DECANTING COMES OF AGE

Presented to the
ABA Tax Section
Estate and Gift Taxes Committee
May 6, 2011
Washington, D.C.

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“We will sell no wine before it’s time”

-- Orson Welles, on behalf of Paul Masson Winery

“Gradually, then suddenly.”

-- Mike Campbell, in response to a question about how he lost his money in THE SUN ALSO RISES, by Ernest Hemingway.

I. INTRODUCTION AND OVERVIEW.

A. Modifying Irrevocable Trusts.

1. On its face, the idea of modifying or changing a trust that, by its terms, is irrevocable seems difficult, if not, impossible and potentially contrary to the settlor’s intent.

2. Irrevocable trusts are often required to achieve the settlor’s tax objectives.

3. In many cases, it may be necessary to modify or change the terms of the trust to more accurately reflect the settlor’s intent, to respond to beneficiary needs and circumstances, to address changes in law, to optimize tax consequences, or to correct errors in the trust instrument.

4. There are a number of mechanisms to modify an irrevocable trust including judicial reformation and modification, trust combinations and divisions, removal and substitution of trustees, non-judicial settlement agreements, the use of “trust protectors” or “trust advisors” to modify the terms of a trust, and now, with increasing popularity, decanting.

B. Decanting Defined.

1. WEBSTER’S DICTIONARY defines the verb “decant” as follows: “(a) to draw off (a liquid) without disturbing the sediment or the lower liquid layers,
(b) to pour from one vessel into another, and (c) to pour out, transfer, or unload as if by pouring.”

2. The act of decanting, in the trust context, is not too different from the definitions offered by Webster’s in that the assets from an old trust are poured into a new trust, with the less useful provisions contained in the old trust (“the sediment”) left behind.

3. Decanting is the act of a trustee exercising its power to distribute trust principal to or for the benefit of a beneficiary by distributing the assets to a new trust.

4. A decanting power is often thought of as the exercise of a special power of appointment, held by the trustee, to distribute assets for the benefit of a beneficiary.

C. State Statutes Authorizing Decanting. To date, 11 states have adopted statutes which authorize decanting. They are, in chronological order of enactment:

1. New York. New York enacted the first decanting statute, N.Y. EST. POWERS & TRUSTS § 10-6.6(b), which became effective on July 24, 1992.


5. Florida. Florida enacted FLA. STAT. § 736.04117, which became effective on July 1, 2003.


10. **Nevada.** Nevada enacted **NEV. REV. STAT.** § 163.556, which became effective on October 1, 2009.

11. **Indiana.** Indiana enacted **IND. CODE** § 30-4-3-36, which became effective on July 1, 2010.

**D. Tax Considerations.**

1. **Income Tax Considerations.** As discussed in Part IV.B., *infra*, in most cases, there should be no income tax consequences associated with the transfer of assets from one trust to another through the process of decanting. It is important, however, that practitioners consider the capital gain implications of *Cottage Savings Ass’n v. Comm’r.*, 499 U.S. 554 (1991), and the negative basis implications of *Crane v. Comm’r.*, 331 U.S. 1 (1947). In addition, it is important to consider whether the tax attributes of the old trust are carried forward into the new trust under the distributable net income (DNI) rules.

2. **Federal Wealth Transfer Tax Considerations.** As discussed in Part IV.C., *infra*, it is important to consider whether a taxable gift occurs when assets are transferred from one trust to another, and whether there is estate inclusion with respect to the decanted assets. In addition, as discussed in Part IV.D., *infra*, it is important to consider the generation skipping transfer (GST) tax consequences of decanting a “grandfathered” GST exempt trust or decanting a non-grandfathered trust that is exempt by reason of the allocation of GST exemption.

3. **IRS Places Decanting on “No-Ruling” List.** Given the increased legislative activity by states in enacting decanting statutes and the need to provide definitive guidance, the Service, in Rev. Proc. 2011-3, placed decanting on its no-ruling list. Specifically, Section 5 of Rev. Proc. 2011-3 provides that until the Service publishes a more definitive revenue ruling, revenue procedure, regulation, or other publication, the Service will not issue determination letters or rule on the following matters:

   a. whether decanting gives rise to a Code § 661 deduction or results in inclusion in gross income under Code § 662;

   b. whether decanting results in a taxable gift being made under Code § 2501; and

   c. whether decanting causes the loss of GST exempt status or constitutes a taxable termination or taxable distribution under Code § 2612.
II. COMMON LAW AND THE UNIFORM TRUST CODE.

A. Nature of Decanting.

1. **Exercise of Special Power of Appointment.** Trust decanting generally refers to the distribution of property from one trust to another trust pursuant to a trustee's discretionary power to distribute property to or for the benefit of the trust's beneficiaries. The rationale behind decanting is that if a trustee has the discretionary power to distribute property to or for the benefit of one or more beneficiaries, then the trustee has, in effect, a special power of appointment that should enable the trustee to distribute property to a second trust for the benefit of one or more of such beneficiaries.

B. Restatement.

1. **Restatement (Second) of Property: Donative Transfers.**

   a. The Restatement (Second) of Property: Donative Transfers § 11.1 (Comment d) provides that the trustee’s ability to transfer trust property is similar to a special power of appointment, under which a trustee can transfer an interest in property equal to or less than the title authorized under the trust instrument. If the trustee is able to transfer full legal title to trust property to a beneficiary, the trustee should be able to transfer less than full legal title by transferring the property further in trust. It provides that “[a] power of appointment is authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property.”

   b. Comment b of Section 11.1 provides that a power of appointment permits persons to transfer a beneficial interest in property they do not otherwise possess, and the exercise of the power is considered the completion of a transfer originating with the creator of the power. Therefore, the power to determine the identity of persons entitled to receive beneficial interests in property that are owned by persons other than the “powerholder” characterizes a power of appointment.

   c. Comment d of Section 11.1 characterizes a trustee’s discretion to pay trust property to a beneficiary or among a class of beneficiaries as a power of appointment because the trustee is authorized to determine the recipients of beneficial interests in property that the trustee does not otherwise possess.
d. Section 19.4 of the SECOND RESTATEMENT also authorizes a powerholder to create a new special power of appointment in any other person, which is exercisable only in favor of permissible appointees of the original power. For example, a trustee with the discretionary power to distribute trust property outright to or for the benefit of one or more trust beneficiaries should be able to distribute property to a separate discretionary trust for the lifetime benefit of one beneficiary that gives the beneficiary a special power of appointment over the appointed trust assets.

2. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS.

a. Section 19.14 of the THIRD RESTATEMENT provides that the holder of a special power of appointment may exercise the power by appointing property to a trust solely for the benefit of permissible appointees of the power. Unless the creator of the power expressly prohibits an appointment of property in trust, the holder of a special power has the authority to exercise the power in favor of permissible appointees by appointing property further in trust.

b. The THIRD RESTATEMENT, however, defines a power of appointment as a power granted to a holder acting in a non-fiduciary capacity.

c. The THIRD RESTATEMENT distinguishes between powers of appointment and fiduciary distributive powers based on the different treatment afforded the powers. Fiduciary standards are imposed on the exercise of a power held in a fiduciary capacity. In addition, a fiduciary power survives the death of a fiduciary and succeeds to the successor fiduciary. By contrast, a power of appointment may be exercised arbitrarily and a power of appointment is personal to the powerholder and lapses if not exercised.

d. Comment g of Section 19.14 of the THIRD RESTATEMENT recognizes that a fiduciary distributive power is subject to the same general rules regarding special powers of appointment, such as the requirement that the power be exercised in favor of permissible appointees, and it may be subject to the same common law or statutory rules relating to perpetuities otherwise applicable to special powers of appointment.

e. In reconciling this seeming conflict, it appears that trustees can exercise a decanting power, but must do so within their fiduciary discretion.
C. Common Law.

1. **Phipps v. Palm Beach Trust Co., 196 So. 229 (Fla. 1940).**
   
   a. In *Phipps*, the individual trustee and his successors had the power in their “sole and absolute discretion” to direct distributions of some, none, or all of the trust property to any one or more of the settlor’s descendants.
   
   b. The individual trustee directed to the corporate trustee to transfer the trust property to a second trust. The second trust was identical to the first trust, except that it gave one of the settlor’s children a special testamentary power of appointment to appoint trust income to that child’s wife.
   
   c. The corporate trustee sought court approval of the proposed decanting transaction. The trial court approved the decanting, but a beneficiary appealed to the Florida Supreme Court.
   
   d. The Florida Supreme Court, in approving the decanting, determined that the individual trustee’s power to distribute trust property to the limited class of persons designated as trust beneficiaries was a special power of appointment, and the trustee’s ability to appoint property further in trust for members of the class depended upon the extent of the power authorized under the terms of the trust agreement. The court stated “[t]he 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.”

