DANIEL G. CRONIN

Decanting Trusts: Evolving Law

I. Introduction.

Many a law school graduate will remember back to their first year and the frustration they faced trying to get their untrained mind around one dauntingly simple concept: the rule against perpetuities. Most can easily state the rule as "lives in being plus twenty-one years." The difficulty arises when students are asked to apply the concept. Even practicing attorneys have failed to properly apply the rule, a mistake that according to the California Supreme Court amounts to legal malpractice.[i] Thankfully, states have decided that the old common law rule should be replaced by statutory rules against perpetuities, usually of a much longer duration; some as long as five hundred years. While this change may ease the law school experience for a few students it has resulted in new challenges facing practicing attorneys. The largest of these challenges is how can clients take advantage of these new statutory rules to extend the life of irrevocable trusts?

One option that is becoming increasingly popular is the process of decanting the trust. In it's most basic terms this involves "pouring" the contests of an irrevocable trust into a new container. This action is often compared to the process of pouring an aged wine into a new container to remove unwanted impurities. However, rather than a wine decanter the new container is a newly created irrevocable trust, usually with substantially the same terms and conditions as the original. While the basic concept remains the same, the terms used to describe the action often vary from state to state and from one professional to another.

Beyond simply extending the life of the trust beyond the common-law rule against perpetuities, the process of decanting can be used to make irrevocable trust more efficient due to modern changes in tax and state laws that the grantor could not have foreseen. Most states permit judicial modification of a trust, which can accomplish much the same results as decanting. However, there are a number of adverse consequences to that judicial process. Under judicial modification the court is required to respect the settlor's intent and modification that requires beneficiary approval may have adverse tax consequences.[ii]

The process of decanting may seem simple but involves multiple complicated issues. First off, there is state law that varies across the country. Some states have no statutory rules regarding decanting and the states that do have such statutes vary greatly in terms of when the allow decanting depending greatly on the character of the trust, the powers of the trustee and the location of the assets held within it. This maze of state statutes is only compounded by the potential income (state and federal), federal estate, federal gift and GST tax implications imposed on trust by the Internal Revenue Service (the "IRS"). Finally, an attorney must consider the parties involved including the trustee(s) and their liability, the beneficiaries and their rights, contingent beneficiaries and last but not least the grantor, who more than likely has long since passed. However, before beginning to even consider these issues it is imperative to understand the origins of the process of decanting.

II. Trust Decanting Overview.

The term "decant" has its origins in the Latin word *decantare*. The modern world defines "decant" as meaning: to draw off (a liquid) without disturbing the sediment or the lower liquid layers; to pour from one vessel into another; and to pour out, transfer, or unload as if by pouring.[iii] While this has been deemed a fitting analogy to the legal process of trust decanting, no case law and very few statutory laws specifically refer to the process as such.

Legally speaking, the term trust decanting refers to the distribution of property from one trust to another pursuant to a trustee's discretionary power to distribute property to or for the benefit of a trust's beneficiaries.[iv] The trustee's discretion to make distributions to the beneficiaries is viewed legally as being similar to a special power of appointment, sometimes called a non-general power of appointment, because it is an ability to transfer property to or among a class of beneficiaries. In more specific terms a power of appointment is authority, other than an incident of the beneficial ownership of property, to designate recipients of beneficial interests in the property.[v] Comments in the Restatement of Property state that a trustee's unlimited discretionary power to make distributions to or for a beneficiary or a group of beneficiaries is a power of appointment.[vi] The exercise of that power in favor of the current beneficiaries under the terms of a second trust would be functionally equivalent of distributing the property outright to the beneficiaries.[vii]

In general, the holder of a power of appointment exercises that power in his or her own discretion, unless subject to an ascertainable standard.[viii] This means that the exercise of the power is not subject to any standard and may be done arbitrarily. However, unlike a traditional power of appointment, the trustee holds such power as a fiduciary.[ix] Therefore, the power of a trustee with absolute discretion to distribute principal to a beneficiary or beneficiaries is always subject, at minimum, to the standard of good faith and possibly to the standard of reasonableness.[x] This means that even if the trust agreement and state law allow the trustee to take such distributive action, the trustee is still subject to the fiduciary standards imposed by state law. In order to avoid any liability a trustee may consider seeking court approval in advance of any such action.[xi]

Many refer to the trust from which distributions are made as the "first trust," the "invaded trust" or the "original trust." The trust to which the distribution is made is referred to as the "second trust," the "appointed trust" or the "recipient trust." For the purposes of this paper the first or invaded trust will be called the original trust and the second or appointed trust will be called the recipient trust.

III. Origination of Trust Decanting.

The common law origin of trust decanting could be said to been born in the Supreme Court of Florida which decided that a trustee with absolute discretion to distribute the principal of a trust among a class of beneficiaries has the authority to distribute principal of the trust to a new trust for a beneficiary. In *Phipps v. Palm Beach Trust Co.,* the Florida courts were asked to decide if a trustee had the power to decant the contents of an existing trust into a newly created trust.[xii] *Phipps* is largely considered the first case on point with regards to the subject of trust decanting.

In 1932 Margarita C. Phipps created a trust for the benefit of her four children, John H., Hubert, Margaret and Michael. While the trust named all four as beneficiaries, John H. was the primary beneficiary. Margarita's husband, John S. Phipps ("John S."), and Palm Beach Trust Company were named at the trustees. John S. was referred to as the "Individual Trustee."

> Section Six of that trust stated, in the pertinent part: "At any time within the duration of this trust, as hereinafter provided, upon the written direction of the then Individual Trustee, the Trustees shall pay over and transfer all or any part of the rest, residue, and remainder of the trust estate, both principal and income, which may at such time remain and be in the hands of the Trustees to the said John H. Phipps, Hubert B. Phipps, Margaret Douglas and Michael G. Phipps and to the descendents of any of them, in such shares and proportions as 'the said Individual Trustee, in his or her sole and absolute discretion, shall determine and fix even to the extent of directing the payment of

> the entire trust estate to one of said parties. The written direction of the said John S. Phipps may be contained in his last will and testament, anything herein to the contrary notwithstanding."[xiii]

Pursuant to Section Six, John S. delivered to Palm Beach Trust Company a written direction to transfer the trust estate to the trustees of a recipient trust for the benefit of the descendants of the original donor with the exception that provision be made for the payment of income to the wife of John H., the primary beneficiary, if John H. should so provide in his will. Upon receipt of said written direction, Palm Beach Trust Company brought suit to determine if such an action was within the scope of the individual trustee under the terms of the original trust. In summation the question posed to the court was whether an individual and a corporate trustee, with absolute power to administer a trust estate could create a recipient trust for the benefit of the same beneficiaries as directed by the individual trustee.

