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Decanting and Modification of SNTs

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I. Irrevocable Trusts and the Uniform Trust Code

Various new provisions addressing modification and termination of irrevocable trusts are included in the Uniform Trust Code, adopted now in 31 states and the District of Columbia¹. These provisions address whether a modification or termination of an irrevocable trust would run afoul of the settlor's intent or violate a material provision of the trust.

UTC §§ 410-417 provide a series of rules for terminating or modifying a trust other than by its express terms. Largely, the effect of these sections has been to increase flexibility consistent with the principle that preserving the settlor's intent is paramount.

Irrevocable trusts are useful devices that can protect assets from creditors, manage assets during incapacity and accomplish tax planning goals, all while enabling a settlor to carefully plan exactly how he wants his property to be divided and used once it is removed from his estate. Despite being drafted with the best of intentions, the extended terms of irrevocable trusts may prove challenging for trustees to implement, administratively inefficient, and acts an impediment to beneficiaries wishing to maximize the property they inherit.

- A. Existing trusts may lack flexibility, making them unable to adjust to unforeseeable changes in the law or circumstances that arise over time.

¹ As of the end of 2016, the following 32 jurisdictions had adopted some version of the UTC: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming

Alternatively, simple drafting errors or ambiguities in existing irrevocable trusts may make it difficult or costly for a trustee to implement the estate plan that the settlor had in mind at the time the irrevocable trust was created.

- B. The following list illustrates some circumstances under which an irrevocable trust might benefit from modification:
1. Administrative provisions of the original trust are outdated and inflexible;
 2. Beneficiary has unforeseen medical needs or public benefits eligibility issues, and the irrevocable trust contains no special needs provisions²;
 3. The original trust created unneeded (and expensive) bypass trusts, making the administration of the trust costly and inefficient for beneficiaries;
 4. Trusts with bad governing law provisions, or no remainder beneficiaries, or other administrative problems;
 5. Original trust lacks provisions to appointing a new trustee or successor trustee(s) and the trustee of the trust was improvidently selected;

² One variant which comes up often, but which does not immediately and obviously involve trust modification/decanting principles: the impending maturity of a Uniform Transfer to Minors Act beneficiary. If, for example, a 20-year-old is beneficiary of a UTMA account established years before, but has since become disabled, the UTMA account will generally not be treated as an available resource for public benefits purposes. Upon the child's 21st birthday, however, the UTMA account is distributable to her outright, and therefore becomes an available resource. Can principles of modification or decanting help?

Perhaps. The UTMA itself is silent on the possibility, though its treatment of accounts as essentially statutory trusts would suggest that anything a trustee could do in another setting would be available in a UTMA account.

Texas has a different idea. Its version of the UTMA, at Texas Property Code §141.015(b-1), expressly permits transfer of UTMA funds to a trust for the benefit of the minor (remembering that "minor" usually means a child under age 21). The recipient trust, however, must be a grantor trust under IRC §2503(c).

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