2. **In Re: Estate of Spencer, 232 N.W.2d 491 (Iowa 1975).**
   
   a. In *Spencer*, the decedent’s husband was the trustee and a beneficiary of a testamentary trust for the benefit of their four children. The trust held a 1/4th interest in a parcel of real estate. The husband owned the other 3/4th interest outright. The trust provided that the assets were to be distributed to their grandchildren (or more remote descendants, *per stirpes*) after the death of the husband and children.
   
   b. The terms of the trust provided the husband with a special power to dispose of the trust property by life estate to and among their children, with the remainder to such children’s surviving issue. Husband exercised his testamentary special power of appointment
to appoint the assets from wife’s trust, along with his own interest in the real estate, to a new, multi-generational trust.

c. The court in Spencer held that the exercise of the power of appointment in further trust was a valid exercise, but that the trust could be not be a multi-generational trust and the assets should vest final distributions to the grandchildren at the death of their children.

d. An expansive reading of Spencer suggests that a trustee can decant trust property to a new trust unless plainly prohibited by the terms of the original trust.


a. Under the trust instrument, the trustees were authorized to distribute any or all of the trust property to the beneficiary—the settlor’s son—or to use the trust property on his behalf as the trustees determined “in their absolute and uncontrolled discretion” for the beneficiary’s “best interests.”

b. The trustees determined that they should condition distributions on the beneficiary setting up another trust (the beneficiary was going through a divorce and the new trust provided protection from marital claims).

c. The guardian ad litem challenged the distribution to the new trust on behalf of certain minor children and alleged that the children lost the contingent remainder interest provided to them under the original trust. The court rejected the guardian ad litem’s challenge arguing that if the beneficiary received the distribution of the trust property outright—as permitted under the trust agreement—then the children would have lost their contingent remainder interest in the property that was distributed from the trust.

d. Wiedenmayer can be distinguished from Phipps and Spencer, in that the court in Wiedenmayer limited its inquiry to whether the trustees’ discretionary power to distribute trust property in further trust was in the beneficiary’s best interest and whether the exercise of that power was an abuse of discretion.

4. Other Cases. See also, Regents of the University System v. Trust Company of Georgia, 186 Ga. 498 (Ga. 1938); Marx v. Rice, 1 N.J. 574 (N.J. 1949).
D. Modifications, Divisions, and Other Changes Under the Uniform Trust Code.

1. Generally.
   a. The Uniform Trust Code (the “UTC”) provides a comprehensive model for codifying the law on trusts. It was completed by the Uniform Law Commissioners in 2000, and amended in 2001, 2003, 2004 and 2005. It has been enacted in Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. In 2011, it was introduced in Connecticut, Massachusetts, and New Jersey.
   b. The UTC does not have a decanting provision. The UTC contains provisions permitting modifications of trusts, reformations to correct mistakes, and combinations and divisions of trusts.
   c. Five states with decanting statutes, Tennessee, Florida, New Hampshire, Arizona, and North Carolina, have adopted the UTC.

2. Modification by Consent.
   a. Section 411(a) of the UTC provides that a non-charitable irrevocable trust may be modified or terminated (with or without court approval depending on the jurisdiction) upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust.
   b. Section 411(b) provides that a non-charitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.
   c. Section 411(e) provides that if not all of the beneficiaries consent to a proposed modification or termination of the trust under 411(a) or 411(b), the modification or termination may be approved by the court if the court is satisfied that:
      i. if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and
      ii. the interests of a beneficiary who does not consent will be adequately protected.
3. **Modification Due to Unanticipated Circumstances.**
   
   a. Section 412(a) of the UTC provides that 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. To the extent practicable, the modification must be made in accordance with the settlor’s probable intention.

   b. Section 412(b) of the UTC provides that the court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust’s administration.

4. **Modification of Uneconomic Trust.** Under UTC § 414(b) the court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

5. **Reformation to Correct Mistakes.**
   
   a. Under Section 415 of the UTC, the court may 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.

   b. The Comment to Section 415 provides that reformation of inter vivos instruments to correct a mistake of law or fact is a long-established remedy. **RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS** § 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine also applies to wills.

6. **Modification to Achieve Settlor’s Tax Objective.**
   
   a. Section 416 of the UTC provides that “[t]o 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. The court may provide that the modification has retroactive effect.”

   b. Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in
the case of the federal estate tax. See Rev. Rul. 73-142, 1973-1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split-interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation-skipping tax.

7. **Combination and Division of Trust.**

   a. UTC § 417 provides that, after notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.

   b. The Official Comment to UTC § 417 provides important context:

   This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary’s interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414. Administrative economies promoted by combining trusts include a potential reduction in trustees’ fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination.

III. **REASONS TO DECANT.**

A. **Change of Administrative Provisions.**

   1. Change of situs of trust administration.

   2. Change of law governing the administration of the trust.
3. Provide for the resignation, removal, and appointment of trustees without court approval.

4. Expand powers of trustee to engage in sophisticated financial transactions, such as derivatives and options, make or guarantee loans, adjust between income and principal, or participate in an initial public offering.

5. Provide for the division of trustee roles and responsibilities through the use of investment direction advisors, distribution advisors, trust protectors, or special asset direction advisors.

6. Address issues related to trustee compensation, which may be too high or too low.

7. Address trustee liability (and indemnification) for failure to diversify under the Prudent Investor rule with respect to an over-concentration of investment (typically closely held business) assets.

8. Convert a foreign trust to a domestic trust or vice versa.

9. Consolidate trusts for administrative efficiency.

B. Beneficiary-Related Change of Circumstances.

1. Limit distributions to beneficiaries with substance abuse problems or those engaging in other unproductive behaviors.

2. Transfer of assets to a special needs trust for a disabled beneficiary.

3. Limit beneficiary rights to obtain information about the nature and extent of their interests in a trust by moving assets to a state, like Delaware, where the Trustee’s duty to provide such information can be restricted.

4. Divide single “pot” sprinkle trusts into separate trusts for each branch of the family.

5. Eliminate a beneficiary altogether.

6. Transfer a self-settled irrevocable trust to a jurisdiction that recognizes asset protection for self-settled spendthrift trusts.

C. Changes Related to Federal or State Tax Planning.

1. Mitigate state income taxation of trust by moving assets to a new trust in a jurisdiction that does not subject the trust to income taxation based on the location of the trustee or the grantor.
2. Convert a non-grantor trust to a grantor trust or vice versa.

3. Maximize GST planning for assets being distributed to a beneficiary outright (or over which the beneficiary has a general power) by decanting to another trust to make use of the beneficiary’s and the grantor’s available GST exemption.

4. Division of trusts for GST or marital deduction planning purposes.

D. Changes to Correct Errors or Address Ambiguities.

1. Correct a scrivener’s error.

2. Address ambiguities in the original trust instrument.

3. Add a spendthrift clause to a trust that does not contain such a provision.

IV. TAX CONSEQUENCES OF DECANTING.

A. Overview.

1. The term “decant” does not appear anywhere in the Code or Regulations.

2. The Service, however, has recognized that decanting is an emerging issue with tax consequences that are not entirely clear under current law. For this reason, the Service, in Rev. Proc. 2011-3, placed decanting on its “no-ruling” list with respect to certain income, gift and GST tax matters, see supra Part I.D.3, which suggests that it is an area under study. Though it is expected that guidance may be forthcoming, to date, such guidance is not on the Service’s Priority Guidance Plan.

3. With such minimal guidance from the IRS, it can be hard to analogize a trustee’s act of decanting to an act or event explicitly characterized by the Code or Regulations. Nevertheless, most commentators, drawing from origins at common law, have equated decanting with the exercise of a trustee’s special power of appointment.

   a. The power of appointment analogy is based on the Restatement (Second) of Property, which provides that a trustee’s ability to make discretionary distributions to or for the benefit of trust beneficiaries is akin to the exercise of special power of appointment. See generally Restatement (Second) of Property: Donative Transfers § 11.1.
b. This view has been supported by several state statutes that specifically refer to a trustee’s power to invade principal as the exercise of a special power of appointment. See, e.g., ALASKA STAT. § 13.36.157(c); ARIZ. REV. STAT. ANN. § 14-10819(C); DEL. CODE ANN. tit. 12, § 3528(c); FLA. STAT. ANN. § 736.04117(3); N.Y. EST. POWERS & TRUSTS § 10-6.6(f).

c. The Restatement (Third) of Property, which was approved by the American Law Institute in 2010, distinguishes a trustee’s discretionary power of distribution from a special power of appointment because a trustee’s distributive power is exercisable only in a fiduciary capacity. See RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 17.1. The Restatement (Third) of Property does recognize, however, that the same basic rules apply to a non-fiduciary’s special power of appointment and a fiduciary’s ability to make trust distributions. See id.

4. Unless and until the Service issues more definitive guidance on the tax consequences of decanting, it is best to view decanting, from a theoretical perspective, as the trustee’s exercise of a special power of appointment. It is important to remain flexible, however, to enable critical evaluation of the actual results that a proposed decanting will yield. For instance, as discussed in Part IV.D.2, infra, the GST Regulations contain separate provisions for decanting and special powers of appointment.

B. Income Tax.

1. General Rule. As a general matter, decanting assets from one domestic trust to another will generate minimal, if any, income tax consequences for the trust and its beneficiaries.