The Florida Supreme Court, relying on prior case law and the Restatement of the Law of Trusts, concluded that the power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than a fee unless the donor clearly indicates a contrary intent.[xiv] Applying this reasoning to the trust created by Margarita, the court found that Section Six showed that the donor "reposed unlimited confidence and discretion in the individual trustee and clothed him with absolute power to administer and dispose of the trust estate to anyone of the named beneficiaries…" In other words the court held that if a trustee has absolute discretion to distribute the trust estate to the named beneficiaries outright, then the trustee can create a recipient trust for the benefit of those beneficiaries. The only real limit the *Phipps* court placed on such a distribution would be if such an action would be contrary to the donor's wishes. Because John S. had the discretion to distribute directly to the beneficiaries, he had the discretion to place the trust estate into the recipient trust. The addition of the ability for John H. to provide for the trust income to be paid to his wife did not run afoul of this because John S. could also have distributed the trust estate directly to John H. and John H. could have placed it into trust for his wife. Such a situation would be very similar to a trust granting a John H. a special power of appointment in favor of his wife.

Interestingly, the court's holding in *Phipps* states that the individual trustee could create the recipient trust to provide for one of more of the beneficiaries of the original trust.[xv] Therefore, the newly created second trust did not have to include all four of the beneficiaries of the original trust but only one or more because John S. had absolute authority. Perhaps if his authority had been limited by an ascertainable standard the court may have ruled differently.

While the *Phipps* case is considered the common law origin of trust decanting, since then states have taken it upon themselves to codify the process for decanting in order to create an orderly process for doing so. This follows hand-in-hand with the decisions of the Tax Court, which has held that state law determines the nature of property rights, and federal law determines the appropriate tax treatment of those rights.[xvi]

IV. <u>Trust Decanting Laws by State</u>

While Florida may be considered the birthplace trust decanting, the practice has now been codified in eighteen states including, New York, Alaska, Delaware, Tennessee, Florida, South Dakota, New Hampshire, North Carolina, Arizona, Nevada, Indiana, Ohio, Missouri, Virginia, Kentucky, Rhode Island, Michigan and Illinois. Six of those states passed legislation to create decanting statutes in 2012. Additionally other state legislatures, like the Colorado legislature, have proposed decanting statutes of their own but have not yet passed them into law.[xvii]

New York was the first state to allow decanting under statute when it passed such legislation in 1992; over fifty years after the Florida Supreme Court decided *Phipps*.[xviii] While New York's statute was the first passed into law, it certainly cannot be said that the other states used that statute as a model for their own. In fact, there is little consensus among the states as to how to design a statute that controls the appointive powers of a trustee. Some require that the trust give the trustee absolute discretion to do so, while others do not. Others chose to dictate what sort of distributions can be made to the recipient trust based on the original. Still others place restrictions on decanting if it may benefit the trustee or if the trustee is also a beneficiary. The two continuous themes of each state's provision is that any such decanting must still meet the statutory rule against perpetuities and the trust must be subject to the laws of the state in which such decanting action is taken. It is interesting to note that few of these statutes ever mention the term "decant" or "decanting." The following is a synopsis of the laws of each state but is not meant to be an exhaustive study of the laws of each state.

<u>New York</u>. New York, in 1992, was the first state to pass legislation governing the decanting of trusts. New York importantly identifies the power to decant as a fiduciary power and therefore makes the power unique from that of a power of appointment. This is important for two reasons: first, the power is not exercisable in favor of the trustee directly (even though the trustee may be a beneficiary); and second, that the power must be exercised with a minimum standard of good faith.

Originally, New York required that a trustee have absolute discretion in order to decant. However, the New York statute has since evolved to allow trustees with limited discretion to decant.[xix] A trustee with unlimited discretion to invade trust principal may appoint to a recipient trust as long as that trust benefits one or more of the beneficiaries of the original trust.[xx]

Alternately, if a trustee lacks unlimited discretion to invade the principal a trustee may still decant but the recipient trust must have the same beneficiaries as the original trust.[xxi] While this may seem overly complicated, the statute is solidly grounded in the concept that decanting is a power of appointment and the concepts put forth by in *Phipps*. In a different manner of thinking, a trustee with unlimited discretion could in theory give the entire trust principal outright to one beneficiary. On the other hand, a trustee with less than unlimited discretion would be restricted in their ability to distribute outright to a single beneficiary. Thus the statute attempts to reflect the settlor's intentions.

New York does identify the power to invade the trust principal as a power of appoint. It has protection for a trustee as the statute is not intended to create or imply a duty to exercise a power to invade principal.[xxii]

Being that New York is on the forefront of the evolution of decanting it is interesting to note that the New York statute allows the recipient trust to have a term that is longer than the original trust.[xxiii] As discussed later, this could have adverse tax consequences. New York also casts a wide net by placing not only trusts that are governed by New York law but also any trust that has a New York trustee, including a trustee which is an entity having an office in the state.[xxiv] Given the number of large banks and trust companies with offices in New York City, it would seem that this statute could be used to decant any trust with a corporate trustee.

<u>Alaska</u>. In 1998 Alaska, one of the last states to join the Union was one of the first to follow New York's lead in adopting decanting legislation.[xxv] One of the main features of the Alaska statute is that the recipient trust must incorporate the same payment provisions as the original trust. This means that if discretionary distributions in the original trust were limited to distributions for health, education, maintenance and support, then the recipient trust must be

limited to that same ascertainable standard. This aspect of the statute avoids creating a general power of appoint which may result in inclusion in the beneficiary's estate.

Unlike New York, Alaska does not distinguish between trustees with unlimited authority to make distribution and those without. In order to decant under Alaskan law the trustee must simply have the ability to make discretionary distribution under the original trust. Additionally, unlike other states, Alaska requires that the beneficiaries of the recipient trust be the same as those in the original trust. Specifically, the Alaska statute states that the recipient trust must be "in favor of *the* beneficiaries of the invaded trust."[xxvi] Many other state statutes require that the recipient trust be in favor of one or more of the beneficiaries. When compared to the New York statute, the Alaska statute falls short because it forecloses a trustee with absolute discretion from removing beneficiaries. This is counter intuitive because, as discussed earlier, a trustee with absolute discretion could distribute outright all the trust principal to a single beneficiary but under the Alaska statute could not make the same distribution into trust for that same beneficiary.

Beyond the requirement that the recipient trust include the same beneficiaries as the original trust, Alaska has three other requirements: that there is no reduction in any fixed income interest of a beneficiary; that the recipient trust does not violate the limitations on validity under Alaska's statutory rule against perpetuities (one thousand years[xxvii]); and that any limitation on the right of the trustee to invade principal in the original trust be included in the recipient trust.[xxviii]

Delaware. The Delaware legislature decided to give a trustee the authority to invade trust principal in 2003.[xxix] There is no requirement in the statute that the trustee's power to make distribution be an absolute or unfettered power.[xxx] The recipient trust is not required to include all of the beneficiaries of the original trust but it cannot include beneficiaries who could not receive principal distributions under the original trust.[xxxi] In the same vein of logic, the Delaware statute allows the recipient trust to grant a power of appointment but only in favor of one or more of the beneficiaries who are proper objects of the exercise of the power in the original trust.[xxxii] Additionally the beneficiary's remainder interest in the recipient trust must vest and become distributable no later than the date upon which such interest would have vested under the terms of the original trust.[xxxiii] An exercise of the power to decant must be done in writing and filed with the trustee but there is no requirement of consent by or notice to the beneficiaries nor is there a requirement of court approval.[xxxiv]

Tennessee. Tennessee amended its trust code in 2004 to allow for trust decanting.[xxxv] Rather than creating a separate decanting statute, Tennessee buries the decanting powers deep within the statute that describes the specific powers of the trustee. As with Alaska and Delaware, Tennessee does not differentiate between trustees with absolute power to distribute and those whose power is limited. However, unlike Alaska the Tennessee statute only requires that the power be exercised in favor of the proper objects of the power.[xxxvi] This seems to indicate that the recipient trust would only have to benefit one or more of the beneficiaries of the original trust and not all of the beneficiaries. This would allow a trustee, even one with limited authority, to eliminate beneficiaries in the recipient trust. Other than that requirement, the recipient trust may not reduce any fixed income interest and must not extend the permissible period of the rule against perpetuities that applies to the original trust.

