



## DECANTING IN NEVADA

### *Considerations for the Trustee Desiring to Decant*

#### **1 Decanting, Generally.**

1.1 What is Decanting? “Decanting” is the process of “pouring” some or all of the assets of an irrevocable trust into a new irrevocable trust that contains improved trust provisions. “Decanting” is one of many techniques that can be used to modify the terms of an irrevocable trust.<sup>1</sup> It must be done by the trustee as an exercise of existing discretion.

1.1.1 If the trustee of a trust has the discretion to make or decline to make distributions to beneficiaries, the trustee can exercise that power by “appointing” the assets of one trust into a second trust. NRS 163.556 is Nevada’s statute that permits “decanting”,<sup>2</sup> but it does not use that term.

1.1.2 Decanting may be considered when the trustee determines that it is appropriate to:

- (a) Divide a trust so that a beneficiary’s share will be held in a separate trust with a separate trustee;
- (b) Change the trustee or successor trustee or change the process for removing and replacing trustees;
- (c) Change or add advisors, such as an investment advisor or “trust protector;”
- (d) Remove one or more beneficiaries;
- (e) Change the tax status of the trust;<sup>3</sup>
- (f) Grant a power of appointment;
- (g) Change the assets or share allocated to beneficiaries or the timing and nature of distributions to beneficiaries;
- (h) Change applicable law or the trust situs; and/or
- (i) Add administrative provisions that can affect a beneficiary’s share, such as a no-contest clause, a provision requiring a property agreement with a spouse or significant other, a clause allowing the trustee to require drug testing of beneficiaries, a provision allowing the trustee to delay a distribution to a beneficiary who is under threat of a lawsuit, who is in bankruptcy, or going through a divorce, etc.

1.2 Eligibility. Decanting can be used to modify the interests of beneficiaries if distributions to them are made only in the discretion of the trustee. A trustee cannot use the decanting statute to defeat a beneficiary’s vested share in a trust. For example, a trustee cannot decant into a second trust if a beneficiary’s share is changed from a mandatory distribution to a discretionary distribution. The transactions that are expressly prohibited by statute include:

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<sup>1</sup> See the memo titled “Trust Modifications”. <http://www.rklegal.info/pdf/trustmodifications.pdf>.

<sup>2</sup> See <https://www.leg.state.nv.us/NRS/NRS-163.html#NRS163Sec556>.

<sup>3</sup> The IRS is not necessarily bound by such a change.

1.2.1 Nullifying an income interest or benefit that is needed for tax benefits, such as a charitable deduction, marital deduction, or a trust that qualifies for benefits under a specific tax-code provision;

1.2.2 Depriving a beneficiary of the benefit of specifically allocated property without the beneficiary's consent; or

1.2.3 Allocating property to a beneficiary under the second trust that is of a lesser value than the property allocated to that beneficiary under the original trust unless the property allocated is clearly sufficient to provide the original benefit.<sup>4</sup>

## **2 The Process of Decanting.**

2.1 Nevada Jurisdiction. If the original trust that is to be decanted is not already governed under Nevada law, the first step is to change the governing law and situs (domicile) of the trust. That must be done as permitted in the trust instrument or under the laws of the jurisdiction presently governing the original trust.<sup>5</sup> For a trust to be considered a Nevada trust, only a minimal connection (or "nexus") to Nevada is required.<sup>6</sup> Even so, that does not prevent another state from assuming jurisdiction, especially if there are more connections (e.g., trustees, beneficiaries, or assets) to that state than there are to Nevada. For that reason, it is prudent to bolster the Nevada nexus to the trust.

2.2 Creation. Decanting pours assets into another trust, but the trust can be an existing trust or a newly created trust. Under Nevada law, the second trust may be established by anyone, including the trustee or the original settlor.

2.2.1 The second trust can take the format of a completely different trust, a restated trust, or as an amendment that uses the original trust agreement with specified modifications.

2.2.2 The trust agreement should meet the requirements to create a Nevada trust.

2.2.3 For Nevada's spendthrift trust laws to apply<sup>7</sup>, a Nevada trustee is required, and the Nevada trustee must be an individual who is a bona fide resident of Nevada, a trust company recognized as such under Nevada law, or bank with trust powers under Nevada law. The bank or trust company must have an office in Nevada.

2.3 Decanting Declaration. The power to decant is a power of appointment that is held by the trustee and exercised in a manner consistent with the trustee's discretion under the terms of the original trust agreement, and so the trustee needs to sign a document that appoints and assigns some or all of the assets of the original trust into the second trust.

2.3.1 In our practice, the declaration includes a summary of the differences between the second trust and the original trust.

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<sup>4</sup> The provision will cease to apply October 1, 2019 because the 2019 Nevada Legislature passed AB 286.

<sup>5</sup> The failure to legally make Nevada law the trust's governing law will almost certainly negate any attempt to decant the trust under Nevada law. Nevada law will not apply to the process of changing the governing law and situs of the original trust.

