

Decanting Irrevocable Trusts in Texas

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What is Decanting?

Decanting is . . .

1. *A method for modifying an **irrevocable** trust.*
1. *Initiated by a **Trustee** with authority over trust **principal**.*
1. *Accomplished by the Trustee distributing all or some of the assets of one trust to a second trust.*

Source of Authority to Decant

Power to Decant May Exist Under . . .

1. Governing Trust Instrument
1. Common Law Power of Trustee
1. State Statute

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Source of Authority to Decant

Under Common Law . . .

- ✓ Courts have recognized the authority of Trustee with broad discretion ***over principal*** to distribute “in further trust”
- ✓ Early decision: *Phipps v. Palm Beach Trust Co.* (1940)
- ✓ Broad Trustee discretion over principal is equivalent to a “special power of appointment,” which includes power to distribute in further trust

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Source of Authority to Decant

Under Common Law . . .

Power of Trustee to Decant NOT Unlimited:

Trustee Duties . . .

- To Act Reasonably and in Good Faith
- To Act in the Interest of the Beneficiaries
- To Adhere to Intent & Purposes of the Trust
- To Follow Other Fiduciary Duties
(Duty of Loyalty, Impartiality, No Self-Dealing, etc.)

Source of Authority to Decant

Decanting Under State Statutes

- ✓ New York passed first decanting statute 1992
- ✓ 26 States currently have decanting statutes
- ✓ Texas passed decanting statute in 2013
- ✓ Texas modified decanting statute in 2017

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"Decanting: A Solution for Defective or Problematic Trusts"