2. Income Tax Consequences to the Old and New Trusts.

   a. Decanting assets from one domestic trust to another should not affect the income taxation of the trust because (i) the old trust and the new trust are treated as the same trust for income tax purposes or (ii) in the alternative, the transfer of assets merely carries out the original trust’s distributable net income (“DNI”), resulting in income to the new trust with a corresponding distribution deduction for the old trust.

   b. Basic Principles of Trust Taxation.

      i. If a trust is classified as a grantor trust pursuant to Code §§ 671 through 679, then all of the trust’s income tax
attributes (gain, loss, deductions, credits, etc.) are passed through to the grantor. See Code § 671.

ii. In the case of non-grantor trusts, income tax consequences are largely determined by a trust’s DNI, which is computed in accordance with Code § 643(a). DNI tracks the net income earned by a trust and is designed to represent the maximum amount on which the IRS may impose an income tax. When the trustee makes a discretionary distribution to a beneficiary from an irrevocable trust, the distribution is deemed to consist entirely of DNI, unless the distribution exceeds the trust’s total DNI. With respect to the allocation of income taxes between the trust and its beneficiaries:

aa. accumulated income is taxed to the trust and, if added to principal, not taxed again upon distribution to the beneficiaries;

bb. distributed income is taxed to the beneficiaries to the extent that it consists of the trust’s DNI, with the trust receiving a corresponding deduction for the income distribution; and

c. any amount distributed in excess of the trust’s DNI will constitute principal and will not be taxed to the trust or to the beneficiary.

c. When a trustee decants all the assets of an exiting trust to a new trust, the new and existing trusts should be treated as the same trust for income tax purposes. See Priv. Ltr. Rul. 200736002 (Oct. 26, 2007).

i. Based on this “same trust theory,” decanting should be viewed as a trust modification, and not the creation of an entirely new trust. See, e.g., Priv. Ltr. Rul. 200723014 (Feb. 5, 2007) (ruling that a trust division would not cause a distribution under Code §§ 661 or 662); Priv. Ltr. Rul. 200607015 (Nov. 5, 2005) (ruling that a transfer of assets from existing trusts to new trusts for purposes of changing governing law and modifying administrative provisions would not cause the existing trusts, the new trusts, or the beneficiaries to realize income, gain, or loss under Code §§ 661 or 662).
ii. The old and new trusts should be treated as the same trust regardless of whether the new trust obtains a new taxpayer identification number.

d. Importantly, non-recognition should still apply even if the tax law treats the old and new trusts as separate entities.

i. Under this line of reasoning, the old trust would terminate and its DNI, including any capital gains for the year, would pour into the new trust. See Treas. Reg. § 1.643(a)-3(e), Example (7).

ii. In addition, all of the old trust’s unused loss carryovers and excess deductions on termination would be transferred into the new trust. This is because under Code § 642(h)(2), the new trust should be considered the beneficiary succeeding to the property of the old trust.

iii. Under the separate trust theory, the new trust would receive taxable income under Code § 662(a) to the extent of the old trust’s DNI, and the old trust would be entitled to a corresponding deduction under Code § 661(a). While this should not produce a taxable event when viewed in the aggregate, it is important to consider any state income (or property) tax issues that may arise when transferring assets from one trust to another.

3. **Income Tax Consequences to the Beneficiaries.**

a. In any trust decanting, the beneficiaries should be primarily concerned with two income tax issues:

i. whether the mere act of decanting, which arguably involves the exchange of one property interest for another, causes the trust beneficiaries to realize gain or loss; and

ii. whether a trustee’s decanting of encumbered property or other negative basis assets causes the trust beneficiaries to realize a taxable gain.

b. The general rule is that decanting should not cause the trust beneficiaries to realize any gain or loss unless the trustee’s appointment (i) converts a grantor trust to a non-grantor trust and (ii) the assets appointed include negative basis assets.
c. The Beneficiary Gain Concern (Cottage Savings).

i. The mere act of decanting should constitute a non-recognition event.

ii. The basic rule under Code § 1001 is that a taxpayer only realizes gain or loss when the taxpayer (aa) sells or disposes of property (bb) in exchange for property that is materially different from the property the taxpayer sold or disposed. See Treas. Reg. § 1.1001-1(a).

iii. In the well-cited case of Cottage Savings Ass’n v. Comm’r., 499 U.S. 554 (1991), the Supreme Court considered whether a financial institution realized a loss when it exchanged its interests in one set of residential mortgage loans for another institution’s interests in a different set of residential mortgage loans. The Court found that under Code § 1001(a) and Treas. Reg. § 1.1001-1(a), a taxpayer realized gain or loss whenever it received property that was “materially different” from the property the taxpayer exchanged. Two items of property are materially different, the Court explained, if their owners possess legal entitlements that differ in kind or extent. Although the financial regulatory agency found the two sets of mortgage interests substantially identical, the Court held the mortgages to be materially different because they were made to different borrowers and secured by different pieces of real property. As a consequence, the exchange of mortgage interests between the institutions constituted a realization event.

iv. Following the Court’s interpretation of Code § 1001(a) in Cottage Savings, the question with respect to decanting was whether the IRS would consider a trustee’s distribution in further trust to be a realization event because each beneficiary’s new interest was materially different from his or her old interest. See, e.g., Priv. Ltr. Rul. 199951028 (Sept. 28, 1999); see also Priv. Ltr. Rul. 200231011 (Aug. 2, 2002) (finding a taxable exchange when a settlement provided a beneficiary with a unitrust interest instead of an annuity interest); Priv. Ltr. Rul. 200736002 (specifying that a beneficiary could realize a taxable gain if his interests in a new trust created under a pro rata trust division were materially different than his interests in the old trust).
v. In Priv. Ltr. Rul. 200743022 (Oct. 26, 2007), however, the Service confirmed that decanting would not result in a beneficiary’s realization of income or loss so long as the decanting was authorized by the trust instrument or governing state law. The Service reasoned that the taxpayer’s proposed decanting would not involve a taxable exchange of property because there would only be a transfer of assets from one trust to another, and not a reciprocal exchange involving the legal rights and entitlements of the trust beneficiaries. *Id.*

aa. Stated another way, if a beneficiary’s trust interest is subject to the trustee’s discretion to decant—either under the terms of the trust or applicable state law—then there is no change in the quality of the beneficiary’s interest (i.e., it is not materially different under *Cottage Savings*) when the trustee actually exercises that discretion. This is because the beneficiary’s interest was always subject to the trustee’s decanting authority. *Cf.* Treas. Reg. § 1.1001-1(h) (prescribing similar rules for the severance of trusts); Priv. Ltr. Rul. 200810019 (Mar. 7, 2008) (finding no adverse income tax consequences when income interest converted to unitrust interest under governing state law); Priv. Ltr. Rul. 200010037 (Dec. 13, 1999) (ruling that a taxable exchange would not occur when a trustee partitioned a trust pursuant to partition authority granted in the trust instrument).

bb. Importantly, however, if decanting is not authorized by the terms of the trust or local law, the Service could persuasively argue that a beneficiary’s consent to a decanting constitutes a recognition event. *See, e.g.*, Rev. Rul. 69-486, 1969-2 C.B. 159 (finding that a non-pro-rata trust distribution will be treated as a taxable exchange if the trustee lacked authority to make such a distribution). Even if decanting were authorized by the trust instrument or state statute, the Service could argue that requiring beneficiary consent connotes a change in the quality of the beneficiary’s interest, thereby resulting in a recognition event. For this reason, many states have drafted their decanting statutes to require only beneficiary notice, and not consent. *See, e.g.*, FLA. STAT. § 736.04117(4); IND. CODE § 30-4-3-36(e);
c. The Negative Basis Concern (Crane).

i. The negative basis concern arises when the trustee decants:
   aa. property with debt in excess of basis; or
   bb. an LLC or partnership interest with a negative capital account.

ii. In the landmark case of Crane v. Comm’r., 331 U.S. 1 (1947), the Supreme Court considered whether the amount of gain realized under Code § 1001 included any liability discharged by the taxpayer’s transfer of property subject to a non-recourse debt. The Court found that a taxpayer’s amount realized from a sale or disposition of property under Code § 1001 includes cash and other property received in the transaction, as well as the amount of liabilities from which the taxpayer is discharged as a result of the sale or disposition. See also Treas. Reg. § 1.1001-2(a). In other words, when a transferee assumes the transferor’s liability in connection with a sale or exchange, the transferor must include in his amount realized the liability assumed by the transferee.

iii. Similar to the holding in Crane, Code § 752(d) provides that when a transferor sells or exchanges a partnership interest, the transferor must treat any partnership liabilities transferred in the same manner as liabilities transferred in connection with the sale or exchange of any other property. See also Treas. Reg. § 1.1001-2(a)(4)(v) (providing that upon the sale or exchange of a partnership interest, the transferor’s share of partnership liabilities are treated as liabilities in which the transferor was discharged).

iv. Despite the Court’s holding in Crane and the plain language of Code § 752(d), there is some argument that beneficiaries should not recognize gain under Code § 643(e). Code § 643(e) provides that in the case of trust distributions of property, the beneficiary will receive a carryover basis in the property received, subject to the trustee’s election to recognize any gain on the distribution. The question is whether Code § 643(e) overrides the gain
recognition principles of *Crane* and Code §§ 752(d) and 1001.

