no occasion to make an outright distribution of trust income or principal. Wareh & Dorsch, "Decanting: A Statutory Cornucopia," TRUSTS & ESTATES, March 2012, at 22.

b. *Ferri*: Decanting Rejected; Claims Against Trustee Asserted. In *Ferri v. Powell-Ferri*, 2013 Conn. Super. LEXIS 1938, the plaintiffs, Michael Ferri and Anthony Medaglia (the "Trustees"), were the Trustees of a trust referred to as the "1983 Trust," created by Paul John Ferri. The plaintiffs brought this action against the beneficiary of the 1983 Trust, Paul John Ferri, Jr., ("Paul") seeking a declaration from the court that a decanting of the 1983 Trust assets to a new trust was "consistent with the purposes and language" of the 1983 Trust and consistent with "the public policy of the State of Connecticut."

In March of 2011, the Trustees decanted the "overwhelming majority" of the 1983 Trust assets to a new trust referred to as the "2011 Trust." Under the terms of the 1983 Trust, at the beginning of this litigation, Paul held a right of withdrawal over a portion of the trust property. At the time of the decanting, Paul's power of withdrawal had expanded to cover the entire trust property. The Trustees also had a discretionary power to distribute income and principal to Paul. Under the terms of the 2011 Trust, Paul remained the sole beneficiary, but the Trustees held

complete control over the management of the trust assets. The terms of the 1983 Trust did not include a provision specifically allowing the Trustees to decant the trust property.

Because the 1983 Trust was created in Massachusetts, the court stated that it must apply Massachusetts law to resolve this case. Massachusetts does not have a decanting statute. The court found that, under the 1983 Trust, Paul's absolute right of withdrawal curtailed the Trustees' discretion regarding distributions. Thus, the court concluded that the decanting in this context violated the Trustees' "powers . . . and their duty to dispose of the trust property as stated in the 1983 Trust."

Paul's former wife, Nancy Powell-Ferri ("Nancy"), also asserted a claim in connection with their divorce action. Under the 1983 Trust, Paul's interest was considered marital property under applicable Connecticut law and Nancy had a "financial expectancy" in this Trust property. After the decanting, her expectancy was eliminated. Nancy brought a claim against the Trustees for intentional interference with an equitable interest. This claim had not been recognized under Connecticut law. The Trustees filed a motion to strike the claim. Nancy asserted that the claim was a logical extension of the recognized claim for tortious interference with business expectancy. Although the court did find merit in recognizing this cause of action, it found that, at least under the facts of this case, it was not possible to calculate damages arising from this potential tort. Thus, the court declined to recognize the claim and granted the motion to strike. The court pointed out that Nancy still obtained relief in this case given the court's ruling that the decanting was invalid.

c. <u>Other Steps for Limiting Trustee Liability for Decanting</u>. The Trustee must ensure that the risks of fiduciary liability arising from the decanting are minimized. The issue of Trustee liability will be especially important if the second trust changes the interests of the current or remainder beneficiaries. For example, the Trustee of the first trust may have the ability to transfer all the property of the first trust to the second trust and exclude certain beneficiaries of the first trust from being beneficiaries of the second trust. *See, e.g.*, NY EP&TL § 10-6.6(b). Although decanting statutes do not require beneficiary consent, a decanting Trustee and his, her or its attorney nevertheless should attempt to secure consents from as many beneficiaries as possible, including current and remainder beneficiaries, whether contingent or vested.

Of course, there is a strong argument that, since decanting is fundamentally a discretionary principal distribution, the Trustee should be prepared to proceed without consents as with any discretionary principal distribution. In that situation, the Trustee must ensure that the decanting is in strict accordance with the applicable decanting statute. *See, e.g.*, *In re Petition of Johnson*, 2015 N.Y. Misc. LEXIS 51 (N.Y. Surr. January 13, 2015) (upon complaint by beneficiary, decanting invalidated by court because the decanting resulted in the addition of beneficiaries under the new trust in violation of the New York decanting statute).

➔ **<u>Planning Point</u>:** The second trust may include new protections for the Trustee, such as an exculpatory clause that covers actions or inactions

during the administration of the first trust, and a provision authorizing decanting and the specific procedures to be followed. *See* Aghdami & Chadwick, "Decanting Comes of Age," AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, 2013 Annual Meeting.

