

Out With the Old and In With the New:
Comparing and Contrasting Trust Decanting Under State Statutory Law
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Trust decanting is the term used to describe the “pouring over” of trust property from one trust (the first trust) into a newly created trust (the second trust). It gets its name from the process of decanting wine, whereby the wine is poured from one vessel into another to get rid of unwanted sediment.¹ Conceptually, decanting is similar to the exercise by a trustee of a power of appointment under property law.² The idea behind decanting being that a trustee with the power to distribute trust property to beneficiaries also has the power to appoint the trust property to a new trust through a power of appointment.³ Decanting has been called “one of the most significant advancements in modern personal trust law” and can be used for a multitude of purposes.⁴

At the time of this writing, eleven states have trust decanting statutes and some, including Missouri, are considering decanting legislation.⁵ Despite the fact that many state legislatures have eagerly added decanting to their state’s cache of estate planning tools, questions about decanting remain.⁶ Some critics see decanting as dangerous and question the wisdom of

¹ “When we decant a trust, the liquid is the trust principal, the first vessel is the original trust instrument, the second vessel is the new trust instrument, and the unwanted sediment is the unwanted terms and conditions of the original trust instrument, or the lack of desirable terms and conditions in the original trust instrument.” Anne Marie Levin & Todd A. Flubacher, *Put Decanting to Work to Give Breath to Trust Purpose*, 38 Est. Pln. 3, 3 (2011).

² George L. Cushing, *Trust to Trust Transfers and the Trustee’s Duty of Loyalty*, 3 (2010).

³ William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 Real Prop. Tr. & Est. L.J. 1, 2 (2010).

⁴ Levin & Flubacher, *supra* at 3.

⁵ M. Patricia Culler, *Demystifying Decanting and Ohio’s Proposed Statute*, 20 Ohio Probate L.J. 135, 3 (2010) (“In addition to Ohio, Colorado, Minnesota, Missouri, Pennsylvania and South Carolina are considering decanting statutes. No doubt others are in the works.”); There are also unofficial reports that the National Conference of Commissioners on Uniform State Laws (NCCUSL) is considering uniform decanting legislation. Thomas E. Simmons, *Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. Rev. 253, 273 (2010).

⁶ “As more advisors become familiar with the significant benefits of state decanting statutes, practical questions arise concerning the use of decanting to amend problematic trusts.” Levin & Flubacher, *supra* at 2.

allowing trustees to reform irrevocable trusts through decanting.⁷ In addition, there is confusion about the extent to which decanting is supported by common law. Even in states that have adopted decanting statutes there is continued uncertainty as the statutes themselves are interpreted and further refined.

I. WHY DECANT?

More and more, in the context of trusts, “irrevocable” does not mean unassailable.⁸ Developments allowing for new ways to alter trusts have likely been in response to the existence of more long-term trusts.⁹ As states have acted to extend or eliminate the common law Rule against Perpetuities, trusts are lasting longer.¹⁰ Longer-lasting trusts mean more opportunity for unforeseen changes and settlors today must draft with a consideration for any number of possible future events. In addition to the emergence of longer-lasting trusts, many trusts already in existence are controlled by archaic instruments that lack the flexibility of more modern trusts.¹¹ For both situations, decanting can provide a straightforward and comprehensive solution.

There are a number of specific ways in which decanting can be utilized. This article will deal only with the non-tax reasons to decant. Decanting can be used for a host of purposes: to conform a trust to the requirements of a “supplemental needs trust,” change trustee

⁷ Thomas E. Simmons writes: “Some practitioners--the author included--have reservations about the scope and startling reach of this newly enacted trustee power, whether or not the power may have already existed in some form under common law. Drafting against the possibility of future trust decanting by the trustee is certainly possible, as the very first phrase of the South Dakota trust decanting statutes suggests...Without addressing the possibility in the trust instrument itself, this trust power is now firmly in play. And trusts, as the greatest creation of English law, are subject to being rewritten by their trustees.” Simmons, *supra* at 283.

⁸ Simmons, *supra* at 254.

⁹ See Cushing, *supra* at 1.

¹⁰ *Id.*

¹¹ “Many existing trusts are governed by arcane instruments that lack the flexibility and modern tools that are found in trust instruments drafted today. An evolution of drafting techniques over the last 50 years has provided significantly more flexibility, utility, and detail in the terms of governing instruments. Many of the provisions that are boilerplate and have come to be expected by beneficiaries and fiduciaries are simply lacking in older documents.” Levin & Flubacher, *supra* at 8.

provisions,¹² change beneficial interests,¹³ change administrative provisions, change the “situs” of a trust, correct a drafting error,¹⁴ and to add or delete a spendthrift provision.¹⁵¹⁶

While a number of the above-named goals can be reached through other routes, such as beneficiary consent, court approval, or trust modification,¹⁷ some cannot. In addition, obtaining approval by all beneficiaries can be time-consuming and may ultimately prove impossible. Court approval or trust modification can be similarly protracted and, in addition, is expensive. Allowing a trustee the flexibility to decant conserves time, energy, and trust assets. In addition, if a trust settlor determines that he or she does not want the trustee to have decanting powers, the trust can be drafted to disallow decanting or to require court approval for certain changes.¹⁸

II. COMMON LAW BACKGROUND

There is support in some states for decanting as a common law right. Despite the fact that there is little case law on the topic, there are a few cases that are commonly cited. The only one that serves as solid support for a common law right to decant is *Phipps v. Palm Beach Trust Co.*,¹⁹ a Florida Supreme Court case from 1940. The court in *Phipps* found that the trustees in

¹² For example, to add or modify provisions that govern the appointment of successor trustees, including provisions relating to trustee removal. Cushing, *supra* at 3.