aa. On the one hand, because there is no authority directly on point, a trustee could use its fiduciary discretion to comply literally with the terms of Code § 643(e) and not make an election to recognize gain on the distribution of trust property to a beneficiary.

bb. On the other hand, the plain language of Code § 643(e)(1) provides that the beneficiary’s basis must be adjusted for any gain or loss recognized by the trust on the distribution. Because the trust could recognize a gain by discharging its liabilities, it is arguable that the gain should be recognized and the beneficiary’s basis should be increased in accordance with Code § 643(e)(1).

v. The interplay between Code § 643(e) and Code §§ 752(d) and 1001 causes the tax consequences of decanting negative basis property (i.e., whether the beneficiaries recognize any gain) to be uncertain in the following situations:

aa. the decanting of negative basis assets from a complex trust to a complex trust;

bb. the decanting of negative basis assets from a complex trust to a grantor trust; and

cc. the decanting of negative basis assets from a non-grantor trust to a grantor trust (*but see* Chief Counsel Advice 2009 23024 (finding no income tax consequences upon the conversion from a non-grantor trust to a grantor trust, albeit without negative basis assets)).

vi. The law is certain, however, with respect to the following issues:

aa. Gain will not be recognized on the decanting of negative basis assets from a grantor trust to another grantor trust. Non-recognition is based on the bedrock principle that transactions between two grantor trusts (with the same grantor) are

bb. Gain will be recognized on the decanting of negative basis assets from a grantor trust to a non-grantor trust. When grantor trust status terminates, the grantor is treated as having transferred the assets to the trust and the grantor is deemed to realize an amount equal to any liabilities held as part of the trust property. See Treas. Reg. § 1.1001-2(c), Example (5) (explaining the tax consequences associated with the termination of grantor trust status for a trust holding a partnership interest with a negative capital account); see also Madorin v. Comm’r., 84 T.C. 667 (1985). Code § 643(e) does not offer any protection in this context because it does not apply to grantor trusts (Subpart E of Subchapter J).

4. Foreign Trusts.

a. Decanting from Domestic Trust to Foreign Trust.

i. Code § 684 generally treats the transfer of assets to a foreign trust as a recognition event.

ii. Despite this, if the trustee of a domestic trust decants all of the trust assets to a foreign trust, the domestic trust will be entitled to a deduction equal to the amount of any income generated by the decanting. See Code § 661(a).

iii. In addition, if the foreign trust receiving the decanted assets is a grantor trust with respect to the transferor, Code § 684(b) provides that the transfer will be a non-recognition event. The gain, if any, will be recognized once the grantor trust status of the foreign trust terminates. See Treas. Reg. § 1.684-2(c)(1).

b. Decanting from Foreign Trust to Domestic Trust.

i. When decanting the assets of a foreign trust, the transfer may carry out the foreign trust’s undistributed net income (UNI) and trigger the throwback rules of Subchapter J.

ii. A foreign trust decanting is also likely to necessitate a reporting obligation pursuant to Code § 6048.
iii. And although the same trust theory arguably applies when a foreign trust is domesticated via decanting, the Service may assert, if the trust changes are substantial, that the domestic trust is a new trust for income tax purposes.

C. Estate and Gift Taxes.


a. Decanting will not cause a beneficiary to make a taxable gift to the trust unless:

i. the trustee exercising the discretion to decant is also a trust beneficiary;

ii. the trustee’s ability to decant is contingent on obtaining beneficiary consent; or

iii. the Delaware tax trap applies.

b. Decanting will not result in estate inclusion for federal estate tax purposes unless:

i. the new trust gives a beneficiary a general power of appointment over trust property that would render such property includible in the beneficiary’s gross estate under Code § 2041(a)(2);

ii. the decanting is treated as an incomplete gift pursuant to a beneficiary’s testamentary limited power of appointment and such gift becomes complete at the beneficiary’s death;

iii. a grantor’s or beneficiary’s involvement in the decanting process shows that the grantor or beneficiary had implied control over the trust assets within the meaning of Code §§ 2036 or 2038; or

iv. the Delaware tax trap applies.

2. Beneficiaries Who Also Serve as Trustees.

a. Pursuant to Treas. Reg. § 25.2511-1(g)(2), if a trustee is also a beneficiary, the trustee’s distribution of trust assets will constitute a taxable gift unless such distribution is limited by an ascertainable standard relating to health, education, maintenance, or support.
b. While caution must be taken when decanting with a beneficiary who also serves as a trustee, as a practical matter, many state statutes limit a trustee’s ability to make distributions to an ascertainable standard whenever the trustee also has a beneficial interest in the trust. See, e.g., VA. CODE ANN. § 55.548-14(B)(1).

3. **Beneficiary Consent.**

   a. The Service could argue that when a beneficiary consents to a decanting, the beneficiary has exercised sufficient control over the trust assets to characterize such consent as a taxable gift.

      i. In addition, the Service could extend this line of reasoning to beneficiary acquiescence. The Service could argue, for example, that if a beneficiary had the right to object to a trust decanting, but did not, then the beneficiary’s failure to exercise her right to object constituted a gratuitous transfer.

      ii. Although beneficiary consent could very well constitute a gift under appropriate circumstances, beneficiary acquiescence should not. This is because taxable gifts require the transferor to make a voluntary transfer. See Harris v. Comm’r, 340 U.S. 106 (1958); Estate of DiMarco v. Comm’r, 87 T.C. 653 (1986), acq. 1990-2 C.B.1. When a trustee exercises the power to decant in the trustee’s sole discretion and without beneficiary intervention, the beneficiary’s inaction, as a factual matter, should not constitute a voluntary transfer capable of triggering the gift tax.

   b. In any event, the Service is unlikely to assert that beneficiary consent or acquiescence causes a beneficiary to make a taxable gift unless the decanting:

      i. shifts a beneficial interest in the trust; or

      ii. delays the vesting of a beneficiary’s property interest in the trust.

   c. With respect to a delay in vesting, the Service could advance this argument if the original trust provided that a beneficiary would receive trust principal at a specified age or ages. If the beneficiary consented or acquiesced to decanting the assets to a new trust that extended or eliminated the ages at which the beneficiary was entitled to principal, then the Service could treat the beneficiary’s
(in)action as a release of a general power of appointment pursuant to Code § 2514(b). Again, the Service’s gift argument would be much stronger if the trustee also had a beneficial interest in the trust or if the decanting required beneficiary consent.

4. Delaware Tax Trap.

a. Code § 2514(d), commonly referred to as the “Delaware tax trap,” provides that the exercise of a power of appointment will be considered a transfer for transfer tax purposes if:

i. the powerholder, in exercising the power of appointment, grants another person the right to exercise a power of appointment; and

ii. under applicable local law, the new powerholder can exercise his or her power of appointment to postpone the vesting of any trust interest or suspend the absolute ownership or power of alienation of such property for a period ascertainable without regard to the date that the first power was created.

b. Importantly, the Delaware tax trap applies whether the second powerholder exercises the power in the prohibited manner or not. In other words, if the second powerholder has the mere potential to limit the ownership rights of trust property beyond the time period that such property was limited by the terms of the original trust instrument, then the first powerholder’s appointment of the property will result in a taxable gift.

c. If a person exercises a power of appointment as provided in Code § 2514(d) during his or her lifetime, then such exercise is treated as a taxable gift. If the person exercises his or her power at death, then such exercise will result in estate inclusion.

d. The Delaware tax trap should not apply to a trust decanting when:

i. prohibited by a state’s decanting statute, see, e.g., N.C. GEN. STAT. § 36C-8-816.1(c)(8), (e)(2);

ii. an independent trustee with no beneficial interest in the trust initiates the decanting; or

iii. the second trust includes a provision that prohibits the exercise of a power of appointment in such a manner that
extends the vesting period or suspends the ownership or alienation of any interest in the first trust.

5. **Limiting Taxable Gifts.** If the risks of a gift are particularly acute, trustees and their advisors may insulate themselves from gift tax liability by:

a. ensuring that an independent trustee who has no beneficial interest in the trust is the only fiduciary who exercises the authority to decant;

b. limiting the decanting to administrative changes only, thereby avoiding the shifting of beneficial interests in trust and the postponement of vesting periods in trust property; and/or

c. giving the beneficiary a testamentary limited power of appointment.

6. **Incomplete Gifts.** If a beneficiary is given a testamentary limited power of appointment over the assets of the second trust, then any gift should be rendered incomplete for gift tax purposes. *See* Treas. Reg. § 25.2511-2(b); *see also* Priv. Ltr. Rul. 200715005 (Apr. 13, 2007). If the beneficiary later releases this power of appointment, the gift will be complete. If the beneficiary does not release the power during his or her lifetime, then the property will be included in the beneficiary’s gross estate under Code §§ 2036 and 2038.

7. **Value of Taxable Gifts.** Interestingly, if a decanting does result in a taxable gift and trust distributions are discretionary, then the amount of the gift is a factual issue that cannot be determined by use of the tables contained in Code § 2512. *See* Priv. Ltr. Rul. 200745015 (June 6, 2007).

