

To: Scope and Program Committee

From: David English, Executive Director, JEB-UTEA

Date: 1/8/12

Re: Trust Decanting

JEB-UTEA recommends that the Scope and Program Committee appoint a drafting committee to draft an amendment to the Uniform Trust Code addressing the ability of a trustee to amend an irrevocable trust by a method known as trust decanting.

Trust decanting, a technique which has gained wide currency within the past several years, is a nonjudicial means for modifying an irrevocable trust. Ten or so states have enacted statutes on the subject, most within the past few years. The 2011 Missouri statute is among the most advanced and might serve as the drafting model. Before modifying an irrevocable trust, the trustee must send notice to the affected beneficiaries informing them of the right to object. If no objection is made, the modification may proceed. The curious name “decanting” arises because the trustee does not technically modify the existing trust but instead pours over the affected beneficiaries’ interest into a new trust with different terms.

Except in Florida, which has an old case authorizing the technique, the common law support for decanting is quite uncertain. Decanting is used to correct trusts that fail to qualify for certain tax benefits. The IRS has expressed concerns and is currently refusing to issue rulings on the effect of decanting. The use of decanting in special needs planning is quite popular and is also less controversial.

Although judicial modification of trusts is authorized under the UTC, decanting is much less expensive and easier to implement, which may be the main reason behind its growing popularity.

JEB-UTEA recommends the appointment of a drafting committee to draft an appropriate decanting provision as an amendment to the Uniform Trust Code. Any such project should be coordinated with outreach to the Internal Revenue Service to assure that the new provision is tax-qualified. On 12/21/11, the Service issued Notice 2011-101, requesting comments on the effect of decanting on a variety of income and GST tax attributes. To assure the success of this project, any decanting provision should comply with any guidance that the Service might issue in follow-up to this comment request.

There is no need for the project to go to a study committee. There is widespread consensus among estate planners that a fully detailed decanting provision is desirable. Also, the detailed paper written by Shabnam Nouriae of the University of Missouri class of 2011 may be used as a drafting guide. This paper, which analyzes the state statutes issue by issue, was specifically designed for this purpose. The main hurdle in this project will be obtaining the concurrence of the IRS. If that concurrence is obtained, the UTC provision on decanting will likely be widely enacted.