¹³ This may include changing the duration of a trust. *State Decanting Statutes*, PRACTICAL DRAFTING, U.S. Trust, Bank of Am. Private Wealth Mgmt., 4 (2008); It may also include granting powers of appointment to the beneficiaries to enable them to designate who will succeed to their beneficial interests. Cushing, *supra* at 4.

¹⁴ Drafting errors can be corrected through decanting without having to go to court. Cushing, *supra* at 4.

¹⁵ *State Decanting Statutes*, PRACTICAL DRAFTING, U.S. Trust, Bank of Am. Private Wealth Mgmt., 4 (2008).

¹⁶ This list is non-exhaustive. There are many other reasons to decant, among them: combining trusts for greater efficiency, separating trusts, segregating “high risk” assets, and reducing distribution rights for Medicaid eligibility planning purposes. Simmons, *supra* at 255.

¹⁷ See Simmons, *supra* at 266-70; see also Culp & Mellen, *supra* at 27-28; Sections 410-17 of the Uniform Trust Code (U.T.C.) include provisions for modifying, reforming, and even combining or dividing trusts in various circumstances. U.T.C. § 410-17 (West 2000); The terms of a noncharitable, irrevocable trust may be modified or terminated with the consent of the settlor and all the beneficiaries, even if such modification or termination is inconsistent with the material purpose of the trust. U.T.C. § 411(a) (West 2000); In some circumstances, with court approval, the U.T.C. allows for such modification with approval from less than all of the beneficiaries. U.T.C. § 411(e).

¹⁸ Each decanting statute begins with something similar to: “Unless the terms of a testamentary instrument or irrevocable trust provide otherwise...”

¹⁹ 196 So. 299 (Fla. 1940).

the case had common law authority to decant.²⁰ Although the court did not refer to it as “decanting,” it stated that “[T]he power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than fee unless the donor clearly indicates a contrary intent.”²¹ Ultimately, the court found that the trustees in the case had a special power of appointment, and thus could create a second trust by way of this power.²² This was later codified in 2007 with the enactment of the Florida decanting statute,²³ discussed below.

A few other cases are often cited as potential support for common law decanting, but their connection to decanting is attenuated at best. *In re Estate of Spencer*²⁴ is one such case. *Spencer* deals specifically with the extent to which a special power of appointment may be exercised.²⁵ In the case, the Iowa Supreme Court found that the trustee could exercise a special power of appointment in further trust, as the trust did not prohibit such exercise of the power.²⁶ It is worth noting that the special power of appointment was given to the trustee by his wife and exercised through his will. It was not a discretionary power to distribute.²⁷ Read narrowly, *Spencer* suggests that a special power of appointment may be exercised to appoint property outright or in trust, so long as the trust instrument does not prohibit it.²⁸ Broadly construed, the case stands for the proposition that a trustee may decant unless plainly prohibited by the terms of the original trust.²⁹

²⁰ *Id.*

²¹ *Id.* at 301.

²² *Id.*

²³ See FLA. STAT. ANN. § 736.04117 (West 2011).

²⁴ 232 N.W.2d 491 (Iowa 1975).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 493-94.

²⁸ Simmons, *supra* at 260.

²⁹ *Id.*

The Massachusetts Supreme Court, in Loring v. Karri-Davies,³⁰ however, came to a different conclusion on similar facts. The settlor in the case attempted to exercise two powers of appointment, granted to her by her father, by appointing trust property in further trust.³¹ The court noted that the issue before it was whether the powers of appointment were validly exercised when the settlor appointed the property in further trust.³² Noting a jurisdictional split on the issue, the court determined that the exercise was not valid.³³ After a lengthy discussion, the court held that, “[W]here it does not appear that the donor of a special power of appointment intended the donee thereof to exercise such power by an appointment in further trust, any attempt by the donee to do so is invalid.”³⁴ In essence, Spencer and Loring stand in direct opposition to each other.

Another case that is sometimes cited in support of decanting is the New Jersey case of Wiedenmayer v. Johnson.³⁵ In that case the trustee sought to distribute all of the trust property to the beneficiary of the trust, conditioned on the beneficiary then contributing the property to a new trust.³⁶ The trustee’s objective in so doing was to eliminate the contingent remaindermen of the first trust.³⁷ It should be noted also that the original trust gave the trustee absolute discretion to distribute principal, provided that the distribution be in the beneficiary’s “best interests.”³⁸ The court in Wiedenmayer opined that because the remaindermen’s interests could have been eliminated by an outright distribution, the trustee had the power to distribute to the beneficiary

³⁰ 357 N.E.2d 11 (Mass. 1976).

³¹ *Id.* at 13.

³² *Id.*

³³ *Id.* at 14.

³⁴ *Id.*

³⁵ 254 A.2d 534 (N.J. Super Ct. App. Div. 1969), *aff’d*, Wiedenmayer v. Villanueva, 259 A.2d 465 (N.J. 1969).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

with the condition that the beneficiary put the property into another trust.³⁹ An important feature of the case is the fact that the beneficiary had to consent in order for the trustee to act. This distinction suggests that the issue in the case was really a contractual one and not one of a trustee's right to decant.

III. RESTATEMENT VIEW

As noted above, decanting has been likened to the exercise of a power of appointment.⁴⁰ The rationale underlying this is that a trustee with discretionary power to distribute property to current beneficiaries effectively has a power of appointment.⁴¹ That power allows a trustee, in lieu of distributing directly to the beneficiaries, to distribute the property to a second trust for their benefit. This comparison, however, is not supported by the Restatement Third of Trusts. Section 50 of the Restatement Third holds: "A trustee's discretionary power with respect to trust benefits is to be distinguished from a power of appointment. The latter is not subject to fiduciary obligations and may be exercised arbitrarily within the scope of the power."⁴² Although this most recent edition of the Restatement of Trusts clarifies the nature of powers of appointment with regard to trustees, it provides little guidance for decanting overall.⁴³ It does not deal squarely with the thorny question of whether a trustee has an inherent power to decant on other grounds and instead leaves the issue open.⁴⁴

³⁹ *Id.*

⁴⁰ See Simmons, *supra* at 262.