D. **GST Tax.**

1. **Background.**

   a. Generation-skipping transfers made from a non-exempt trust will be subject to GST tax. *See* Code § 2601.

   b. Trusts are generally exempt from GST tax if:

      i. they became irrevocable on or before September 25, 1985, the effective date of the GST statute, or are otherwise subject to certain transition rules associated with the GST effective date regulations (referred to collectively as “grandfathered trusts”), *see generally* Treas. Reg. 26.2601-1(b); or
ii. for trusts that were not irrevocable on or before September 25, 1985, the transferor allocated GST exemption to the trust (referred to collectively as “non-grandfathered trusts”).

c. Treas. Reg. § 26.2601-1(b)(1) provides that a grandfathered trust will lose its GST exempt status if an actual or constructive addition is made to the trust after the effective date.

d. Because decanting could be construed as an addition or other modification that causes a trust to lose its GST exempt status, it is important to understand the treatment of decanting under the GST regulations.

2. Special Powers of Appointment under the GST Regulations. The GST regulations do not treat decanting as the exercise of a special power of appointment.

a. As discussed in Part IV.A., supra, practitioners can view decanting, in some circumstances, as the trustee’s exercise of a special power of appointment. Several states have adopted this view and have explicitly referred to the decanting authority as the power to exercise a special power of appointment over trust assets. See, e.g., ALASKA STAT. § 13.36.157(c); DEL. CODE ANN. tit. 12, § 3528(c); FLA. STAT. § 736.04117(3); N.Y. EST. POWERS & TRUSTS § 10-6.6(f).

b. The GST regulations, however, do not characterize decanting as a special power of appointment. The GST regulations relevant to a trustee’s decanting authority are organized as follows:

i. Treas. Reg. § 26.2601-1(b)(1)(v)(B) determines whether the post-effective date exercise of a power of appointment over the assets of a grandfathered trust causes the trust to lose its GST exempt status;

ii. Treas. Reg. § 26.2601-1(b)(4)(i)(A) concerns the effect of the trustee’s distribution of trust principal from an exempt trust to a new or continuing trust; and

c. With respect to powers of appointment, the Regulations provide that the exercise of a power of appointment over the assets of a grandfathered trust will not cause the trust to lose its GST exempt status unless the exercise violates the permissible perpetuities period under federal law. See Treas. Reg. § 26.2601-1(b)(1)(v)(B).

i. The federal perpetuities period will not be violated by the exercise of a special power of appointment if the vesting, absolute ownership, or power of alienation of an interest in property is not suspended or delayed beyond:

aa. some life in being at the date of the creation of the grandfathered trust plus 21 years; or


ii. Importantly, the mere release or lapse of a power of appointment after the effective date will not taint the GST exempt status of the grandfathered trust. See Treas. Reg. § 26.2601-1(b)(1)(v)(B)(1).


a. Decanting will not cause a grandfathered trust to lose its GST exempt status if the decanting satisfies either the discretionary distribution safe harbor of Treas. Reg. § 26.2601-1(b)(4)(i)(A) or the trust modification safe harbor of Treas. Reg. § 26.2601-1(b)(4)(i)(D).

b. Under the discretionary distribution safe harbor of Treas. Reg. § 26.2601-1(b)(4)(i)(A), a decanting will not taint the GST exempt status of a grandfathered trust if the following conditions are satisfied:

i. when the grandfathered trust became irrevocable, either the terms of the trust instrument or local law (i.e., state statute or common law) authorized the trustee to make distributions to a new trust;

ii. neither beneficiary consent nor court approval is required for the trustee to exercise his discretionary authority; and

iii. the new trust will not suspend or delay the vesting, absolute ownership, or power of alienation of an interest in trust
beyond the permissible perpetuities period under federal law (see supra Part IV.D.2.c.).

c. In the event a decanting will not satisfy the discretionary distribution safe harbor, the trust modification safe harbor of Treas. Reg. § 26.2601-1(b)(4)(i)(D) acts as a catch-all. The trust modification safe harbor provides that a decanting will not taint the GST exempt status of a grandfathered trust if the following conditions are satisfied:

i. the decanting will not shift a beneficial interest in the trust to a beneficiary occupying a lower generation than the person or persons holding the beneficial interest under the terms of the original trust; and

ii. the decanting will not extend the time for vesting of any beneficial interest in the trust beyond the period provided in the original trust.


a. If a decanting involves only administrative changes, there should be no loss of GST exempt status. See Priv. Ltr. Rul. 200607015 (Nov. 4, 2005); see also Treas. Reg. § 26.2601-1(b)(4)(i)(E), Example (6) (explaining that a trust modification that is merely administrative will not taint GST exempt status even if the modification indirectly increases the benefits available to the beneficiaries); cf. Priv. Ltr. Rul. 9737024 (Sept. 12, 1997) (finding that grandfathered status is preserved when a trust is modified pursuant to a state decanting statute so long as the terms of the new trust do not adversely affect the quality, value, or timing of any beneficial interest in the trust). Under the trust modification safe harbor, this is true regardless of whether state law authorizes the decanting. Decanting for the purposes of making administrative changes, therefore, should not result in any adverse income, gift, estate, or GST tax consequences.

b. State Law Considerations.

i. The first prong of the discretionary distribution safe harbor requires that decanting be authorized under the terms of the trust instrument or applicable state law. Because no state decanting statute was in existence at the time of the GST’s effective date in 1985, a trustee must rely on his or her inherit ability under common law to decant the trust assets.
This common law reliance should not pose a problem, especially if the trustee had the ability to move the trust situs to Florida, a state that explicitly recognized the common law decanting authority of its trustees. See Phipps v. Palm Beach Trust Co., 142 Fla. 782 (1940).

ii. Unlike the discretionary distribution safe harbor, a decanting will not fail the trust modification safe harbor solely by reason of a beneficiary’s consent or a court’s approval of the decanting. While these measures may not affect the trust’s GST status, they could result in adverse income, gift, or estate tax consequences, as discussed in Parts IV.B. and IV.C., supra.

c. Note that a trustee may only extend an interest’s vesting period beyond the period prescribed in the original trust if the decanting satisfies the discretionary distribution safe harbor. Even then, the decanting cannot extend the vesting period beyond the federal perpetuities period.

i. A trustee may desire to extend the vesting period, for example, when a beneficiary is scheduled to receive trust principal at a certain age or upon the death of a certain person. When extending the vesting period in these scenarios, it is important to include provisions in the new trust document limiting the vesting period to comply with federal perpetuities period.

ii. Interestingly, the federal perpetuities period contained in the decanting Regulations (Treas. Reg. § 26.2601-1(b)(4)(i)(A)) prescribes a different starting point than the period contained in the power of appointment Regulations (Treas. Reg. § 26.2601-1(b)(1)(v)(B)). The power of appointment Regulations measure the perpetuities period (the later of 21 years plus some life in being or 90 years) from the date of the creation of the trust, while the decanting Regulations measure the perpetuities period from the date the grandfathered trust became irrevocable.

d. Like the extension of vesting periods, a trustee may only shift a beneficial interest in trust down generational lines if the decanting meets the requirements of the discretionary distribution safe harbor. Because the trust modification safe harbor only prohibits the shifting of beneficial interests to persons occupying a lower generation, a trustee may still shift beneficial interests up or across generational lines under the trust modification safe harbor.
e. Treas. Reg. § 26.2601-1(b)(4)(i)(E), Example (2) provides a good example of the interaction between the discretionary distribution and trust modification safe harbors.

i. Under the facts of the Example, the grantor established an irrevocable trust for the benefit of the grantor’s child “A,” A’s spouse, and A’s issue. When the trust was established, A had two children, “B” and “C.” The trust provided for discretionary distributions of income and principal to the beneficiaries. The trust terminated at A’s death, with the principal distributed to A’s issue, per stirpes.

ii. Pursuant to a state decanting statute enacted after the creation of the trust, the trustee may appoint the assets to a new trust with either the consent of the beneficiaries or court approval. The trustee did not have the authority to decant under state law prior to the enactment of the decanting statute.

iii. The trustee appointed one-half of the principal to a new trust pursuant to the state decanting statute. The terms of the new trust provide income to A for life, with the remainder passing one-half to B or B’s issue and one-half to C or C’s issue.

iv. The decanting does not satisfy the discretionary distribution safe harbor because beneficiary consent or court approval is required.

v. The decanting does satisfy the trust modification safe harbor, however, because it will not shift a beneficial interest in the trust and it will not extend the vesting period beyond the period prescribed in the original trust.

f. Care should be taken when converting a grandfathered trust from a complex trust to a grantor trust. The Service could argue that the conversion constitutes a shift in the beneficial interest of the trust, resulting in a loss of GST exempt status. This argument is unlikely to succeed, however, as Rev. Rul. 2004-64, 2004-2 C.B. 7, confirms that when a grantor pays the income tax liability attributable to a grantor trust, he has not made a gift to the trust or its beneficiaries. If the payment of income taxes by the grantor is not deemed a transfer under Rev. Rul. 2004-64, then a conversion to grantor trust status, in and of itself, should not shift a beneficial interest in the trust.
5. **Preserving GST Exempt Status for Non-Grandfathered Trusts.**

a. Neither the Code nor the Regulations directly address the consequences of decanting the assets of a non-grandfathered trust.

