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HOW DO IRREVOCABLE TRUSTS SERVE FAMILIES AND THEIR HEIRS?

By: Steven Abernathy

Families who employ irrevocable trusts do so for multiple reasons, chiefly lessening tax burdens when wealth is passed to heirs. Modifying an irrevocable trust used to involve lengthy, potentially costly, time in court. Depending on how recognizable the family name was, unwanted media attention could ensue. Decanting a trust today is not done in court, costs a fraction of what it used to and allows for an air of discretion and privacy.

There are a variety of trusts and trust structures which, while easier to modify, don't offer the same tax advantages. Trust "decanting" allows a degree of change within these types of trusts. At one time, irrevocable trusts were hard to change—and even if you could, it was expensive to do so; including occasions where the trustee believed such an alteration would serve the interests of the recipient. Decanting a trust allows trustees to modify some provisos within it by "pouring" the assets into a new trust. 23 states allow this at present.

"Decanting is simply a tool. When a client brings in a problematic trust, there may not be enough flexibility within it, or it's very old. There may be features of the trust that we don't have the power to change by virtue of the grantor, trustee or trust advisor (a.k.a. trust protector) powers alone. In that case, we can "decant": appoint the property into a new trust with essentially the same substance but more features. There's no downside to this," says Austin F. DuBois, a law partner at Blustein, Shapiro, Rich & Barone in New York.

It's worth noting; not every state has the same rules, and, there are restrictions which vary greatly. Trustees, for example, may: move the trust to a state that offers greater flexibility as far as taxes go, push back the age at which the recipient gets a disbursement, or, if the trustee decides to retire, decanting creates an occasion where it may be easier to assign a new trustee. However, they're not allowed to change the beneficiary's interest



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which has vested to date. There are some states which allow the trustee's role to be divided among multiple people. For example, one person might deal with the trust paperwork, someone else would oversee to investments and another could manage payments to the recipients.

And, in certain states, trustees who decant an old trust where one person administers all three roles can transition to a new one where the roles are split. For instance, a family member might be named as the investment manager and take a more hands-on approach. In this situation, an outside facilitator, such as a family office, is recommended to act as counsel with a fiduciary, objective and unbiased approach.

Now, taxes in relation to decanting can be complex. When a family employs this to move a trust from one state to another, it's important to note the legal intricacies in each state—and counsel from an experienced tax attorney could prove useful here. A Connecticut Trust which is decanted in

another state won't necessarily make it "immune" to Connecticut taxes. (Real property based in Connecticut will be taxed in and by Connecticut – there is no getting around that.)

What about gift, income, generation-skipping, transfer and federal taxes? "If the decanting trust is similar to the appointing trust - no tax effect should ensue just with decanting - it should be a wash. The only tax differences are specific - i.e. new state, new terms," says DuBois. "You can use decanting to put assets from one trust into another and change the "situs", similar to residence, of the trust.

When you plan to move a trust from one state to another, it's important to fully understand the state tax implications and other state laws. Are you severing ties with the prior state? When something goes wrong, clients and beneficiaries will want the new trust to hold muster with whatever new state they are dealing with. However, when a trust is drafted appropriately from the get-go, there should already be provisions spelt out, so you need not rely on particularities of law separate from the document itself," says DuBois. Discretion, flexibility and the opportunity to change how heirs will receive assets are often discussed among family offices

and their clients. Here, an objective, outside facilitator, along with a highly skilled attorney, can guide this conversation so as to keep it efficient and in the best interests of the beneficiaries (for whom the trust was created in the first place). If you want to know if an irrevocable is appropriate for your wealth planning, please feel free to reach out to discuss this further with us.

Steven Abernathy counsels affluent families on multi-generational wealth management strategies. He contributes articles and commentary to a variety of publications. For more information, contact him at sabernathy@abbygroup.com.



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