⁴¹ Culp & Mellon, *supra* at 2.

⁴² RESTATEMENT (THIRD) OF TRUSTS § 50 (A Tentative Draft was approved in 2009 and the final Tentative Draft will be presented for approval at the 2011 Annual Meeting; http://www.ali.org/index.cfm?fuseaction=projcts.proj_ip&projectid=17).

⁴³ The Restatement Third of Property, Wills and Other Donative Transfers, supports the view that a fiduciary distributive power is not a power of appointment. See *infra* note 44.

⁴⁴ The following history is helpful in understanding the Restatement view on powers of appointment: Section 11.1 of the Restatement Second of Property provides that "a power of appointment is authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property." RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 11.1 (West 2011); In addition, included in the comments to that section is the statement that a "trustee holding a discretionary power has a power of appointment as defined in this section." *Id.* at § 11.1, cmt. d; Section 19.3 of the Restatement Second of Property provides further support for

Acting prudently, a trustee would be unlikely to decant based solely on a common law right. There is only a small amount of such authority for decanting and the restatement is vague and unclear on issues that concern decanting. Given this landscape, it is not surprising that a number of states have recently passed decanting statutes and others have decanting legislation in the works.

IV. STATE STATUTES

As noted above, eleven states presently have decanting statutes. These states are New York,⁴⁵ Alaska,⁴⁶ Delaware,⁴⁷ Tennessee,⁴⁸ Florida,⁴⁹ South Dakota,⁵⁰ New Hampshire,⁵¹ North

decanting as a power held by the trustee. That section holds that, absent a contrary provision in the instrument creating a power of appointment (the trust), a power of appointment may be exercised in further trust. *Id.* at § 19.3; (*Spencer* suggests that there is a split of authority regarding whether the holder of a limited power of appointment could appoint in further trust.) Simmons, *supra* at 262-263 (citing *In re Estate of Spencer*, 232 N.W.2d 491); The Restatement Third of Property, Wills and Other Donative Transfers however, calls into question the use of powers of appointment as authority for a trustee to decant. Section 17.1 states that “A power of appointment is a power that enables the donee of the power, acting in a nonfiduciary capacity, to designate recipients of beneficial ownership interests in the appointive property.” RESTATEMENT (THIRD) OF PROPERTY, WILLS AND OTHER DONATIVE TRANSFERS § 17.1 (West 2011). The comments to that section differentiate between fiduciary distributive powers and powers of appointment, providing that “a fiduciary distributive power is not a power of appointment.” *Id.* at 17.1, cmt. g; The differences, most notably the fact that fiduciaries owe fiduciary duties to the beneficiaries, are reiterated. *Id.*

⁴⁵ N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (West 2011); New York’s trust decanting statute was the first of its kind and went into effect in 1992. Those who supported the legislation argued that decanting was already authorized under existing common law in New York and that the statute would simply codify already existing law. Simmons, *supra* at 271; Although the statute seems to have been enacted in order to extend the generation-skipping transfer tax, it has been used by practitioners for multiple other purposes. Culp & Mellen, *supra* at 2; The New York statute has been called one of the most conservatively drafted statutes, but there are efforts under way to amend the statute, thus expanding its applicability. Culler, *supra* at 3.

⁴⁶ ALASKA STAT. § 13.36.157 (West 2011); In 1998, Alaska became the second state, after New York, to enact a statutory framework for trust decanting. *Id.*

⁴⁷ DEL. CODE ANN. tit. 12, § 3528 (West 2011); In 2003, Delaware adopted a trust decanting statute and became the third state with such a statute. *Id.*

⁴⁸ TENN. CODE ANN. § 35-15-816(b)(27) (West 2011); Tennessee enacted a trust decanting statute in 2004, making it the fourth state with trust decanting legislation. *Id.*

⁴⁹ FLA. STAT. ANN. § 736.04117 (West 2011); Florida did not adopt its trust decanting statute until 2007. However, as noted above, in *Phipps v. Palm Beach Trust Co.* (196 So. 299 (Fla. 1940)), the Florida Supreme Court found that the trustees in the case had common law authority to decant, although the court did not refer to it as “decanting.” Simmons, *supra* at 272.

⁵⁰ 2011 S.D. Session Laws Ch. 212 (H.B. 1155) (amending S.D. CODIFIED LAWS § 55-2-15) (West 2011); South Dakota’s statutory framework for decanting was, like Florida’s, adopted in 2007, with modifications occurring in 2008, 2009, and 2011. The statutes were apparently modeled after the Delaware decanting statute. Simmons, *supra* at 263.

⁵¹ N.H. REV. STAT. ANN. § 564-B:4-418 (West 2011); In 2008, a year after the Florida and South Dakota statutes were adopted, New Hampshire adopted its own decanting statute. *Id.*

Carolina,⁵² Arizona,⁵³ Nevada,⁵⁴ and Indiana.⁵⁵ All but the New York and Alaska statutes have been enacted since 2003. In addition, Ohio, Colorado, Minnesota, Missouri, Pennsylvania, and South Carolina are considering decanting legislation.⁵⁶ The eleven state decanting statutes, while different in some significant respects, are also similar in a number of ways. The first area of similarity regards the issue of fixed income interest. Ten of the state statutes specify that a fixed income interest may not be reduced by a decanting, with Delaware's decanting statute not addressing the issue.⁵⁷

A second issue on which the statutes correspond relates to the type of trust to be decanted.⁵⁸ All but one of the state decanting statutes seem to apply to both inter vivos and testamentary trusts, with North Carolina's applying only to inter-vivos trusts.⁵⁹ Yet a third area where the decanting statutes are alike deals with the rule against perpetuities.⁶⁰ In most of the states that still have a rule against perpetuities, the decanting statute has a savings provision.⁶¹