b. The Service has indicated, however, that the GST Regulations for grandfathered trusts should apply to non-grandfathered trusts. See Priv. Ltr. Rul. 200743028 (May 29, 2007) (“At a minimum, a change that would not affect the GST status of a grandfathered trust should similarly not affect the exempt status of such a [non-grandfathered] trust.”); see also Priv. Ltr. Rul. 200919008 (May 8, 2008) (confirming that the GST Regulations should apply to non-grantor trusts).

c. With more recent trusts, it is possible that a state decanting statute was in existence at the time a transferor allocated GST exemption to the trust. Therefore, assuming the grandfathered GST Regulations apply to such trusts, a trustee could decant the trust assets pursuant to the state’s decanting statute without losing GST exempt status and, so long as no beneficiary consent or court approval was required, could shift a beneficial interest down generational lines or extend the vesting period of a trust interest.

d. Even if the GST Regulations do not apply to non-grandfathered trusts, a non-grandfathered trust is likely to enjoy more liberal rules with respect to the preservation of its GST exempt status.

i. For one, the policy rationales behind the GST rules for grandfathered and non-grandfathered trusts are different. The GST rules for grandfathered trusts are far more concerned with preventing abuse, while the rules for non-grandfathered trusts are more flexible.

ii. In addition, if the grandfathered GST Regulations did not apply, more liberal analogies may be drawn, such as to the rules concerning special powers of appointment, as discussed above. See Treas. Reg. § 26.2601-1(b)(1)(v)(B).

iii. Some analogy may be drawn, however, to the rules governing the qualified severance of trusts for GST purposes. See Treas. Reg. § 26.2642-6. For a good discussion of the intersection between the qualified severance rules and trust decanting, see Diana S.C. Zeydel & Jonathan G. Blattmachr, *Tax Effects of Decanting—
6. Consequences of Losing GST Exempt Status.

a. The tax consequences of an IRS determination that a decanting has tainted GST exempt status remain unclear.


c. The Service has since retreated from this position, however, and does not regard the loss of GST exempt status as a transaction with immediate gift tax implications. Instead, when a trust loses its GST exempt status, the grantor becomes the transferor for purposes of Chapter 13. See Priv. Ltr. Rul. 9522032 (June 2, 1995).

d. Although there is no authority directly on point, it is unlikely that a loss of GST exempt status will result in all future distributions from the trust being subject to GST tax. Instead, a GST tax should only be imposed when a distribution is made to a person who would have been unable to receive the distribution under the terms of the original trust without being subject to GST tax.

i. Under this view, if a grandfathered trust for the benefit of the grantor’s grandchild loses its GST exempt status, then future distributions to the grandchild would still be exempt from GST taxation because the grandchild would have received tax-free distributions under the original trust. With the grantor deemed the transferor for purposes of Chapter 13, however, trust distributions to the grantor’s great-grandchildren would be subject to GST tax.

ii. Given the great uncertainty with respect to the tax implications of losing GST exempt status, practitioners should take great care to preserve a trust’s grandfathered or GST exempt status.
V. STATE DECANTING STATUTES.

A. Overview.

1. Eleven states have enacted decanting statutes. New York was the first state to do so in 1996, with Indiana becoming the latest in 2010.

2. No case law has provided a meaningful interpretation of any state decanting statute, although New York has provided some guidance at the surrogate’s court level. See, e.g., In re Estate of Mayer, 672 N.Y.S.2d 998 (N.Y. Surr. Ct. 1998) (finding that a trustee’s ability to invade principal pursuant to an ascertainable standard did not rise to the level of the absolute discretion necessary to decant under New York’s statute); In re Kaskel, 620 N.Y.S.2d 217 (N.Y. Surr. Ct. 1994) (considering spendthrift implications).

3. While there is no substitute for careful consideration of applicable state law, most state decanting statutes follow a similar pattern, which can be best explained by answering the questions outlined in the paragraphs below.

B. Who possesses the authority to decant?

1. As a general matter, it is the trustee who has the ability to decant, and not the grantor or the beneficiaries.

2. Some states place a further limit on who may decant by prohibiting a trustee who also has a beneficial interest in the trust from exercising the decanting authority in certain situations. See, e.g., N.H. REV. STAT. ANN. § 564-B:4-418(c); N.C. GEN. STAT. § 36C-8-816.1(d); S.D. CODIFIED LAWS § 55-2-15(2). These provisions are designed to limit gift tax exposure caused by trustee/beneficiary decanting. See supra Part IV.C.2.

C. Under what circumstances may the trustee exercise his or her authority to decant?

1. In order to exercise the decanting authority:

   a. the trustee must have the power to decant under the terms of the trust instrument or applicable state law; and

   b. the exercise of the decanting authority must be consistent with the discharge of the trustee’s fiduciary duties.
2. Power to decant under the terms of the trust instrument or applicable state law.

a. As is the case with some newer trusts, the trust instrument may explicitly vest the trustee with decanting authority and outline the procedures by which the trustee may exercise such authority. In these circumstances, the trustee has the authority to decant and the trust instrument will control the method and extent to which the decanting may occur.

b. If the trust instrument does not explicitly grant decanting authority, the trustee must look to applicable state law. The decanting statutes of all states determine whether the trustee possesses the ability to decant based on the extent of the trustee’s power of invasion. As explained below, however, some state statutes are more accessible than others in this respect.

i. The most stringent state statutes require that a trustee have “absolute discretion” or “absolute power” to invade trust principal before the trustee is granted decanting authority. See *Fla. Stat.* § 736.04117(1)(a); *N.Y. Est. Powers & Trusts* § 10-6.6(b)(1); *Ind. Code* § 30-4-3-36(a).

ii. The majority of state statutes, however, merely require that a trustee have some authority to invade trust principal. See, e.g., *Alaska Stat.* § 13.36.157(a); *Ariz. Rev. Stat. Ann.* § 14-10819(A); *S.D. Codified Laws* § 55-2-15.

iii. Many statutes do not address the issue of whether a trustee has the power to decant when the trustee’s power of invasion is limited to an ascertainable standard relating to health, education, maintenance, or support. Some statutes have addressed this concern on the backend, providing that the terms of the second trust must contain the same or a more restrictive standard of invasion than that contained in the first trust. See, e.g., *Alaska Stat.* § 13.36.157(a)(4). North Carolina has addressed this issue on the frontend, providing that decanting authority exists in limited circumstances when the trustee’s power of invasion is limited by an ascertainable standard. See *N.C. Gen. Stat.* § 36C-8-816(b), (c)(7).

3. Fiduciary Duties.

a. In addition to holding the power to decant trust assets under the terms of the trust or applicable state statute, the trustee must also
determine that the decanting is consistent with the discharge of his or her fiduciary duties.

b. While the scope of a trustee’s fiduciary duties will vary from state to state and trust to trust, a core duty of loyalty transcends individual application. The duty of loyalty requires the trustee to administer the trust solely in the best interests of the beneficiaries. In this sense, the trustee must avoid self-dealing and, where appropriate, remain fair and impartial towards all beneficiaries.

c. When a decanting involves only administrative changes, the trustee’s duty of loyalty should not be seriously implicated.

d. A decanting could, however, raise duty of loyalty issues when a trustee’s discretion shifts beneficial interests in the trust or otherwise exhibits a preference for one individual or class of beneficiary over another. A beneficiary may complain, for instance, because his or her interest in the trust has been reduced. In addition, a living settlor may complain because the decanting does not comport with his or her desires with respect to the trust administration.

e. Although it would seem advantageous to obtain a release from all affected beneficiaries or a court order approving the decanting, these measures could have adverse tax consequences, as discussed in Part IV, supra. Similarly, if the grantor signs an indemnification agreement, the Service may argue that the decanted trust assets should be included in the grantor’s estate because the grantor retained implied control under Code §§ 2036 or 2038.

f. Proper methods to limit a trustee’s liability with respect to a decanting include the use of a receipt and refunding agreement or the inclusion of indemnifying language in the decanted trust agreement.

g. Because a trustee’s fiduciary duties are omnipresent throughout the trust administration, a trustee must always consider the impact a trust decanting would have on his or her duty of loyalty.

D. Which assets of the trust may the trustee decant?

1. All states permit the trustee to decant trust principal.

2. Many states, however, limit the trustee’s decanting authority to trust principal only. See Alaska Stat. § 13.36.157(a); Del. Code Ann. tit. 12, § 3528(a); Fla. Stat. Ann. § 736.04117(1)(a); Ind. Code § 30-4-3-36(a);


E. Must the trustee decant the assets to a separate trust instrument?

1. Most statutes require that the decanted assets be transferred to another trust established by separate trust agreement. See, e.g., S.D. Codified Laws § 55-2-15; Tenn. Code Ann. § 35-15-816(b)(27)(A).

2. The Florida, North Carolina, and Indiana statutes, however, permit the trustee to establish a new trust under the original trust instrument. See Fla. Stat. Ann. § 736.04117(1)(a); N.C. Gen. Stat. § 36C-8-816.1(a)(3); Ind. Code § 30-4-3-36(a).