Florida. While Florida was the birthplace of trust decanting it failed to codify the requirements of decanting until 2007.[xxxvii] Florida law requires that a trustee have absolute discretion over the distribution of the trust corpus in order to decant and, unlike New York, provides no alternate path for decanting when the trustee has less than absolute discretion. While the original trust need not refer to the distribution power as "absolute," the distribution cannot be limited by an ascertainable standard such as health, education, maintenance and support.[xxxviii] While most statutes do not actually refer to "decanting," the Florida statute specifically addresses the use of a "second trust." While this is not legally significant, the structure of the Florida law makes it more narrowly tailored to decanting than the laws of most other states. The Florida statute does not allow for a reduction of an income payment under the original trust. The key to this statute is that the holder of the appointive power can never take possession of the trust corpus because it does not allow the appointive power to be used in favor of the trustee. If the statute were to allow otherwise, under IRC § 2501, the trustee could be considered to have made a taxable gift. This statute also requires that notification of any "qualified beneficiary" as defined under Florida law.[xxxix] One interesting addition to the Florida statute is that it provides for the exoneration from liability for any trustee that does not exercise any such appointive power.[xl] As such, like New York, this statute does not create or imply a duty to decant.

Finally Florida law would allow the beneficiaries of the original trust to be reduced. The statute states that the recipient trust may include only beneficiaries of the original trust.[xli] So while beneficiaries cannot be added, the recipient trust is only required to include one of the beneficiaries of the original trust.

South Dakota. The South Dakota statute, which was signed into law in 2007, begins with a requirement that the trustee consider if the exercise is necessary to the purpose of the original trust, the terms and conditions of the new trust and the consequences of the distribution.[xlii] This may be a counterbalance to the fact that absolute discretion of the trustee to exercise the appointive power is not required. Similar to Florida's statute, the South Dakota legislature was concerned with the negative tax consequences and therefore, prohibits the reduction of income payments in a qualified marital trust, a charitable remainder trust or a grantor retained annuity trust. Finally, the trustee cannot decant if it would benefit the trustee and the beneficiary has the right to remove the trustee or if the beneficiary has any right of withdrawal.

South Dakota requires that the recipient trust include only beneficiaries of the original trust but as with a number of states, does not require that all the beneficiaries of the original trust be included. South Dakota also takes a step to address issues that arise when the trustee is also a beneficiary or when a beneficiary may change the trustee.[xliii] While most states seem to rely on the fiduciary duties imposed on the trustee to control potential abuse of the decanting power, South Dakota is one of the few states that place additional restrictions on beneficiary-trustees.

South Dakota also requires that the vesting period of the recipient trust be no later than the vesting period of the governing instrument of the original trust.[xliv]

The South Dakota statute was updated by the state legislature this year.[xlv] While most of the changes were minor grammatical changes, one change is of interest. The previous wording applied the section to "any trust *governed* by the laws of this state."[xlvi] The legislature amended that wording to read, "any trust *administered* under the laws this state."[xlvii] This seems to move in the direction of New York's statute and attempts to include a larger number of trusts. While a trust itself may not be governed by state laws, an entity or individual acting as trustee for an out-of-state trust would be subject to state laws and therefore, the trust would be administered under the laws of South Dakota.

<u>New Hampshire</u>. An interesting twist that New Hampshire has placed on trust decanting takes a step to further restrict decanting and prohibits decanting if the beneficiary has a presently exercisable power of withdrawal.[xlviii] Additionally in New Hampshire, a recipient trust cannot include any new beneficiaries and the exercise of any appointive power must include a thirty-day

notice if the original trust has a charitable beneficiary. The statute imposes additional restrictions if the trustee is also a beneficiary.

New Hampshire is also unique in that the statute is titled "Trustee's Authority to Decant Trust."[xlix] This is unique in that, while most state statutes accurately describe the process of decanting, very few use the term "decant." Additionally, rather than refer to the power as a power of appointment, the New Hampshire statute calls the power a "power to decant."[l] While legally this does not seem to have any significance it is interesting that the legislature choose to use such language.

The legislature also took another interesting step in stating that a power to decant is not a power to amend the trust.[li] This seems redundant because the language of the statute refers repeatedly to a first and second trust, which clearly indicates that the power to decant was not a power to amend. However, the legislature found it necessary to point out such a difference.

<u>North Carolina</u>. Similar to many other states, the North Carolina statute requires that if the power to distribute is governed by an ascertainable standard, the recipient trust must restrict distributions to the same ascertainable standard.[lii] North Carolina's statute allows for distribution to a recipient trust but only in favor of beneficiaries of the original trust. The recipient trust may not add any beneficiaries but can grant a beneficiary a power of appointment that can be exercised in favor of individuals who are not beneficiaries.[liii]

North Carolina prohibits a trustee who is also a beneficiary from exercising the decanting power.[liv] While the statute prohibits a trustee who is also a beneficiary from exercising an appointive power, it does allow for other co-trustees who are not beneficiaries to exercise the power. If no such trustee exists, then a court appointed fiduciary may exercise such a power. This seems to be another attempt to protect beneficiaries from being taken advantage of by a self-interested trustee. As discussed earlier this seems to be redundant because of the fiduciary duties placed on the trustee.

Also like other states, North Carolina requires that the recipient trust be subject to the statutory rule against perpetuities beginning with the creation of the original trust. North Carolina currently applies the common law rule against perpetuities or alternately a requirement that a trust vest within ninety years of its creation.[lv] However, there is legislation being considered that would change the rule to be similar to the rule under Alaskan law.[lvi]

Arizona. Arizona passed it's own statute to govern decanting in 2010.[lvii] Like many other states, the Arizona legislature was concerned with the tax consequences of trust decanting and prohibits decanting if such an action would adversely effect the tax treatment of the trust, the trustee, the settlor or the beneficiaries. Following the lead of other states, Arizona also requires that any ascertainable standard in the original trust be included in the recipient trust as well.[lviii] However, the ascertainable standard in the recipient trust may be more restrictive than that found in the original trust. Arizona requires that in order to decant a trust it must be subject to Arizona laws but the statute specifically states that this includes a trust whose governing jurisdiction has been transferred to the state.[lix] Even though Arizona requires that the trust to be decanted be governed by the law of the state, it does not require that the trustee be an Arizona trustee. While the statute does not require court approval, the trustee may seek such approval before or after the exercise. Interestingly, Arizona is one of the few states that specifically define the trustee's power to decant as a power of appointment.[lx] The Arizona statute does not address any requirement of notice prior to decanting.