There are also few areas where the statutes line up exactly. None of the states require court approval before a decanting can occur,⁶² with four expressly providing that court approval

⁵² N.C. GEN. STAT. ANN. § 36C-8-816.1 (West 2011); North Carolina's trust decanting statute went into effect in 2009. *Id.*

⁵³ 2011 Ariz. Sess. Laws (H.B. 2403) (amending ARIZ. REV. STAT. ANN. § 14-10819) (West 2011); The Arizona decanting statute was initially enacted in 2009. *Id.*

⁵⁴ 2011 Nev. Stat. (S.B. 221) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011); Nevada, like North Carolina and Arizona, adopted its trust decanting statute in 2009. *Id.*

⁵⁵ IND. CODE ANN. § 30-4-3-36 (West 2011); The most recent of the eleven states to adopt a decanting statute, Indiana's went into effect in 2010. *Id.*

⁵⁶ Culler, *supra* at 3.

⁵⁷ See *supra* notes 45-55; In addition, the more recent decanting statutes tend to also include prohibitions on reductions to fixed annuity or unitrust interests and protections for marital or charitable deductions or gift tax exclusions allowed under the first trust. Culp & Mellen, *supra* at 23.

⁵⁸ See *supra* notes 45-55.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² However, some states such as New York, do require judicial approval for the trustee's fees to be increased in the new trust. Simmons, *supra* at 271-72.

may be sought.⁶³ In addition, not a single state decanting statute requires that the trustee in the second trust be the same as in the first.⁶⁴

While the decanting statutes are similar in a number of ways, there are also major ways in which they differ. There are at least seven critical places where the statutes diverge. These include: 1) the amount of discretion required to decant; 2) treatment of trustee-beneficiaries; 3) whether or not notice to existing beneficiaries is required; 4) whether a trustee is required to file the decanting instrument; 5) how a trustee's fiduciary duties are affected; 6) permissible beneficiaries of the second trust; and 7) whether decanting allows transfer to a trust in another state (or country). While not every state statute addresses each of these seven issues, silence on an issue also affects the law of decanting in such a state. Each of these issues will be discussed extensively below.

A. Discretion Required to Decant

Indicative of the importance of the issue, each of the state statutes explicitly address the amount of discretion required to decant. Three of the states- New York, Florida, and Indiana- require that a trustee have absolute power over distributions before a trustee may decant. The New York statute requires “absolute discretion” in order to decant.⁶⁵ Similarly, the Florida statute requires that a trustee possess “absolute power” to invade principal before the trustee can decant.⁶⁶ Unlike New York, however, the Florida statute provides that a power to invade principal for “best interests, welfare, comfort, or happiness” amounts to an absolute power to

⁶³ These states are New York, North Carolina, Arizona, and Nevada; *see supra* notes 45-55.

⁶⁴ *See supra* notes 45-55.

⁶⁵ N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1) (West 2011). The statute provides: “[A] trustee who has the **absolute** discretion...to invade the **principal** of a trust... may exercise such discretion...” *Id.*

⁶⁶ FLA. STAT. ANN. § 736.04117(1)(a) (West 2011). The statute provides: “[A] trustee who has **absolute** power under the terms of a trust to invade the **principal** of the trust...to make distributions...may instead exercise the power by appointing all or part of the principal...” *Id.*

invade.⁶⁷ Indiana's statute also requires absolute discretion to invade principal as a prerequisite for decanting.⁶⁸ Seemingly taking Florida's lead, the Indiana statute describes what is meant by 'absolute discretion,' noting that the term *absolute* need not be used.⁶⁹

The other eight state statutes require something less than absolute discretion. The Alaska, Delaware, and Tennessee statutes require only "authority" to invade principal.⁷⁰ Alaska also requires that the standard for accessing principal be no more liberal in the second trust than it was in the first⁷¹ and the Delaware statute explicitly provides that the decanting must comply with any standard stated in the trust instrument.⁷³ South Dakota's statute allows a trustee to decant "whether or not restricted by any standard," as long as the trustee has "discretion" under

⁶⁷ *Id.* at § (1)(b). The statute also provides: "For purposes of this subsection, an absolute power to invade principal shall include a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes." *Id.*

⁶⁸ IND. CODE ANN. § 30-4-3-36(a) provides: "[A] trustee who has **absolute** power under the terms of a trust...to invade the **principal** of the trust to make distributions...may instead exercise the power by appointing all or part of the principal of the first trust in favor of a trustee of another trust..." *Id.*

⁶⁹ *Id.* at § (b). The statute also provides: "For purposes of this section, an absolute power to invade principal includes a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support regardless of whether the term "absolute" is used." *Id.*

⁷⁰ ALASKA STAT. § 13.36.157(a) provides: "[A] trustee who has **authority** under the terms of an instrument...to invade the **principal** of a trust for the benefit of a beneficiary...may exercise...the trustee's authority by appointing...part or all of the principal of the trust in favor of a trustee of another trust..." *Id.*; The Alaska statute at one time required absolute discretion, but this was amended. *State Decanting Statutes*, PRACTICAL DRAFTING, U.S. Trust, Bank of Am. Private Wealth Mgmt., 6 (2008); DEL. CODE ANN. tit. 12, § 3528(a) provides: "[A] trustee who has **authority**...to invade the **principal** of a trust...to make distributions...may instead exercise such authority..." *Id.*; TENN. CODE ANN. § 35-15-816(b)(27)(A) provides: "A trustee who has **authority**...to invade the **principal** of a trust to make distributions...may instead exercise such authority by appointing all or part of the principal...in favor of a trustee of another trust." *Id.*

⁷¹ ALASKA STAT. § 13.36.157(a)(4) clarifies: "[The resulting or second trust must have] a standard for invading principal that is the same as the standard for invading principal in the invaded trust." *Id.*

⁷² It is arguable whether, at common law, a trustee who has power to distribute principal to a beneficiary or beneficiaries under an ascertainable standard (e.g. maintenance, support, health and education) would have the power to distribute to another trust even if the terms of the recipient trust provide the same standard. The argument being that the distribution to the second trust is not a distribution for the purpose. Culler, *supra* at 8; The Alaska and North Carolina statutes deal with this directly, providing that the trustee may decant "whether or not there is a current need to [invade principal/income] under any standard stated in the [first trust]." Culp & Mellen, *supra* at 21.