F. Who are the permissible appointees of the decanted trust?

1. As a general matter, all states require that the second trust name at least some of the beneficiaries named in the original trust. While this generally prohibits adding to the class of beneficiaries, it does not prevent the removal of a beneficiary.

2. Older decanting statutes define permissible appointees to include those persons who are the “proper objects of the exercise of the power.” See Del. Code Ann. tit. 12, § 3528(a)(1); N.Y. Est. Powers & Trusts § 10-6.6(b)(1); Tenn. Code Ann. § 35-15-816(27)(A)(ii). Because the term “proper objects” is not statutorily defined, there is some question as to whether the term includes future or contingent beneficiaries, in addition to current permissible beneficiaries. Most commentators agree that future and contingent beneficiaries are the proper objects of the trustee’s decanting power under older state statutes.

4. Notably, although most statutes limit the class of permissible appointees, it may be possible to add to the class of beneficiaries by giving a beneficiary a limited or general power of appointment in the second trust. Such strategy is expressly contemplated by the Delaware, Nevada, and North Carolina statutes. Del. Code Ann. tit 12, § 3528(a); Nev. Rev. Stat. § 163.556(5)(a); N.C. Gen. Stat. § 36C-8-816.1(c)(8).

5. As is the case with the tax consequences of decanting, under any state statutory regime, shifting beneficial interests through decanting—either directly or indirectly through power of appointment—is a risky and, in some cases, a prohibited endeavor.

G. Are there any limitations on a trustee’s authority to decant?

1. Many states have placed limitations on a trustee’s decanting authority to shield the decanting from adverse tax consequences and to protect the rights of trust beneficiaries.


   a. With the exception of South Dakota, all states prohibit the acceleration of a remainderman’s interest to a current right to receive distributions from the trust. South Dakota’s statute, in fact, expressly permits the acceleration of remainder interests. See S.D. Codified Laws § 55-2-15(1).


   c. North Carolina’s statute expressly prohibits the acceleration of remainder interests. See N.C. Gen. Stat. § 36C-8-816.1(c)(2).

3. Distribution standard of second trust.


   b. Notably, North Carolina’s statute provides that if an ascertainable standard is contained in the first trust, the decanted trust must include the same ascertainable standard. See N.C. Gen. Stat. § 36C-8-816.1(c)(7).
c. The general purpose of these provisions is to preserve the settlor’s intent with respect to discretionary distributions from the trust.

4. Reduction of income interests.

a. Almost every state decanting statute prohibits a trustee’s decanting if it would reduce a beneficiary’s fixed income interest in the trust. See, e.g., ALASKA STAT. § 13.36.157(a)(1); N.Y. EPTL § 10-6.6(b)(1)(A).

b. More modern decanting statutes also prohibit decanting if it would result in the reduction of a beneficiary’s fixed annuity or unitrust interest. See, e.g., FLA. STAT. ANN. § 736.04117(1)(a)(2); N.H REV. STAT. ANN. § 564-B:418(b)(2).

5. Tax savings provisions.

a. Another trend in recent statutes is to include tax savings provisions that are designed to prevent decanting when it would otherwise produce unintended and adverse tax consequences.

b. Most state statutes include a perpetuities savings provision designed to avoid a violation of the state’s rule against perpetuities. See, e.g., FLA. STAT. ANN. § 736.04117(3); NY EST. POWERS & TRUSTS § 10-6.6(f); TENN. CODE ANN. § 35-15-816(b)(27)(C);

c. Some statutes also limit a trustee’s decanting authority when the first trust qualifies for the marital or charitable deduction for federal or state income, gift, or estate tax purposes, and the decanted trust would risk or forfeit such marital or charitable deduction. See, e.g., N.C. GEN. STAT. § 36C-8-816.1(c)(4); NEV. REV. STAT. § 163.556(2)(c); N.H. REV. STAT. ANN. § 564-B:418(b)(3).

d. Other statutes limit a trustee’s decanting authority when the trust assets are subject to a beneficiary’s presently exercisable right of withdrawal, such as a Crumme right or a 5 X 5 power. See, e.g., N.C. GEN. STAT. § 36C-8-816.1(c)(6); NEV. REV. STAT. § 163.556(2)(d); N.H REV. STAT. ANN. § 564-B:418(b)(4). These provisions are designed to prevent beneficiaries from making a taxable gift to the trust upon the lapse of a withdrawal right. North Carolina permits the decanting trustees to carry over the beneficiary’s withdrawal right to the new trust. N.C. GEN. STAT. § 36C-8-816.1(c)(6).
H. What are the procedural requirements for decanting?

1. Most states require an appointment or decanting document that is:
   a. in writing;
   b. signed and acknowledged by the trustees; and
   c. kept with the original trust records. See, e.g., DEL. CODE ANN. tit. 12, § 3528(b).

2. Some states also impose an additional requirement that the trustees provide notice of the decanting to the beneficiaries. See, e.g., FLA. STAT. ANN. § 736.04117(4); INDIANA CODE § 30-4-3-36(e); N.C. GEN. STAT. § 36C-8-816.1(f); S.D. CODIFIED LAWS § 55-2-18.

3. New York imposes a unique obligation on its trustees, requiring them to file a signed copy of the decanting instrument with the clerk of court having jurisdiction over the trust. See N.Y. EST. POWERS & TRUSTS § 10-6.6(d).

4. Notably, neither the Alaska nor the Arizona statute lists the procedures a trustee must follow to decant a trust.

I. Is beneficiary consent or court approval required to decant a trust?

1. Due in large part to the tax consequences associated with requiring beneficiary consent or court approval, see supra Part IV, no state statute requires the trustee to obtain beneficiary consent or court approval prior to decanting a trust.

2. Some states, however, do require the trustees to notify the beneficiaries of the decanting. See, e.g., FLA. STAT. ANN. § 736.04117(4); IND. CODE § 30-4-3-36(e); N.C. GEN. STAT. § 36C-8-816.1(f); S.D. CODIFIED LAWS § 55-2-18.

3. In addition, some states also permit a trustee or beneficiary to seek court approval for a decanting. See, e.g., ARIZ. REV. STAT. ANN. § 14-10819(D); NEV. REV. STAT. § 163.556(4); N.Y. EST. POWERS & TRUSTS § 10-6.6(b)(2); N.C. GEN. STAT. § 36C-8-816.1(h).

4. Notably, Nevada requires beneficiary consent if property that is designated for one beneficiary under the terms of the original trust will no longer be designated for that beneficiary under the terms of the decanted trust. See NEV. REV. STAT. § 163.556(2)(e).
J. What other provisions are typically contained in a state’s decanting statute?

1. Many statutes provide that a trustee’s exercise of a decanting authority is akin to the exercise of a special power of appointment in a fiduciary capacity. See, e.g., ALASKA STAT. § 13.36.157(c); ARIZ. REV. STAT. ANN. § 14-10819(C); DEL. CODE ANN. tit. 12, § 3528(c); FLA. STAT. ANN. § 736.04117(3); IND. CODE § 30-4-3-36(d); N.Y. EST. POWERS & TRUSTS § 10-6.6(f).

2. Most state statutes provide that the decanting authority vested in the trustee by statute is in addition to, and not in place of, the powers and authority granted to the trustee by common law and the terms of the trust instrument. See, e.g., FLA. STAT. ANN. § 736.04117(7); IND. CODE § 30-4-3-36(h); N.Y. EST. POWERS & TRUSTS § 10-6.6(g).

3. More recent statutes have clarified that a trustee’s decanting authority is not jeopardized by a spendthrift provision in the original trust agreement or a provision that prohibits the settlor from amending or revoking the trust. See, e.g., IND. CODE § 30-4-3-36(f); N.H REV. STAT. ANN. § 564-B:418(g), (h).

4. Several statutes also clarify that the trustee’s exercise of the decanting authority is voluntary and does not impose any additional duty or obligation on the trustee. See, e.g., FLA. STAT. ANN. § 736.04117(6); N.H REV. STAT. ANN. § 564-B:418(f).

K. Again, although all of the state decanting statutes follow a similar pattern, each statute contains its own nuances and unique procedures. Consequently, a trustee, in addition to weighing other considerations, should carefully review the appropriate statutory language to ensure that the trustee’s exercise of the decanting authority complies with the applicable statutory requirements.

VI. CONCLUSION.

A. A Change, or At Least a Clarification, Is Coming.

1. Although decanting is by no means a new phenomenon, its popularity has grown by leaps and bounds in recent years. As more and more states adopt decanting statutes, more practitioners are beginning to view irrevocable trusts as a starting, instead of the end, point.

2. Moreover, the Service’s decision to place decanting on its no-ruling list may signal that it is considering publishing authoritative decanting Regulations or similar guidance.
3. In any event, with many trustees and beneficiaries willing to push the decanting boundaries in pursuit of more favorable trust benefits, it only seems a matter of time before more definitive guidance is warranted.

B. Advice to the Service.

1. With the rapid increase in the use and number of state decanting statutes, the Service should issue definitive guidance outlining the tax consequences of decanting.