While the Arizona statute does require that the recipient trust must include a beneficiary of the original, it is not clear whether other beneficiaries may be added.[lxi] From the plain language of the statute it would appear that beneficiaries could be added to the recipient trust as long as the addition of those beneficiaries does not reduce any fixed nondiscretionary income payment to a beneficiary and does not alter any nondiscretionary annuity or unitrust payment to a beneficiary. Therefore, it seems that beneficiaries not included in the original trust could be included in the recipient trust.

Arizona by statute allows trust to exist for up to five hundred years.[lxii] Unlike many other statutes, the Arizona statute for decanting does not seem to tie the applicable perpetuities period for the recipient trust to that of the original trust. So even though the original trust was subject to the common law rule against perpetuities, it would seem that the recipient trust may be able to extend the life of the trust under the Arizona statutory rule for up to five hundred years from the creation of the original trust.

Nevada. Nevada out of all the states has one of the more confusing decanting statutes. The vast majority of the statute is written in the negative and describes only situations in which a trustee may not appoint to a recipient trust.[lxiii] While this does make the statute unique and a bit cumbersome to operate, it does allow for liberal use of decanting. Because the statute only describes situations in which a trustee cannot decant, it leaves open the possibility of decanting in situations that other states have not allowed or considered.

Nevada has a unique requirement that necessitates the approval of a beneficiary but only if they are a beneficiary of the original trust and not of a beneficiary of the recipient trust.[lxiv] This requirement is in place even if the trustee has absolute discretion to distribute trust principal. As will be addressed later, such a requirement could potentially result in gift tax and generation-skipping tax consequences. Recent legislation by the Nevada legislature makes this requirement of consent by a beneficiary even stranger as it absolves the trustee of any individual or fiduciary liability for failure to obtain such consent.[lxv]

Nevada also does not allow for a recipient trust to have a lesser value than that of the original trust. Any recipient trust must be held for the beneficiaries of the original trust under substantially identical terms and conditions. The recipient trust may not include beneficiaries who were not beneficiaries of the original trust, but the recipient trust can give a beneficiary a power of appointment in favor of an appointee who is not a beneficiary.

Indiana. Indiana introduced its decanting statute in 2010 and, like New Hampshire, uses the term “decanting” in the language of its statute.[lxvi] The Indiana statute creates what could be considered an outdated method of trust decanting because the statute requires that the trustee have absolute discretion to distribute trust principal under the original trust to decant.

Another strange bit of wording in the Indiana statute involves the beneficiaries of the trust. The statute allows decanting for the benefit of one or more persons, meaning beneficiaries, but in the next line requires that the recipient trust have the same beneficiaries as the first.[lxvii] On it’s face this seems to require that all the beneficiaries of the original trust be included in the in recipient trust. However, this could also be read to mean that the recipient trust cannot include any additional beneficiaries. This second reading would be in line with the idea that a trustee with absolute discretion, as required by the Indiana statute, could distribute outright to one single beneficiary and therefore, should be able to make such distributions into trusts for that same beneficiary.

Indiana also requires a trustee provide sixty days notice prior to decanting but does not seem to give a beneficiary a means by which to prevent the decanting action.[lxviii] This seems to avoid any possible tax consequences that may arise due to a beneficiary's consent being viewed as a gift by the IRS.

Ohio. Ohio is a recent addition to the group of states that allow decanting having passed its decanting statute in 2012.[lxix] As with the New York statute, the new Ohio statute provides for broader decanting power if the trustee has absolute power to make distributions and a more limited decanting power if the trustee's power is limited. Under the Ohio statute, the interest of the beneficiaries must not be changed in the recipient trust if the distribution power is limited in the original trust.[lxx]

Like other states, the Ohio statute is concerned with the potential tax issues that decanting presents. If the original trust qualified for a marital or charitable deduction or qualified for a gift tax annual exclusion, the recipient trust must not disqualify any such deduction.[lxxi] Additionally if the original trust qualified as an "S" corporation holder, the recipient trust must qualify as well.

Unlike many states, Ohio requires that a trustee provide notice of any decanting action to all the current beneficiaries of the trust. Such notice must be given thirty days in advance of any distribution.[lxxii]

Missouri. Missouri's statute, which was passed in 2011, contains the now standard restrictions that the second trust must qualify for the same tax benefits as the first. As with other states examined, the trustee may distribute for the benefit of one or more of the beneficiaries of the original trust whether the trustee's discretionary power is limited by an ascertainable standard or not.[lxxiii] Before making a discretionary distribution under this statute the trustee must provide notice to all permissible distributees. Such notice will be at least sixty days prior to making any discretionary distribution.[lxxiv]

The one different step Missouri has taken is to place restrictions on a trustee's ability to decant if that trustee is also a beneficiary of the original trust. Unless that beneficiary-trustee's discretionary power is limited to an ascertainable standard, that trustee may not make a distribution.[lxxv] So under Missouri law, it seems that if a beneficiary-trustee had absolute discretion, that trustee could distribute outright to himself personally but not into a second trust from which he benefits. While Missouri is attempting with this provision to protect the other beneficiaries of a trust, the legislature has strayed away from the treatment of the decanting power as a power of appointment as discussed by the court in *Phipps*.

Virginia. The Virginia statute, passed in 2012, follows a now familiar pattern in its formation. The statute allows a trustee to exercise a discretionary power to distribute to a recipient trust without court approval but with proper notification to all current beneficiaries sixty days before any action is taken.[lxxvi] The recipient trust may include only those who were beneficiaries of the original trust and distributions must be subject to the same ascertainable standard as the original trust. A power of withdrawal in the original trust must survive in the recipient trust or sufficient funds must remain in the original trust to satisfy that withdrawal right.

Virginia's statute does show some concern for the trustee and beneficiary relationship. The statute starts out by defining "interested distributees" and "interested trustees." An interested distributee is a current beneficiary who has the power to remove the trustee of the original trust. An interested trustee is one who is a current beneficiary, one who can be removed by an interested distributee, or one who has a legal obligation to support a beneficiary.[lxxvii] The statute then goes on to prohibit an interested trustee from making any distribution, however, it does allow co-trustees to make such a distribution.[lxxviii]

Finally, the Virginia statute holds the recipient trust to the Uniform Statutory Rule Against Perpetuities that is followed by Virginia. The time period is considered to have begun when the original trust was created.[lxxix]

Kentucky. In 2012, Kentucky passed one of the simplest and clearest decanting statutes in the nation. The statute allows a trustee with discretionary power to make distributions to a recipient trust.[lxxx] The statute does not appear to require that discretion to be absolute. That recipient trust must include one or more beneficiaries of the original trust but cannot include anyone who was not a beneficiary of the original trust.