⁷³ DEL. CODE ANN. tit. 12, § 3528(a)(5) states: "The exercise of such authority shall comply with any standard that limits the trustee's authority to make distributions from the first trust." *Id.*

the governing instrument.⁷⁴ The New Hampshire statute allows any trustee with “discretion to make distributions” to decant.⁷⁵ North Carolina allows a decanting to occur even if the trustee has only discretionary power to distribute principal or income⁷⁶ and like Alaska, North Carolina requires that the discretionary standard remain the same in the first and second trust.⁷⁷ Arizona allows a trustee to decant “regardless of whether a standard is provided in the instrument,” as long as the trustee has “discretion to make distributions.”⁷⁸ The Nevada statute requires only that a trustee have “discretion or authority to distribute trust income or principal” in order to decant.⁷⁹

Worth noting is the fact that New York, Alaska, Delaware, Tennessee, Florida, and Indiana specify that distributions for a decanting may be made only from principal.⁸⁰ South Dakota, North Carolina, and Nevada allow distributions from both income and principal.⁸¹ New

⁷⁴ 2011 S.D. Session Laws Ch. 212 (H.B. 1155) (amending S.D. CODIFIED LAWS § 55-2-15) (West 2011). The amended statute provides: “[I]f a trustee has **discretion** under the terms of a governing instrument to make a distribution of **income or principal**...of a trust (the “first trust”), whether or not restricted by any standard, then the trustee may instead exercise such discretion by appointing part or all of the income or principal subject to the discretion in favor of a trustee of a second trust (the “second trust”)...” *Id.*

⁷⁵ N.H. REV. STAT. ANN. § 564-B:4-418(a) provides: “[A] trustee with the **discretion** to make distributions to or for the benefit of one or more beneficiaries of a trust (the “first trust”) may exercise that discretion...in favor of another trust for the benefit of one or more of those beneficiaries (the “second trust”)...” *Id.*

⁷⁶ N.C. GEN. STAT. ANN. § 36C-8-816.1(b) provides: “A trustee of an original trust may...exercise the **discretionary power** to distribute **principal or income** to or for the benefit of one or more current beneficiaries of the original trust by appointing all or part of the principal or income of the original trust...in favor of a trustee of a second trust.” *Id.*

⁷⁷ The statute also provides: “If a trustee of an original trust exercises a power to distribute principal or income that is subject to an ascertainable standard by appointing property to a second trust, then the power to distribute income or principal in the second trust must be subject to the same ascertainable standard as in the original trust...” *Id.* at § 36C-8-816.1(c)(7).

⁷⁸ 2011 Ariz. Sess. Laws (H.B. 2403) (amending ARIZ. REV. STAT. ANN. § 14-10819) (West 2011). The amended version provides: “[A] trustee who has the **discretion**...to make distributions, **regardless of whether a standard is provided** in the instrument or agreement, for the benefit of a beneficiary of the trust may exercise...the trustee’s discretion by appointing **part or all of the estate** trust in favor of a trustee of a trust under an instrument other than that under which the power to make distributions was created...” *Id.*

⁷⁹ 2011 Nev. Stat. (S.B. 221) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011). The newly amended version of the statute provides: “[A] trustee with **discretion or authority** to distribute trust **income or principal** to or for a beneficiary of the trust may exercise such discretion or authority by appointing the property subject to such discretion or authority in favor of a second trust...” *Id.*

⁸⁰ See *supra* notes 65, 66, 68, 70 and accompanying text.

⁸¹ See *supra* notes 74, 76, 79 and accompanying text.

Hampshire's statute does not specify where distributions may come from⁸² and the Arizona statute simply refers to "part or all of the estate."⁸³

B. Treatment of Trustee-Beneficiaries

A number of the newer state statutes deal head-on with the issue of trustees who are also beneficiaries of the first trust. This issue might fall more generally into the category of fiduciary duties, discussed later, but inclusion of specific provisions regarding trustee-beneficiaries suggests that the issue is important enough to warrant particular attention.⁸⁴

The first five states to enact statutes- New York, Alaska, Delaware, Tennessee, and Florida- did not include trustee-beneficiary provisions. In addition, Indiana's statute does not deal with the issue.⁸⁵ The remaining five states specifically address trustee-beneficiaries, but in different ways. South Dakota's statute deals with the topic in a unique way, describing a trustee as a "restricted trustee" if the trustee is a beneficiary of the first trust or if a beneficiary of the first trust has the power to change the trustee.⁸⁶ The statute then goes on to specify when such a trustee may not decant.⁸⁷ A "restricted trustee" may not decant if the decanting would benefit the trustee as a beneficiary of the first trust, unless the exercise is limited by an ascertainable standard "based on or related to health, education, maintenance, or support."⁸⁸ In addition, a "restricted trustee" cannot decant to remove restrictions on discretionary distributions to a beneficiary, imposed by the first trust.⁸⁹ The statutes also prohibits a "restricted trustee" from

⁸² See note 75 and accompanying text.

⁸³ See note 78 and accompanying text.

⁸⁴ Practitioners should be especially aware of the possible tax consequences in cases involving trustee-beneficiaries. Levin & Flubacher, *supra* at 3.