➔ **Planning Point:** The IRS has issued Notice 2011-101, 2011-52 I.R.B. 932, requesting comments regarding the income, gift, estate and GST tax consequences arising from a decanting that changes a beneficiary's interest. The IRS stated that, while these issues are under study, it will not issue private letter rulings regarding decanting that result in a change in beneficial interests. Rev. Proc. 2011-3, 2011-1 I.R.B. 111. This notice should weigh heavily in a Trustee's decision regarding whether to decant. The IRS has not, however, listed decanting regulations on its latest priority guidance plan. *See* Joint Treasury, Internal Revenue Service 2014-2015 Priority Guidance Plan (August 26, 2014).

D. Can a Trust Settlor Foreclose Future Modification or Decanting of a Trust?

Flexibility in estate planning is almost universally touted as the greatest thing since sliced bread. Estate planning professionals seem consistently to accept and promote the use of techniques and strategies, enabled or enhanced by the developments described above, that can be and sometimes are used to eviscerate a trust. Of course, changes to irrevocable trust instruments are often objectively desirable or necessary. Errors need to be corrected. Antiquated, obsolete provisions need to be updated. Unanticipated changes in applicable law and beneficiaries' circumstances need to be addressed. Sometimes, though, the motivation to make changes, and the changes themselves, may transcend that which is desirable or necessary. Beneficiaries may simply decide they don't care for the terms of a trust established by an ancestor and want to relax the rules or eliminate restrictions altogether. Indeed, a determined coalition of beneficiaries who are willing to expend sufficient time, effort and money may well be able to effectuate virtually any change in trust provisions they desire.

How should estate planners today formulate an estate plan in a legal environment in which the concept of irrevocability is so porous? On one hand, it would be unwise and impossible to foreclose the making of any and all changes to an irrevocable trust. On the other hand, most estate planning clients would be shocked to their core to learn that their beneficiaries, with little or no regard for the client's dispositive desires, could drastically change the client's carefully considered and crafted estate plan.

Achieving an appropriate balance between flexibility and certainty in an estate plan is a delicate exercise and varies from one client to another. A client could consider including in his will or trust instrument a strong statement regarding his dispositive desires and his overriding wish that, notwithstanding what may be possible under applicable state trust law, his dispositive plan not be disturbed except in the most compelling of circumstances. Additionally, a client could include an explicit statement in his will or trust instrument regarding the client's "material

purposes" (thereby making it more difficult to change provisions that would implement such purposes). Yet another approach would be to include "*in terrorem*" language in the will or trust instrument that would remove as a beneficiary anyone who initiated or participated in any process or proceeding to alter specified provisions or types of provisions. Still further, many decanting statutes can be used only if the trust's governing instrument does not provide otherwise, so a client who is concerned about the potential for decanting may be able to eliminate that potential by including a provision prohibiting decanting. *See*, *e.g.*, Del. Code Ann. tit. 12, §3528(a); Section 456.4-419.1, RSMo.; Alaska Stat. § 13.36.157. Finally, although under UTC § 105(b) a court would always have authority to modify or terminate a trust under UTC §§ 410 through 416 regardless of any provision in the governing instrument, a governing instrument could limit or prohibit using a nonjudicial settlement agreement under UTC § 111 to modify a trust without court involvement or transferring the trust's principal place of administration to another state under UTC § 108.

Furthermore, while the beneficiaries can terminate or modify an irrevocable trust without the concurrence of the settlor, the settlor also has standing to challenge the proposed action. UTC § 410(b).

Whether any of the prophylactic provisions suggested above should be included in a client's estate planning documents and, if so, specifically how they should be designed may be debatable. Moreover, given the wide variety of state trust laws, whether or to what extent such provisions would be enforceable would have to be considered carefully on a case-by-case basis. What seems beyond debate, however, is that estate planning clients deserve to know of the potential that their estate plans could be turned upside down and what the possible preventative remedies are.