As with the Virginia statute, if any beneficiary of the original trust has a currently exercisable power of withdrawal over trust property, then the recipient trust must include an identical power. Alternately, the trustee may leave sufficient trust property in the original trust to satisfy that currently exercisable power of withdrawal.[lxxxi]

One interesting aspect of the Kentucky law is that it allows the decanting to a trust created or administered under the laws of any jurisdiction, within or without the United States.[lxxxii] Most statutes are silent on this issue, but don't seem to restrict a trustee's ability to decant to a trustee governed by the rules of another state. However, Kentucky takes this a bit further and allows the trust principal to be distributed to a recipient trust outside of the United States. This seems to be in line with the thinking that a trustee could distribute to a beneficiary outright even if that beneficiary was outside the United States. However, it could present additional tax problems for all parties involved and could result in problems if the original trust held stock in a subchapter S corporation.

Rhode Island. Rhode Island passed a decanting statute in 2012.[lxxxiii] The statute provides a trustee the ability to decant after providing sixty days prior written notice to the beneficiaries of the original trust. It does not require a beneficiary's approval but the recipient trust must be for the benefit of one or more of the beneficiaries of the original trust.

As it was passed in 2012, the Rhode Island statute requires a trustee to have absolute authority in order to decant.[lxxxiv] However, the Rhode Island legislature has proposed legislation to remove the requirement that the trustee must have absolute discretion.[lxxxv] Judging by the fact that the bills currently in both the Rhode Island House and Senate are very similar it is very likely that the Rhode Island law will change in 2013 to allow a trustee lacking absolute authority to decant.

Michigan. Michigan passed its decanting statute on December 28, 2012.[lxxxvi] The statute also includes the requirements that the recipient trust must qualify for the same tax benefits as the original trust and cannot materially change the interests of beneficiaries of the original trust. Additionally, while the Michigan statute does not require consent of the trust's settlor, any beneficiary nor a court, it does require that notice be given to the settlor(s), if then living, and qualified trust beneficiaries no later than sixty-three days before exercise of the power.[lxxxvii] While other states do require notice, Michigan's statute is unique in that it requires sixty-three days prior notice and not a more traditional time period such as thirty or sixty days.

Like many other states Michigan does not require that a trustee have absolute discretion to distribute. A trustee merely needs to have discretion to make distribution but Michigan then redefines discretionary in other statutes.[lxxxviii] This makes Michigan's statute a bit cumbersome because it requires two separate statutes to be examined. This creates a potential problem because the Michigan Trust Code states in the pertinent part:

> "…if an irrevocable trust includes a discretionary trust provision, the trustee of the trust may, unless the first trust expressly provides otherwise, distribute by

> written instrument all or part of the property subject to that provision to the trustee of a second trust…"[lxxxix]

When reading this part of the Michigan statute in comparison to the statutes of other states it appears that a trustee with either absolute or limited discretion can decant. Michigan however, confuses the process by defining a trustee's power to appoint to a recipient trust in a second statute. That statute, found in the Michigan Power of Appointment Act of 1967 states in the pertinent part:

> "A power to make distributions is not discretionary if it is limited by a definite and ascertainable standard…"[xc]

As if that was not complicated enough, Michigan further defines a "discretionary trust provision" in a third statute.[xci] The pertinent part of this statute states that a discretionary trust provision means

> "…a provision in a trust, regardless of whether the terms of the trust provide a standard for the exercise of the trustee's discretion…"[xcii]

This meaning seems to conflict with the definition of a trustee's power under the Michigan Power of Appointment Act of 1967. So even though the trust provision is discretionary regardless of a standard, the trustee's power under that provision is not discretionary unless it is absolute or in other words not restricted by a standard. Because of this confusing and circular language, it seems that a trustee may only decant under Michigan law when they have absolute discretion to distribute trust principal. Michigan law unnecessarily creates pitfalls and liabilities for trustees because three separate statutes define the trustee's power.

Illinois. Illinois recently amended the trust code to allow for decanting. Effective January 1, 2013, the Illinois code now provides for distribution of a trust principal in further trust.[xciii] Illinois has learned from the trials of other states and separates the rules for decanting based on whether or not the trustee has absolute discretion to distribute principal. Under Illinois law absolute discretion is consider to include distributions for purposes such as best interests, welfare or happiness of a beneficiary.[xciv] Whether the trustee's discretion is absolute or limited to an ascertainable standard, distributions must be made in furtherance of the trust. The Illinois statute does not require settlor or beneficiary consent but the trustee must notify the current beneficiaries that can be located.[xcv] Illinois has also taken the step to protect trustees from liability by absolving the trustee of any duty to decant or even inform the beneficiaries about the availability of such an action.[xcvi] The term of the recipient trust may be longer than that of the original trust but is limited to the same permissible period of the rule against perpetuities that applied to the original trust, unless the original trust expressly permits the perpetuities period to be lengthened.[xcvii] The greatest benefit of creating a trust under Illinois law is that, if the trust is a qualified perpetual trust, then no perpetuity period exists and the trust can continue indefinitely.[xcviii]

If a trustee has absolute discretion they may distribute to a recipient trust for the benefit of one or more (or all) of the beneficiaries of the original trust.[xcix] The recipient trust may grant a beneficiary a power of appointment provided that beneficiary could receive the principal outright under the terms of the original trust. If a recipient trust includes a power of appointment it may be broader than or otherwise different from the current, successor and presumptive remainder beneficiaries of the first trust.[c]

If a trustee does not have absolute discretion, the trustee may distribute to a recipient trust but that recipient trust must be in favor of the same current beneficiaries of the original trust and must have the same successor and remainder beneficiaries as the first.[ci] The recipient trust must include the same language authorizing the trustee to distribute the income or principal as the original. Additionally, if the original trust grants a beneficiary a power of appointment, the recipient trust must contain the same power and the class of permissible appointees must be the same as in the original trust.[cii]

V. Tax Consequences.

The process of trust decanting, as dictated by various state laws, is difficult and this process only becomes more complicated because of the income (state and federal) and federal estate, gift and generation-skipping tax consequences. And while state law determines property rights, federal law determines how to tax property.[ciii] Normally when exploring uncharted waters hidden in the tax code, a party could obtain a private letter ruling in which the IRS would provide guidance on that particular situation. However, the IRS has decided that trust decanting requires further study and will not issue private letter rules with respect to transfers that result in a change in beneficial interests.[civ] So while the IRS has requested public comment on a list of tax issues and consequences arising from transfer of part or all of the principal of one trust to a recipient trust the doctrine of trust decanting will hang in a tax limbo.[cv] The deadline for submission during the public comment period was April 25, 2012, but the IRS has yet to release any decision or guidance based on the requested comments.[cvi] As such, any transfer in which the interests of one or more of the beneficiaries may be changed, the interest of a beneficiary may be terminated or another beneficiary who did not have an interest in the original trust may receive an interest in the second trust is made without IRS guidance.[cvii]

Because the IRS has left the doctrine of decanting in tax limbo the speculation on the tax consequences of a decanting action are based on tax treatment of similar actions. Furthermore, because of the unique nature of each decanted trust and variations in applicable state law, the tax treatment of a recipient trust in Arizona, for example, may differ greatly from a similar recipient trust under New York law. The following is a general summary of the potential tax implications of a decanting action.