<sup>6</sup> [NRS 164.010\(2\)](#).

<sup>7</sup> [NRS Chapter 166](#).

2.3.2 To educate the beneficiaries (either before or after the decanting is done) and to protect the trustee, the declaration also includes a recitation of the appropriate provisions of the Nevada "decanting" statute showing that the changes are either expressly permitted or not expressly prohibited.

2.3.3 Full disclosure is recommended. We attach a copy of the original trust as Exhibit "A" and a copy of the second trust as Exhibit "B". The assets being transferred (if not all assets are being transferred) can be shown on Exhibit "C". If legal issues might be affected by the decanting (such as GST tax issues or issues relating to the construction of the original agreement, the impact on beneficial interests, or applicable law), additional exhibits might include one or more opinion letters that support the decanting.

2.3.4 We recommend that the decanting declaration be signed by all co-trustees, including a Nevada trustee.

### **3 Other Steps**

3.1 Certification of Trust. A certification of trust that is compliant with NRS 164.410<sup>8</sup> should be prepared.

3.2 Tax Identification Number . If only some of the assets of the original trust are being decanted, the second trust will need its own tax identification number (also "employer identification number" or "EIN"). If all of the assets of the original trust are going into the second trust, we frequently keep the same name and EIN for the second trust, alleviating the need for asset-transfer documents. If the original trust is a grantor trust, it may not have a tax identification number other than the settlor's social security number, and that can continue if the second trust is also a grantor trust.<sup>9</sup>

3.3 Asset-Transfer Documents. If the second trust is created with a new name and a new tax identification number, asset-transfer (trust-funding) documents need to be prepared. If the second trust keeps the original trust's name and tax identification number, the decanting declaration can serve as an "assignment" of assets to the "second trust", but no other trust-funding document is required.

3.4 Consent of Beneficiaries. Nevada law does not require a beneficiary's consent to decant. Even so, if the beneficiaries agree with the decanting, consent forms should be prepared. If a beneficiary is being "virtually represented" by another beneficiary, it helps to recite Nevada law on virtual representation that supports that.

3.5 Notice to Beneficiaries. NRS 163.556 does not require that the Trustee notify the beneficiaries of a decanting.

3.5.1 That said, unless the original trust instrument provides otherwise, the Trustee is under the fiduciary duty to keep the beneficiaries "reasonably informed". Under Nevada law, the duty to inform and account does not apply to discretionary beneficiaries, but it does apply to remainder beneficiaries.

<sup>8</sup> See <https://www.leg.state.nv.us/NRS/NRS-164.html#NRS164Sec410>.

<sup>9</sup> We generally recommend a separate tax identification number for an irrevocable trust, even if it is a grantor trust. Using the settlor's social security number can lead to confusion. Some financial institutions commingle account information and online access for all accounts using the social security number. While that will not cause a tax problem, it may lead to granting online access and transfer authority to the settlor, when it really needs to be held solely by the Trustee(s)

3.5.2 An informal notice will inform the beneficiaries of the process and potentially reduces the likelihood of success in a later attempt years later to claim that they were not properly informed.

3.5.3 Nevada law permits a more formal “Notice of Proposed Action” process in which the Trustee gives written notice to the beneficiaries that explains the proposal to decant and gives them 30 days to object. If no one objects within 30 day, the Trustee is free to proceed without liability.

3.5.4 For even more protection, the Trustee can petition the probate court for ratification of the decanting, which requires a hearing and a notice of that hearing to the beneficiaries.

## 4 Final Thoughts

4.1 Fiduciary Duties. The trustee must be careful not to decant in a way that would breach a fiduciary duty. Decanting is a discretionary act performed by the trustee as an exercise of discretion that has been granted in the original trust agreement.

4.1.1 Nevada law may permit the trustee to decant, but that does not absolve the trustee of liability to a beneficiary if that beneficiary is deprived of benefits that could not have properly been withheld under the original trust instrument.

4.1.2 If the second trust into which assets are decanted contains scenarios that could never have occurred by the exercise of the trustee’s discretion in the original trust, the decanting is probably not prudent. If there is any question, the trustee should consider:

- (a) Obtaining a written consent from each beneficiary or from someone who “virtually represents” a beneficiary;
- (b) Sending each beneficiary a formal Notice of Proposed Action<sup>10</sup> that allows the trustee to proceed without liability if no beneficiary objects within 30 days; or
- (c) Filing a petition with the probate court asking the court to confirm and ratify the decanting.

4.2 Legal Advice. We recommend that the trustee consult with its own independent legal counsel in determining the nature and extent of any decanting. The settlor’s counsel or the counsel for a beneficiary will have a conflict of interest in advising you. If our firm is engaged by the settlor or the settlor’s beneficiaries, we cannot represent the trustee, and vice versa.

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<sup>10</sup> [NRS 164.725](#).