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Certificate of Attendance

_____

(Participant Name)

_____

(Colorado Attorney Registration #)

Has successfully completed the Cannon Financial Institute, Inc. course:

Trust Modification, Decanting and Premature Termination
(745673)

April 21, 2015

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

Colorado – 2 General Credits

****As required by the State of Colorado, attorneys must submit their own credits.

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

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(Attorney Bar # or Social Security #)

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April 21, 2015

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Frye

Laurie Frye
Professional Education Coordinator

Continuing Legal Education Credits for this course are as follows:

The following states have been approved for 1.5 hours of General Credit: (Course number is indicated in parenthesis):Alabama, Arkansas (TWE48105), California, Delaware, Georgia, Idaho, Illinois, Iowa (161392), Kentucky (151759), Louisiana, Maine (036026), Minnesota (199857), Mississippi, Montana (25835), Nebraska(101877), Nevada (6505), New Mexico, New York, North Carolina, North Dakota, Oregon (1048* 222), Pennsylvania, South Carolina, Tennessee (Distance Ed), Texas (901306274), Utah , Vermont, Virginia, Washington, Wisconsin , & Wyoming.

These states have been approved for the following General Credit: Colorado – 2 hours, Florida - 2 hours (1407636N), Missouri –1.8 hours, Oklahoma – 2 hours, West Virginia – 1.8 hours

The following states either do not require/do not accept outside CLE Credit/or do not accept teleconference calls for CLE Credit: District of Columbia, Hawaii, Maryland, Massachusetts, Michigan & South Dakota

The following states have special circumstances:
Alaska-Attorneys can use this certificate to submit to Alaska State Bar
Arizona-On honor system
Indiana & Ohio-Site Coordinators must apply for credit as the sponsor in order for participants to receive credit
Kansas–Attorney or Site may apply 30 days prior to program
New Hampshire- *NHMCLE does not approve or accredit CLE activities for the NH Minimum CLE requirement. NH attendees must self-determine whether a program is eligible for credit, and self-report their attendance.*
New Jersey-Attorneys can use this certificate to submit to New Jersey State Bar for 1.5 General credits (Reciprocity Rule)
New York–Attorneys may use this certificate to report their attendance as it is accredited by Approved NY Jurisdictions: AL, AR, CO, DE, GA, KY, LA, MS, NM, NC, ND, OK,. Type of credit: Areas of Professional Practice, 1.5 Credits

* In order for PA attorneys to receive credit they must listen to the teleconference in a live classroom setting. The teleconference site must also be listed on the PACLE website and the site must be open to any PA attorney who desires to listen to the program. Call PACLE at 1-800-497-2253 with questions on website listing.

****As required by the following State Bars, and in order to obtain CLE in these states, Cannon will submit the mandatory attendance rosters for the attorneys seeking CLE credits **ONLY** in the following states: Alabama, Delaware, Georgia, Idaho, Louisiana, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, West Virginia and Washington. ****

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

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Trust Modification, Decanting and Premature Termination

April 21, 2015

CANNON FINANCIAL INSTITUTE, INC. CORPORATE SEAL GEORGIA

Laurie Frye
Professional Education Coordinator

Continuing Education Credits for this course are as follows:

- **Certified Public Accountant** — **1.5 total credit hours**
  In accordance with the National CPE Registry of CPE sponsors, CPE credits have been granted based on a 50-minute hour. For information regarding available CPE credits please visithttp://cpemarket.nasbatools.com/index".
  Instructional delivery method: Group-Live
  NASBA #103655; Field of Study –Specialized Knowledge & Application
- **Enrolled Agent (IRS)** — **2.0 total credit hours**
  Cannon is designated as a qualified education sponsor by the IRS and can offer continuing education credit to Enrolled Agents. Cannon's agreement with the IRS' Office of Professional Responsibility does not constitute an endorsement by the IRS as to the quality of the programs or their contribution to the professional competence of the enrolled individual.
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  Course #199071
- **Accredited Fiduciary Investment Manager (AFIM™)** — **1.5 total credit hours**
- **Certified Wealth Strategists (CWS®)** — **2.0 total credit hours**
- **Certified Investment Management Analyst (CIMA®)** — **1.5 total credit hours**
  Course #14CFI010
  If you hold the CIMA®, CIMC® or CPWA® certification, you may report this pre-accepted CE program online by logging into your My IMCA account at www.imca.org/user
- **Certified Trust Financial Advisor (CTFA™)** — **2.0 total credit hours**