⁸⁵ This is interesting, considering it is the most recently enacted statute, going into effect in 2011.

⁸⁶ 2011 S.D. Session Laws Ch. 212 (H.B. 1155) § 55-2-15 (amending S.D. CODIFIED LAWS § 55-2-15) (West 2011).

⁸⁷ *Id.* at § 55-2-15(2).

⁸⁸ *Id.* at § 55-2-15(2)(a)

⁸⁹ *Id.* at § 55-2-15(2)(b) "Except that a provision in the second trust which limits distributions by an ascertainable standard based on or related to the health, education, maintenance, or support of any such beneficiary is permitted."
Id.

decanting if the decanting would increase distributions from the second trust to the restricted trustee or to a beneficiary who may change the restricted trustee unless the exercise of the authority is limited by an ascertainable standard “based on or related to health, maintenance, education, or support.”⁹⁰

New Hampshire and Nevada have provisions that are practically identical to each other and which take a route similar to South Dakota’s in handling trustee-beneficiaries. Unlike South Dakota, those statutes use separate provisions to deal with the issue of beneficiaries that may change the trustee. Both statutes stipulate that a trustee who is a beneficiary of the first trust may not decant if the trustee does not have discretion to make distributions to him or herself.⁹¹ The New Hampshire statute also restricts a trustee-beneficiary from decanting if the trustee’s discretion to make distributions to him or herself is limited by an ascertainable standard.⁹² The Nevada statute takes a slightly different route, indicating that a trustee-beneficiary may not decant if the trustee’s discretion to make distributions to him or herself is limited by an ascertainable standard *and* under the terms of the second trust, the trustee’s discretion is not limited by the same standard.⁹³

Both statutes forbid a trustee-beneficiary from decanting if the trustee’s discretion to make distributions to him or herself is limited by consent of a co-trustee (or other person with an adverse interest)⁹⁴ but under the terms of the second trust, the trustee’s discretion to make distributions to him or herself is not limited by an ascertainable standard *and* is exercisable

⁹⁰ *Id.* at § 55-2-15(3).

⁹¹ N.H. REV. STAT. ANN. § 564-B:4-418(c)(1)(A) (West 2011); 2011 Nev. Stat. (S.B. 221 § 179) § 163.556(3)(a)(1) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011).

⁹² N.H. REV. STAT. ANN. § 564-B:4-418(c)(1)(B) (West 2011).

⁹³ 2011 Nev. Stat. (S.B. 221 § 179) § 163.556(3)(a)(2) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011).

⁹⁴ Presumably, under the first trust, although the statute does not state this.

without consent of a co-trustee (or other person with an adverse interest).⁹⁵ Lastly, the New Hampshire and Nevada statutes both provide that a trustee-beneficiary may not decant if the terms of the decanting allow the trustee of the second trust discretion to discharge the trustee's legal support obligations, while under the terms of the first trust the trustee could not.⁹⁶

North Carolina handles the trustee-beneficiary matter simply. If a trustee is also a beneficiary of the first trust, that trustee may NOT decant.⁹⁷ The statute does allow for a co-trustee or majority of remaining co-trustees to decant if the trustee(s) is not also a beneficiary of the trust.⁹⁸ If all trustees are beneficiaries, the court may appoint a special fiduciary with authority to decant.⁹⁹ Arizona's decanting statute maintains only that, when a trustee is also a possible beneficiary of the first trust, the ascertainable standard applicable for distributions from the second trust must be the same or more restrictive as in the first.¹⁰⁰

C. Notice

Whether or not notice is required is another area where the statutes diverge. New York, Florida, North Carolina, and Indiana all require notice of a decanting.¹⁰¹ However, the statutes differ in defining who must be notified,¹⁰² when notification must occur,¹⁰³ the terms of the

⁹⁵ N.H. REV. STAT. ANN. § 564-B:4-418(c)(1)(C) (West 2011); 2011 Nev. Stat. (S.B. 221 § 179) § 163.556(3)(a)(3) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011).

⁹⁶ N.H. REV. STAT. ANN. § 564-B:4-418(c)(2) (West 2011); 2011 Nev. Stat. (S.B. 221 § 179) § 163.556(3)(b) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011).

⁹⁷ N.C. GEN. STAT. ANN. § 36C-8-816.1(d) (West 2011).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 2011 Ariz. Sess. Laws (H.B. 2403) § 14-10819(A)(4) (amending ARIZ. REV. STAT. ANN. § 14-10819) (West 2011).

¹⁰¹ N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(d), (e) (West 2011); FLA. STAT. ANN. § 736.04117(4) (West 2011); N.C. GEN. STAT. ANN. § 36C-8-816.1(f) (West 2011); IND. CODE ANN. § 30-4-3-36(e) (West 2011).

¹⁰² New York requires notice to "all persons interested in the trust," defining that term as "all persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee." N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(d), (e) (West 2011); Florida, North Carolina, and Indiana require notice to "qualified beneficiaries." FLA. STAT. ANN. § 736.04117(4) (West 2011); N.C. GEN. STAT. ANN. § 36C-8-816.1(f) (West 2011); IND. CODE ANN. § 30-4-3-36(e) (West 2011); The U.T.C. defines "qualified beneficiary" as follows: "Qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is determined: (A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated

notification,¹⁰⁴ and whether waiver discharges the notification duty.¹⁰⁵¹⁰⁶ New Hampshire requires notice only to charitable organizations and only if the organization has “the rights of a qualified beneficiary.”¹⁰⁷ The Alaska, Delaware, Tennessee, South Dakota, and Arizona statutes are silent on the issue of notice and the Nevada statute merely states that “a trustee *may* give notice of a proposed action.”¹⁰⁸

D. Filing

Not all states require that a trustee file the decanting instrument with the trust documents. Although the filing issue is pretty black and white, either the instrument must be filed or not, it is a difference worth noting. Seven of the eleven states- New York, Delaware, Tennessee, Florida, North Carolina, Nevada, and Indiana- require that the trustee file the decanting instrument,¹⁰⁹ while the remaining four states- Alaska, South Dakota, New Hampshire, and Arizona- are silent on the issue. For the most part, states that are silent regarding notice are also silent on the issue of filing and those that require notice also require filing. Interestingly, Delaware and Tennessee

on that date without causing the trust to terminate; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date. U.T.C. § 103 (West 2000).