Income Tax. The determination of a gain or loss for federal income tax purposes from a sale or distribution is the amount realized therefrom over the adjusted basis for a gain and the loss is the excess of the adjusted basis over the amount realized from the transfer.[cviii] However, for tax purposes two or more trusts shall be treated as one trust if such trusts have substantially the same grantor or grantors and substantially the same primary beneficiary or beneficiaries, and a principal purpose of such trusts is the avoidance of federal income tax.[cix] In most decanting actions the original trust and the recipient trust are treated as one trust because they would have the same primary beneficiaries and principal purposes.

This argument is of course made stronger when the trustees of the original trust create (or declare) the recipient trust rather than pay it to another trust that someone else created.[cx] In theory, if someone other than the trustees of the original trust creates the new recipient trust, that recipient trust would hold some property from the new grantor because a trust is only created if it has property that someone contributed to it (*res*).[cxi] In other words the recipient trust would likely hold some asset that the grantor of the recipient trust contributed when creating it. This would therefore weaken the argument that the IRS should treat the original and recipient trust as one trust. While this is an avoidable tax issue, there are a number of scenarios that could result in an income tax liability.

An asset that has liabilities that exceed the assets income tax basis is considered a negative basis asset. When a negative basis asset is sold or distributed the amount realized includes the indebtedness discharged, including nonrecourse indebtedness.[cxii] Therefore, transfer of such assets from the original trust to the recipient trust may result in the discharge of indebtedness for the original trust and thus, a taxable gain.

As discussed earlier, some states, such as Kentucky, allow for decanting to trusts outside of the United States.[cxiii] Conversion of a domestic trust to a foreign trust may result in a gain recognition.[cxiv] When a domestic trust is converted to a foreign trust, such a transfer is considered a sale or exchange for an amount equal to the fair market value of the property transferred, and the transferor shall recognize as a gain the excess of the fair market value of the property so transferred, over the adjusted basis (for purposes of determining gain) of such property in the hands of the transferor. If both the trusts were domestic they would most likely be treated as the same trust, but if one of the recipient trust were a foreign trust the original trust would recognize a gain in the same manner as if the trustee had sold the trust's assets to a third party.

An additional income tax problem arises when decanting to a foreign trust because the foreign trust would not be qualified to be a stockholder of an S Corporation. Because the foreign trust cannot be a shareholder in an S Corporation, such a transfer would have adverse income tax consequences on individuals holding stock said S Corporation, not just the trust, trustee or beneficiaries.[cxv]

Beyond federal income tax issues, state taxation of trust income varies greatly from state to state. In some circumstances, moving the trust situs to a state, such as South Dakota, with no income may be the primary goal of a decanting action. Other states present unique state income tax challenges such as those in New York. In New York, trusts created by New Yorkers are subject to New York's state income tax, but if all the trustees are non-New Yorkers and all of the trust estate is located (produces income) outside of the State of New York the trust can escape the state tax.[cxvi]

Gift Tax. The main issue with regards to gift tax is how to define the appointive power, whether absolute or not, of the trustee to distribute the trust corpus to a recipient trust. Since the trustee acts as a fiduciary, they must act without concern for their own self-interests. As discussed earlier, various states have tried to limit or define the appointive power, but as of yet those definitions seem to be inadequate. The situation is even further complicated when the trustee is also a beneficiary of the trust. In a very general sense there are two major gift tax issues:

1. Does a beneficiary who acquiesces, either by silent consent or active approval, to a decanting and thereby dilutes or forfeits a beneficial interest in the trust make a taxable gift?

2. Does the power to decant, if held by a beneficiary acting as a trustee, have gift tax consequences?[cxvii]

A person makes a gift for federal tax purposes when a transfer is made of property worth more than the money or value received in exchange.[cxviii] The application of the gift tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor.[cxix] Additionally, in order to be a gift the transfer must be voluntary because the tax is an excise on the donor's *act* of making the transfer.[cxx] Because a beneficiary cannot be said to be taking action when his or her consent or approval is not requested or needed. This is true even if the decanting caused a shift in the beneficial interest under the original trust.

The first issue only arises under state statutes that require beneficiary consent or approval. The act of decanting, from the beneficiary's standpoint, is no longer voluntary because those statutes require beneficiary consent. Due to the legal right to object to the transfer and a failure to exercise that right, the beneficiary could be considered to have made a gift. In a similar fashion, the IRS considered a gift to be made when the statute of limitations was allowed to run on a delinquent loan to a family member.[cxxi] The court reasoned that by letting the statute of limitations run, the loan became unenforceable and thus a gift was made.

A transfer by a trustee of property in which he has no beneficial interest is not a gift by the trustee.[cxxii] Most state statutes and common law, as exemplified by the *Phipps* case, treat the trustee's power to decant as a power of appointment. The IRS definition of a power of appointment includes all powers which are in substance and effect powers of appointment received by the donee of the power from another person, regardless of the nomenclature used in creating the power and regardless of local property law connotations.[cxxiii] In similar fashion the Restatement (3rd) of Property defines a power of appointment as a power that enables the donee of the power to designate recipients of beneficial ownership interests in or powers of appointment over the appointive property.[cxxiv] Comment g. of that section identifies a fiduciary distributive power as a power of appointment but not as a discretionary power of appointment.[cxxv] This makes a fiduciary's distributive power of appointment unique from a donee's power of appointment because the fiduciary is subject to fiduciary standards. The power of a trustee with absolute discretion to distribute principal to a beneficiary or beneficiaries is always subject to at least to the standard of good faith and often to the standard of reasonableness.[cxxvi] In contrast, no good faith or reasonableness standards govern the exercise of a power of appointment held in a nonfiduciary capacity. However, in *U.S. v. O'Malley*, the Supreme Court established that there is no difference between a gift made as a fiduciary and one made as a non-fiduciary.[cxxvii]

If a trustee has a beneficial interest in trust property, a transfer of the property by the trustee is not a taxable transfer if it is made pursuant to a fiduciary power the exercise or nonexercise of which is limited by a reasonably fixed or ascertainable standard which is set forth in the trust instrument.[cxxviii] Many states, such as Virginia, avoid this issue entirely by prohibiting a trustee with a beneficial interest from exercising the appointive power and instead require that a co-trustee or court appointed fiduciary exercise the power.[cxxix] However, the IRS has yet to comment on whether decanting by a trustee who has a beneficial interest and absolute discretion would be considered a gift for federal tax purposes.

Estate Tax. If decanting would cause the beneficiary to be treated as making a gift for federal gift tax purposes and the beneficiary had a special power of appointment to prevent any such gift from being complete, the decanted property likely would be included in the beneficiary's estate.[cxxx]

The value of the gross estate includes the value of all property over which the decedent had the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or income thereform.[cxxxi] If a beneficiary had a legal right to prevent the decanting, then they could be considered to have a special power of appointment under the same logic discussed in the context of gifting above. Such an outcome looks unlikely in states or under original trusts documents that do not require beneficiary consent.