Fiduciary Law	2
Taxes	0
Investments	0
Financial Planning	0
Ethics	0

- **Fiduciary Investment Risk Management Association (FIRMA®)** — **2.0 total credit hours**
- **Chartered Life Underwriter & Chartered Financial Consultant** — **1.5 total credit hours**
  (**No Individual State Insurance Credit Available)

Any questions regarding CE credit, please contact Laurie Frye at (706) 353-3346.
Fax (706) 353-3994, Email lfrye@CannonFinancial.com
PO Box 6447, Athens, Georgia 30604

CERTIFICATE OF ATTENDANCE FOR CALIFORNIA MCLE

To be Completed by the Provider

Provider: Cannon Financial Institute

Subject Matter/Title: Trust Modification, Decanting and Premature Termination

Date and Time of Activity: April 21, 2015 1:00-2:30 PM ET, 12:00-1:30 PM CT, 11:00AM-12: 30 PM MT,

10:00AM- 11:30 AM PT

Location: Teleconference

Length of Presentation: 1.5 Hours

ELIGIBLE CALIFORNIA MCLE CREDIT:

TOTAL HOURS: 1.5

Legal Ethics: 0

Elimination of Bias in the Legal Profession:

Prevention, Detection and Treatment of Substance Abuse:

To Be Completed by the Attorney after Participation in the Above-Name Activity

By signing below, I certify that I participated in the activity described above and am entitled to claim the following California MCLE credit hours:

TOTAL HOURS: _____

(You may not claim credit for the following sub-fields unless the provider is granting credit in these areas as listed above.)

Legal Ethics:_____

Elimination of Bias in the Legal Profession:_____

Prevention, Detection and Treatment of Substance Abuse: _____

Attorney Signature:

REMINDERS: Keep this record of attendance for four years. In the event that you are audited by the State Bar, you may be required to submit this record of attendance. Send this to the State Bar only if you are audited. You must sign in on the Official Record of Attendance for California MCLE maintained by this provider in order for these hours to qualify for California MCLE credit.

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CREDIT REQUEST FORM

BA_____

This form is to be used when you have attended a course that is not sponsored by an AccreditedProvider. Lawyers seeking Pennsylvania CLE credits must complete Section B of this form and return it to PACLE, along with a Uniform Certificate of Attendance, if available, and a check made payable to PACLE for the $1.50, per credit hour attendance fee payment. Please refer to Section C to calculate the correct attendance fee payment.

SECTION A : Course Information

Provider: **1854** Cannon Financial Institute

Course: **208126** Trust Modification, Decanting and Premature Termination (450768)

Date: 04/21/2015 13:00 **Location:** Alternate Delivery

Total CLE Credit Hours: Maximum: 1.50 = 1.50S

SECTION B : Lawyer Information

Lawyer Name _____ PA Lawyer ID _____

Address _____

City _____ State _____ Zip _____

By signing below, I certify that I attended the activity described above and am entitled to claim:
_____ Substantive

_____ _____
Signature Date

I am enclosing check #_____ for $_____

NOTE: If you attended the maximum 1.50 credit hours for this course, please enclose $3.00 attendance fee payment. See Section C below for calculation.

SECTION C : Attendance Fee Calculation

Pennsylvania grants one (1) CLE credit for each 60 minutes of attendance at an approved course. Pennsylvania requires a $1.50 per credit hour attendance fee payment. This $1.50 fee is also required for any portion of a credit hour. We accredit only programs that are at least one hour long; in addition, we accredit only in half hour increments. Please refer to the example below when calculating your attendance fees.

1 hour = 1.50	1.5 to 2 hours = $3.00	2.5 to 3 hours = $4.50	3.5 to 4 hours = $6.00
4.5 to 5 hours = $7.50	5.5 to 6 hours = $9.00	6.5 to 7 hours = $10.50	7.5 to 8 hours = $12.00

etc...

Thank you for attending this event.

Today's event features an online, post-event evaluation form. To send us your feedback, please click on the link below, or type the URL into your web browser's address bar.

http://eval.krm.com/eval.asp?id=21892

Your feedback and comments are very important to us. Thank you in advance for taking the time to complete this evaluation!