

advisory

DECANTING: AN OVERLOOKED TOOL IN THE TOOLKIT

There are many benefits to using an irrevocable trust in estate planning. Chief among them are tax savings and asset protection. However, many blanch at the thought of transferring assets into something so seemingly permanent as an irrevocable trust. You have worked hard your entire life and followed the wise advice of your financial professionals, amassing what is a significant stockpile of assets. Transferring such assets into a trust that cannot be amended or revoked and that, likely, does not benefit you during your lifetime, can give you serious pause. However, as many estate planners will tell you, there are several back doors out of such trusts.

Many practitioners will reserve in the grantors of an irrevocable trust what is called a power of appointment; that is, the power to redirect the assets of the trust to beneficiaries of their choosing by making a will or codicil making reference to the power. In this way, the grantors can retain an ability to alter the dispositive terms of the Trust even after its creation. Another mechanism for amending a trust is by judicial reformation, which effectively is a legal action brought in superior court for the purpose of asking a court to amend the terms of the trust, most likely to achieve a better tax result obviously intended by the grantor, but which is not achieved by the current trust terms. There is also an ability for the grantor and beneficiaries to team up and agree to modify an irrevocable trust, provided that such modification does not alter a material purpose of the trust.

Perhaps an underutilized mechanism by which to change the terms governing disposition of trust assets is to use a strategy known as “decanting.” Decanting, simply put, is the process by which one transfers the assets of one trust into another with more favorable terms. By doing this, you are taking the “good stuff,” namely the assets, from one pot and placing them into another with terms that reflect your updated wishes. Utilizing decanting provisions, as compared with judicial reformation or non-judicial modification, means saving legal fees and court costs, and bypassing the beneficiary consent requirement, respectively.



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The State of Rhode Island permits decanting under Rhode Island General Laws § 18-4-31. In order for a trust to be decanted, the trustee must have the authority to invade the principal of the trust. The new trust may take advantage of new tax savings provisions and may step up asset protection as against future creditors. However, the beneficiaries of the new trust may include only the beneficiaries of the first trust.

In sum, decanting is another tool in the estate planner's toolkit which may be helpful when a client finds that the terms of his or her current irrevocable trust do not accomplish his or her estate planning objectives. Decanting should be considered prior to undertaking a court action to seek judicial reformation, and perhaps even before contacting beneficiaries to get permission to modify an irrevocable trust.

If you have any questions regarding an irrevocable trust that you are concerned no longer accomplishes your estate planning goals, please consult with one of the attorneys in our Trusts & Estate practice or call PLDO Partner Rebecca M. Murphy at 401-824-5100 or email rmurphy@pldolaw.com.



Rebecca M. Murphy

Partner

PANNONE LOPES
DEVEREAUX & O'GARA LLC
c o u n s e l o r s a t l a w

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