Additionally many states have identified the power to decant as a non-general power of appointment. It would seem that this statement in a decanting statute identifies the beneficiary-trustee's power as something unique from a general power of appointment.[cxxxii] Thus the beneficiary-trustee would not have unfettered control over the distribution of the trust principal in the same manner a beneficiary would be if a trust granted them a general power of appointment. Because it is not a general power of appointment it should not be includable in the beneficiary-trustee's gross estate.[cxxxiii]

Generation-Skipping Tax. One of the greatest concerns when dealing with decanting is the danger any modification causes to the Generation-Skipping Tax (GST) exemption of pre-September 26, 1985 irrevocable trusts. If a trustee decants, other than by a state law in effect when the trust became irrevocable or by a power contained in the governing instrument, the trustee forfeits any grandfathered exemption from GST tax.[cxxxiv] Because the earliest decanting statute was passed by New York in 1992, no statutory authority existed pre-September 26, 1985 that would allow such trusts to be decanted without forfeiting the grandfathering status.[cxxxv] The *Phipps* case was decided in 1940, so it is arguable that the right to decant existed under the common law of ever state.[cxxxvi] Even if one were to successfully argue that *Phipps* applied, the terms of the recipient trust cannot postpone vesting beyond the traditional rule against perpetuities applied when the original trust became irrevocable.[cxxxvii]

An irrevocable trust may also be GST exempt, in whole or in part, by reason of allocation of GST exemption by the settlor to the trust.[cxxxviii] The IRS seems to agree that the same rules that allow grandfathered trust to be decanted should apply to non-grandfathered trusts.[cxxxix] One issue that the IRS has left unresolved is the effect of state law changes in the rule against perpetuities. The IRS has stated that a recipient trust may not:

> "extend the time for vesting of any beneficial interest in the trust in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date the original trust became irrevocable, extending beyond any life in being at the date the original

> trust became irrevocable plus a period of 21 years, plus if necessary, a reasonable period of gestation."[cxl]

Thus it is unclear if the IRS will allow modern statutory rules against perpetuities to be applied to GST exempt recipient trusts. Because decanting statutes existed at the time many trusts became irrevocable, decanting is a much more useful tool for non-grandfathered trusts.

VI. Conclusion.

In the coming years, more states will likely pass decanting statutes and those state that already have will continue to refine the appointive powers of a trustee. In additional states will likely extend their limitations on perpetual trusts to allow for trusts to last for longer and longer periods. However, the IRS may hamstring these efforts. In the worst case scenario, the IRS will continue to refuse to comment on the tax effects of decanting and leave the issue in taxation limbo. In theory, the IRS will provide guidance in the coming months or years as to how they will treat decanted trusts, however, if they continue to apply the common-law rule against perpetuities to GST exempt trusts the potential advantages of trust decanting will be greatly limited.

[i] Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685 (1961)
[ii] Jonathan G. Blattmachr, An Analysis of the Tax Effects of Decanting, Real Property, Trust and Estate Law Journal, Spring 2012, at 142
[iii] Merriam-Webster Online Dictionary. 2013. Merriam-Webster Online. April 20, 2013 http://www.merriam-webster.com/dictionary/decant
[iv] USE OF TRUST DECANTING TO EXTEND THE TERM OF IRREVOCABLE TRUSTS, 37 ESTPLN 3, 3
[v] Restatement (Second) of Prop.: Donative Transfers § 11.1
[vi] *Id.* Comment d.
[vii] Restatement (Second) of Prop.: Donative Transfers § 19.4
[viii] Restatement (Third) of Property (Wills & Don. Trans.) § 17.1 (2011)
[ix] Restatement (Third) of Prop. Wills and Other Donative Transfers § 17.1 Comment g
[x] 20 Ohio Prob. L.J. 135
[xi] Probate Practice Reporter, December 2012
[xii] Phipps v. Palm Beach Trust Co., 142 Fla. 782, 196 So. 299 (1940)
[xiii] *Id.* at 783, 196 So. at 300
[xiv] *Id.* at 786, 196 So. At 301
[xv] *Id.*
[xvi] Knight v. C.I.R., 115 T.C. 506, 522 (2000)
[xvii] Robert L. Moshman, Decanting Pre-ATRA Trusts, The Estate Analyst (March 2013)
[xviii] N.Y. Est. Powers & Trusts Law § 10-6.6 (McKinney)
[xix] N.Y. Est. Powers & Trusts Law § 10-6.6 (McKinney)
[xx] N.Y. Est. Powers & Trusts Law § 10-6.6(b) (McKinney)
[xxi] N.Y. Est. Powers & Trusts Law § 10-6.6(c) (McKinney)
[xxii] N.Y. Est. Powers & Trusts Law § 10-6.6(l) (McKinney)
[xxiii] N.Y. Est. Powers & Trusts Law § 10-6.6(e) (McKinney)
[xxiv] N.Y. Est. Powers & Trusts Law § 10-6.6(r)(2) (McKinney)
[xxv] Alaska Stat. Ann. § 13.36.157 (West)
[xxvi] Alaska Stat. Ann. § 13.36.157(a)(2) (West) (Emphasis added).
[xxvii] Alaska Stat. Ann. § 34.27.051 (West)
[xxviii] Alaska Stat. Ann. § 13.36.157(a)(1)-(4) (West)
[xxix] Del. Code Ann. tit. 12, § 3528 (West)
[xxx] SEP-11 KOREN-ETP art., SEP-11 Koren Est. Tax & Pers. Fin. Plan. Upate art.
[xxxi] Del. Code Ann. tit. 12, § 3528(a) (West)
[xxxii] *Id.*
[xxxiii] *Id.* at (a)(2)
[xxxiv] SEP-11 KOREN-ETP art., SEP-11 Koren Est. Tax & Pers. Fin. Plan. Upate art.
[xxxv] Tenn. Code Ann. § 35-15-816(b)(27) (West)
[xxxvi] Tenn. Code Ann. § 35-15-816(b)(27)(A)(ii) (West)
[xxxvii] Fla. Stat. Ann. § 736.04117 (West)
[xxxviii] Fla. Stat. Ann. § 736.04117(1)(b) (West)
[xxxix] Fla. Stat. Ann. § 736.0103 (West)
[xl] Fla. Stat. Ann. § 736.04117 (West)
[xli] Fla. Stat. Ann. § 736.04117(1)(a)(1) (West)
[xlii] S.D. Codified Laws § 55-2-15