¹⁰³ Florida, North Carolina, and Indiana require notice *before* the decanting occurs, but differ on how much notice is needed. New York only requires notice that a decanting has occurred, with a copy of the decanting instrument served on “all persons interested in the trust.” *See supra* note 101.

¹⁰⁴ New York, for example, requires notice “by registered or certified mail, receipt requested, or by personal delivery or upon application of the trustee in any other manner directed by the court,” while the other three states do not specify how notice must be made. *See supra* note 101.

¹⁰⁵ New York does not address waiver. Florida, North Carolina, and Indiana all provide for waiver of notice if all qualified beneficiaries consent. *See supra* note 101.

¹⁰⁶ The Florida, North Carolina, and Indiana statutes specify that notice by the trustee does not limit the right of a beneficiary to object to the decanting. New York does not address the issue. *See supra* note 101.

¹⁰⁷ N.H. REV. STAT. ANN. § 564-B:4-418(d) (West 2011).

¹⁰⁸ Emphasis added; 2011 Nev. Stat. (S.B. 221) § 163.556(5) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011).

¹⁰⁹ N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(d) (West 2011); DEL. CODE ANN. tit.12, § 3528(b) (West 2011); TENN. CODE ANN. §35-15-816(b)(27)(B) (West 2011); FLA. STAT. ANN. § 736.04117(2) (West 2011); N.C. GEN. STAT. ANN. § 36C-8-816.1(f)(1) (West 2011); 2011 Nev. Stat. (S.B. 221) § 163.556(7) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011); IND. CODE ANN. § 30-4-3-36(c) (West 2011).

are both silent on the issue of notice, but require a decanting instrument to be filed.¹¹⁰ Nevada does not require notice (a trustee *may* give notice) but requires filing.¹¹¹

E. Fiduciary Duties

Determining how decanting affects a trustee's fiduciary duties is a complex and weighty consideration. Regardless of whether a trustee decants under common law or statute, the trustee is presumably subject to fiduciary duties when exercising the power.¹¹² While some fiduciary duties can be altered under the trust instrument, a settlor cannot eliminate them altogether.¹¹³ The duty to act in the interest of the beneficiaries¹¹⁴ and to act with prudence in administering the trust are underlying duties that cannot be completely done away with.¹¹⁵ In addition, the duty to act in good faith remains, regardless of the terms of the trust.¹¹⁶

Taking into account these underlying fiduciary duties, decanting raises some important questions for trustees and beneficiaries. First, might a trustee have a fiduciary duty to decant in certain situations?¹¹⁷ A number of state statutes deal with this explicitly, detailing that the statute imposes no duty to decant.¹¹⁸ Other states, however, leave the issue open. Worth noting is the fact that under the Uniform Trust Code (UTC) a trustee is given authority to divide or combine trusts in certain situations.¹¹⁹ In the right circumstances, failure to do so could be a breach of the

¹¹⁰ See *supra* note 109.

¹¹¹ *Id.*

¹¹² This remains true regardless of the level of discretion required under the statute. Culp & Mellen, *supra* at 21.

¹¹³ Cushing, *supra* at 15.

¹¹⁴ The duty to act in the interest of beneficiaries falls more generally under the "duty of loyalty," and includes the duty to treat beneficiaries impartially. Simmons, *supra* at 283.

¹¹⁵ Cushing, *supra* at 15.

¹¹⁶ *Id.* at 15-16.

¹¹⁷ It is possible that the duty to act in the best interests of the trust may sometimes require decanting. In addition, South Dakota's statute suggests that there may be a duty to decant. ("Before exercising its discretion to appoint and distribute assets to a second trust, the trustee of the first trust shall determine whether the appointment is necessary or desirable after taking into account the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution.") 2011 S.D. Session Laws Ch. 212 (H.B. 1155) § 55-2-15 (amending S.D. CODIFIED LAWS § 55-2-15) (West 2011).

¹¹⁸ The statutes will be discussed at length later in this section.

¹¹⁹ U.T.C. § 417 (2000); see Cushing, *supra* at 18-19.

trustee's fiduciary obligations.¹²⁰ While decanting is not identical to combination and division of trusts under the UTC, the comparison is nonetheless useful in considering whether a trustee may have a duty to decant when a statute is silent on the issue.¹²¹

Another consideration for a trustee considering a decanting is the duty of impartiality. Can the remaindermen of the first trust be eliminated through a decanting? Can a decanting result in preference for income generation over long-term capital appreciation?¹²² It would seem that the duty of impartiality would prohibit either of these results, but the state statutes do not expressly address the issue.¹²³

The state decanting statutes vary in their treatment of a trustee's fiduciary duties. As noted above, some serve to protect the trustee by explicitly stating that the statute creates no duty to exercise the power it confers. Others reiterate, usually by citing other statutes, the trustee's fiduciary duties. A few statutes do both. Four states- Alaska, Delaware, Tennessee, and Arizona- have statutes that are silent on the issue of fiduciary duty. Four of the remaining states- Florida, North Carolina, Nevada, and Indiana¹²⁴-explicitly protect trustees by stating that the trustee has no duty to decant.¹²⁵ The remaining three states- New York, South Dakota, and New Hampshire- take different routes. The New York decanting statute disallows the exoneration of a trustee of his or her fiduciary duties as against public policy, citing another New York

¹²⁰ Cushing, *supra* at 18-19.