2. Income Tax.
   a. The general rule should be that decanting is a non-recognition event for income tax purposes.
   b. The guidance should acknowledge the exception to the general rule when decanting results in a conversion from grantor to non-grantor trust status and the property transferred includes negative basis assets.
   c. At the trust level, the Service should clarify that in most situations the original trust and the decanted trust are considered the same trust for federal income tax purposes. In circumstances where this general rule is not applicable, the Service should clarify that there will be minimal income tax consequences because the original trust’s DNI is carried over to the decanted trust, resulting in an offsetting income receipt and distribution deduction.
   d. In addition, any guidance should clarify matters with respect to the decanting of negative basis assets, including the interplay between Code § 643(d) and Code §§ 752(d) and 1001.

   a. The general rule should be that decanting does not result in the grantor, trustees, or beneficiaries making a taxable gift for gift tax purposes.
   b. The guidance should expressly acknowledge that beneficiary acquiescence to decanting does not constitute a taxable gift.

4. Estate Tax.
   a. The general rule should be that decanting does not result in estate inclusion for the grantor, trustees, or beneficiaries.
b. The guidance may specifically acknowledge that estate inclusion could arise under other sections of the Code, including Code §§ 2036, 2038, or 2041.

5. GST Tax.

a. The general rule should be that decanting does not cause a GST exempt trust to lose its GST exempt status if the decanting meets either the discretionary distribution safe harbor or the trust modification safe harbor.

b. The Service should explicitly extend the decanting Regulations for grandfathered trusts to non-grandfathered trusts.

c. Any guidance issued should explain what happens when decanting causes a trust to lose its GST exempt trust. The authors suggest that as a general rule, future trust distributions only be subject to GST tax when made to a beneficiary who would have been unable to receive the distribution under the terms of the original trust without being subject to GST tax.

C. Advice to States Considering the Adoption of Decanting Statutes.

1. The eleven statutes currently in effect provide states considering a decanting statute an ample resource from which to draw. As a general matter, the more modern statutes address a broader array of concerns than their predecessors.

2. When drafting a decanting statute, it is important to balance the competing objectives of providing increased flexibility and honoring the grantor’s original intent. For most states, the North Carolina statute (N.C. GEN. STAT. § 36C-8-816.1) will provide a strong and comprehensive model. The authors suggest that any state decanting statute adhere to the following guidelines:

a. The statute should limit a trustee’s ability to decant when the trustee also owns a beneficial interest in the trust. This helps avoid traps for the unwary, including adverse tax consequences and duty of loyalty violations.

b. The trustee’s ability to decant should only require the authority to invade principal, and not absolute or unfettered authority. This feature makes the statute more accessible and should generally increase the number of trusts moved to the state for decanting purposes.
c. The trustee’s decanting authority should be exercisable over both trust income and trust principal.

d. The trustees should be able to decant to a new trust or a trust created under the original trust instrument. In addition, the trustees should be empowered to create and serve as trustees of the new trust or subtrust, as the case may be.

e. In line with more recent statutes, the statute should define the class of permissible appointees in terms of “beneficiaries” instead of “proper objects of the exercise of the [decanting] power.”

i. The trustee should only be permitted to decant if one or more of the beneficiaries of the original trust are named as beneficiaries of the decanted trust. This gives the decanting trustee the power to remove, but not add, trust beneficiaries. The trustee, of course, should undertake any such removal only after careful consideration of all potential duty of loyalty concerns.

ii. Although the trustee should not be able to add trust beneficiaries, the statute should permit the trustee to grant beneficiaries of the decanted trust a general or limited power of appointment. This enables the powerholder to effectively add to the class of beneficiaries. The statute should include a perpetuities savings provision to avoid adverse tax consequences in these situations.

f. The statute should place limitations on the trustee’s ability to decant in certain circumstances.

i. The statute should expressly prohibit the acceleration of remainder interests.

ii. The standard of distribution in the second trust agreement should be limited to the same or a more restrictive standard than that contained in the original trust agreement. For instance, if the original trust limits trustee distributions to an ascertainable standard, then the decanted trust should also be required to limit trustee distributions to an ascertainable (or more stringent) standard. This limitation helps preserve the settlor’s intent by prohibiting a trustee from using the decanting authority to ease a beneficiary’s access to trust distributions.
iii. The statute should expressly prohibit the reduction of a fixed income, annuity, or unitrust interest.

iv. The statute should include appropriate savings provisions designed to:

   aa. avoid violations of the state’s rule against perpetuities;

   bb. preserve tax benefits, including marital and charitable deductions, of the original trust agreement; and

   cc. prevent beneficiaries from making a taxable gift upon the lapse of a withdrawal right.

g. The statute should set forth specific decanting procedures. While states may consider the use of a statutory decanting form, the statute’s decanting procedures should at least require that the decanting instrument be:

   i. in writing;

   ii. signed and acknowledged by the trustees authorized to participate in the decanting; and

   iii. kept with the original trust records.

h. Requiring that a trustee obtain beneficiary consent or court approval may result in adverse tax consequences. Therefore, the statute should only require that a trustee provide notice to affected beneficiaries, with no requirement for beneficiary or court approval. The statute may provide that a trustee or beneficiary may seek court approval, although this opens the door for unintended tax consequences.

i. A well-drafted statute should include other clarifying provisions.

   i. The decanting authority vested by statute should not abrogate the rights of any trustee, beneficiary, or grantor under common law or the terms of the trust instrument.

   ii. The statute should specify that a spendthrift provision in the original trust should not affect the trustee’s ability to decant. Likewise, a prohibition against amending or revoking a trust should not affect the decanting authority.
iii. The statute should apply to trusts governed by state law, including those trusts transferred to that state.

iv. The statute should not impose any duty or obligation on the trustee to act.

D. Advice to Practitioners and Trustees.

1. It is important to remember that decanting is just one tool in a practitioner’s toolbox. Irrevocable trusts can be modified in other ways, such as through a trust modification under the Uniform Trust Code or through other judicial or non-judicial settlement procedures.

2. If appropriate, speculation that the Service may soon issue guidance is no reason to delay when a trust decanting would otherwise be in the best interests of the beneficiaries. Practitioners can take measures to manage trustee and institutional risk, and vocal beneficiaries are unlikely to wait if their current trust arrangement is not to their liking.

3. A trustee’s first step in the decanting process is to determine that he or she has the authority to decant, either under the trust instrument or applicable state statute.

   i. Although trustees arguably have the power to decant under the common law of all states, if decanting authority is not explicitly granted by the trust agreement or state statute, the trustee should change the situs and/or governing law of the trust to a state with a decanting statute in place.

   ii. Changing trust situs offers the trustee a chance to forum shop based on the individual needs of the beneficiaries and the accessibility of state decanting statutes.

   iii. Any change in trust situs or governing law will be controlled by the procedures set forth in the trust agreement, if any, and applicable choice of law rules.

4. Once in a jurisdiction with a decanting statute, a trustee should take steps to protect himself or herself from fiduciary liability.

   i. As a general matter, a trustee should communicate openly and honestly with the trust beneficiaries and the settlor, if living. The trustee should take care, however, to avoid communications that would seem to indicate a preference for one beneficiary over
another or an implied agreement that the settlor reserved the use and control of irrevocable trust assets.

ii. The trustee should also ensure that he or she knows and understands the potential tax consequences of the decanting, especially if decanting a GST exempt trust. When the decanting involves shifting beneficial interests in trust, a trustee must proceed with extra caution.

iii. Unless a decanting involves purely administrative changes, practitioners should urge clients to rely on independent trustees with no beneficial interests in the trusts. This reduces the risk of both adverse tax consequences and fiduciary liability issues. The use of independent trustees is even more important if the decanting involves the shifting of beneficial interests or extension of vesting periods in trust.

iv. It is important to draft a proper decanting instrument. A decanting instrument may be similar to an exercise of a power of appointment, a property distribution agreement, or a trust merger agreement. In any form, a decanting instrument should include appropriate recitals that provide references to:

a. the terms of the original trust agreement;

b. the identity of current trustees and beneficiaries;

c. any relevant background information regarding the trust administration and need for decanting;

d. the source of the trustee’s authority to decant, either under the terms of the trust or applicable state statute; and

e. identifying information regarding the decanted trust agreement.

v. The trustee must remember to comply with all requirements under state law, including those relating to beneficiary notice.

vi. Although it may be tempting to do so, the trustee should not obtain a separate beneficiary release or grantor indemnification agreement. Obtaining a beneficiary release may result in adverse income, gift, or GST tax consequences, while obtaining a grantor’s indemnification may cause the decanted assets to be included in the grantor’s gross estate pursuant to Code §§ 2036 and 2038.
receipt and refunding agreement is a good alternative to beneficiary releases and grantor indemnifications.

vii. Finally, a trustee may protect himself or herself by including certain provisions in the decanted trust agreement. These include, but are not limited to:

   a. expressly prohibiting the extension of the perpetuities period beyond that of the first trust or as otherwise limited by applicable law;

   b. extending the time period for any trustee indemnification back to the creation of the original trust agreement; and

   c. giving the trustee of the new trust agreement the express authority to decant.