[xliii] S.D. Codified Laws § 55-2-15(2)(a) and (3)
[xliv] S.D. Codified Laws § 55-2-15(5)
[xlv] 2013 South Dakota Laws HB 1056 (West's No. 158), 2013 South Dakota Laws HB 1056 (West's No. 158)
[xlvi] S.D. Codified Laws § 55-2-15(10)
[xlvii] 2013 South Dakota Laws HB 1056 (West's No. 158), 2013 South Dakota Laws HB 1056 (West's No. 158)
[xlviii] N.H. Rev. Stat. Ann. § 564-B:4-418
[xlix] N.H. Rev. Stat. Ann. § 564-B:4-418
[l] N.H. Rev. Stat. Ann. § 564-B:4-418(b)(2)
[li] N.H. Rev. Stat. Ann. § 564-B:4-418(g)
[lii] N.C. Gen. Stat. Ann. § 36C-8-816.1 (West)
[liii] N.C. Gen. Stat. Ann. § 36C-8-816.1(c)(6) (West)
[liv] N.C. Gen. Stat. Ann. § 36C-8-816.1(d) (West)
[lv] N.C. Gen. Stat. Ann. § 41-15 (West)
[lvi] 2007 NC H.B. 1384
[lvii] Ariz. Rev. Stat. Ann. § 14-10819
[lviii] Ariz. Rev. Stat. Ann. § 14-10819 (A)(4)
[lix] Ariz. Rev. Stat. Ann. § 14-10819 (B)
[lx] Ariz. Rev. Stat. Ann. § 14-10819 (C)
[lxi] Ariz. Rev. Stat. Ann. § 14-10819 (A)
[lxii] Ariz. Rev. Stat. Ann. § 14-2901
[lxiii] Nev. Rev. Stat. Ann. § 163.556 (West)
[lxiv] Nev. Rev. Stat. Ann. § 163.556 (West)
[lxv] 2013 NV S.B. 307 (NS), 2013 Nevada Senate Bill No. 307, Nevada Seventy-Seventh Regular Session
[lxvi] Ind. Code Ann. § 30-4-3-36 (West)
[lxvii] Ind. Code Ann. § 30-4-3-36(a) (West)
[lxviii] Ind. Code Ann. § 30-4-3-36(e) (West)
[lxix] Ohio Rev. Code Ann. § 5808.18 (West)
[lxx] J. Michael Cooney, Decanting and Private Settlment Agreements, Cincinnati Estate Planning Council (May 2012)
[lxxi] Ohio Rev. Code Ann. § 5808.18(C)(2) - (3) (West)
[lxxii] Ohio Rev. Code Ann. § 5808.18(F) (West)
[lxxiii] V.A.M.S. 456.4-419.
[lxxiv] V.A.M.S. 456.4-419.3.
[lxxv] V.A.M.S. 456.4-419.2.(2)
[lxxvi] VA Code Ann. § 64.2-778.1
[lxxvii] VA Code Ann. § 64.2-778.1(A)
[lxxviii] VA Code Ann. § 64.2-778.1(D)
[lxxix] VA Code Ann. § 64.2-778.1(E)(3)
[lxxx] KRS § 386.175 (West)
[lxxxi] KRS § 386.175(f) (West)
[lxxxii] KRS § 386.175(3) (West)
[lxxxiii] R.I. Gen. Laws Ann. § 18-4-31 (West)

[lxxxiv] *Id.*
[lxxxv] 2013 RI H.B. 5501 (NS), 2013 Rhode Island House Bill No. 5501, Rhode Island 2013 Legislative Session. 2013 RI S.B. 286 (NS), 2013 Rhode Island Senate Bill No. 286, Rhode Island 2013 Legislative Session
[lxxxvi] Mch. Comp. Laws Ann. § 700.7820a (West)
[lxxxvii] Mich. Comp. Laws Ann. § 700.7820a(7) (West)
[lxxxviii] Mich. Comp. Laws Ann. § 556.115a(3)(b) (West)
[lxxxix] Mich. Comp. Laws Ann. § 700.7820a (West)
[xc] Mich. Comp. Laws Ann. § 556.115a(3)(b) (West)
[xci] Mich. Comp. Laws Ann. § 700.7103(d) (West)
[xcii] *Id.*
[xciii] IL ST CH 760 § 5/16.4
[xciv] IL ST CH 760 § 5/16.4(a)
[xcv] IL ST CH 760 § 5/16.4(e)
[xcvi] IL ST CH 760 § 5/16.4(l)
[xcvii] IL ST CH 760 § 5/16.4(g)
[xcviii] IL ST CH 765 § 305/4
[xcix] IL ST CH 760 § 5/16.4(c)
[c] IL ST CH 760 § 5/16.4(c)(2)
[ci] IL ST CH 760 § 5/16.4(d)
[cii] IL ST CH 760 § 5/16.4(d)(3)
[ciii] Knight v. C.I.R., 115 T.C. 506, 522 (2000)
[civ] I.R.S. Notice 2011-101
[cv] J. Michael Cooney, Decanting and Private Settlment Agreements, Cincinnati Estate Planning Council (May 2012)
[cvi] I.R.S. Notice 2011-101
[cvii] *Id.*
[cviii] 26 U.S.C.A. § 1001 (West)
[cix] 26 U.S.C.A § 643(f) (West)
[cx] Jonathan G. Blattmachr et. al., An Analysis of the Tax Effects of Decanting, 47 Real Prop. Tr. & Est. L.J. 141, 155 (2012)
[cxi] Restatement (Third) of Trusts § 2 cmt. f (2003)
[cxii] Crane v. C.I.R., 331 U.S. 1, 67 S. Ct. 1047, 91 L. Ed. 1301 (1947)
[cxiii] KRS § 386.175(3) (West)
[cxiv] 26 U.S.C.A. § 684 (West)
[cxv] 26 U.S.C.A. § 1361 (West)
[cxvi] Thomas E. Simmons, Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts, 55 S.D. L. Rev. 253 (2010)
[cxvii] Blattmachr, supra.
[cxviii] 26 U.S.C.A. § 2512
[cxix] Treas. Reg § 25.2511-1(g)
[cxx] Treas. Reg § 25.2511-2(a) (emphasis added)
[cxxi] Rev. Rul 81-264
[cxxii] *Id.*
[cxxiii] 26 C.F.R. § 25.2514–1(b)

[cxxiv] Restatement (Third) of Property (Wills & Don. Trans.) § 17.1 (2011)
[cxxv] *Id*. Comment g.
[cxxvi] 20 Ohio Prob. L.J. 135
[cxxvii] United States v. O'Malley, 383 U.S. 627, 86 S. Ct. 1123, 16 L. Ed. 2d 145 (1966)
[cxxviii] 26 C.F.R. § 25.2511–1(g)(2)
[cxxix] VA Code Ann. § 64.2-778.1
[cxxx] Blattmachr, supra.
[cxxxi] 26 U.S.C.A. § 2036(a)(2)
[cxxxii] Diana S.C. Zeydel et al., A Primer on Decanting: A New World for Trusts, ACTEC Fall Meeting (2009)
[cxxxiii] PLR 200928013 (2009)
[cxxxiv] Blattmachr, supra.
[cxxxv] N.Y. Est. Powers & Trusts Law § 10-6.6 (McKinney)
[cxxxvi] Blattmachr, supra.
[cxxxvii] Treas. Reg. § 26.2601-1(b)(4)(i)(A).
[cxxxviii] 26 U.S.C.A. § 2631 (West)
[cxxxix] Priv. Ltr. Rul. 200919009 (2009)
[cxl] Reg 26.2601-1(b)(4)(i)(A)(2) Effective dates., 2002 WL 411776