¹²¹ *Id.*

¹²² "In many instances, this inherent conflict will be exacerbated depending on the specific decanting proposal under consideration." Simmons, *supra* at 283.

¹²³ "The duty of impartiality will no doubt act as the primary "break" on the decanting "train." Simmons, *supra* at 283; "[I]t is difficult to imagine the factual scenario where the trustee would not violate its fiduciary duty of impartiality owed to that beneficiary who is being eliminated; under the right circumstances, however, this is possible." Levin & Flubacher, *supra* at 10.

¹²⁴ FLA. STAT. ANN. § 736.04117(6) (West 2011); N.C. GEN. STAT. ANN. § 36C-8-816.1(g) (West 2011); 2011 Nev. Stat. (S.B. 221) § 163.556(10) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011); IND. CODE ANN. § 30-4-3-36(g) (West 2011).

¹²⁵ The Florida, North Carolina, and Indiana statutes do note that notice by a trustee does not limit the rights of beneficiaries to object to a decanting, unless otherwise provided by the statute. FLA. STAT. ANN. § 736.04117(4) (West 2011); N.C. GEN. STAT. ANN. § 36C-8-816.1(f)(4) (West 2011); IND. CODE ANN. § 30-4-3-36(e) (West 2011).

statute.¹²⁶ Additionally, the statute forbids a trustee from raising his or her own commission, unless directed by a court to do so.¹²⁷ The statute does not speak to whether a trustee has a duty to decant, however.

South Dakota, on the other hand, has the only decanting statute suggesting that a trustee may have a duty to decant.¹²⁸ The language of the statute reads: “Before exercising its discretion to appoint and distribute assets to a second trust, the trustee of the first trust shall determine whether the appointment is necessary or desirable after taking into account the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution.”¹²⁹ While potentially creating a duty to decant,¹³⁰ South Dakota’s statute also protects trustees by citing statutes that limit when a court can review the trustee’s decision to decant.¹³¹ Like South Dakota, New Hampshire is protective of both trustees and beneficiaries. That statute states that a trustee has no duty to decant or to consider a decanting, while also emphasizing that a trustee must decant in good faith.¹³²

F. Permissible Beneficiaries of the Second Trust

The next area of difference has to do with the permissible beneficiaries of the second, newly created trust. While most of the decanting statutes treat the issue similarly, the language of the statutes varies. As a general rule, the statutes at least require that the beneficiaries of the second trust be from the pool of permissible beneficiaries of the first trust.¹³³ Only one state,

¹²⁶ N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1) (West 2011).

¹²⁷ *Id.* at § 10-6.6(c).

¹²⁸ 2011 S.D. Session Laws Ch. 212 (H.B. 1155) § 55-2-15 (amending S.D. CODIFIED LAWS § 55-2-15) (West 2011).

¹²⁹ *Id.*

¹³⁰ “Conceivably, South Dakota will also be presented at some point with a claim for breach of fiduciary duty against a trustee for failing to decant.” Simmons, *supra* at 283.

¹³¹ 2011 S.D. Session Laws Ch. 212 (H.B. 1155) § 55-2-15(10) (amending S.D. CODIFIED LAWS § 55-2-15) (West 2011).

¹³² N.H. REV. STAT. ANN. § 564-B:4-418(e), (f) (West 2011).

¹³³ It should be noted that exercise of a common law decanting power, strictly speaking, would allow provisions of a second trust only to be in favor of current beneficiaries and not remaindermen. Culler, *supra* at 135.

Indiana, suggests that perhaps the two trusts must have identical beneficiaries, maintaining that a trustee may decant as long as “the beneficiaries of the second trust are the same as the beneficiaries of the first trust.”¹³⁴ South Dakota, on the other hand, indicates that the second trust may have as beneficiaries “one or more of the beneficiaries of the first trust” but does not require that the beneficiaries be identical.¹³⁵

Of the remaining states, a few refer to permissible beneficiaries as the “proper objects of the power,”¹³⁶ while others simply state that beneficiaries of the second trust may include only beneficiaries of the first or invaded trust.¹³⁷

The extent to which remainder beneficiaries can be included in the second trust is a complicated issue. Presumably, if we liken decanting to a special power of appointment,¹³⁸ the “objects” of a trustee’s discretionary distribution powers include only beneficiaries to whom current distributions may be made.¹³⁹ This means that the second trust may have provisions for current beneficiaries of the first trust only and not for remaindermen of the first trust.¹⁴⁰ In addition, if at some point in the future the second trust had no beneficiaries who were objects of the power when it was created, the property in the second trust would revert back to the first

¹³⁴ IND. CODE ANN. § 30-4-3-36(a)(1) (West 2011).

¹³⁵ 2011 S.D. Session Laws Ch. 212 (H.B. 1155) § 55-2-15(1) (amending S.D. CODIFIED LAWS § 55-2-15) (West 2011).

¹³⁶ N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1) (West 2011); DEL. CODE ANN. tit.12, § 3528(a)(1) (West 2011); TENN. CODE ANN. §35-15-816(b)(27)(A)(ii) (West 2011).

¹³⁷ (Alaska, Florida, New Hampshire, North Carolina, Arizona, and Nevada all get to the same place using different language.) ALASKA STAT. § 13.36.157(a)(2) (West 2011); FLA. STAT. ANN. § 736.04117(1)(a)(1) (West 2011); N.H. REV. STAT. ANN. § 564-B:4-418(b)(1) (West 2011); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(1), (2) (West 2011); 2011 Ariz. Sess. Laws (H.B. 2403) § 14-10819(A)(3) (amending ARIZ. REV. STAT. ANN. § 14-10819) (West 2011); 2011 Nev. Stat. (S.B. 221) § 163.556(2)(a) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011).

¹³⁸ Eight of the eleven state statutes specify that decanting under the statute is considered the exercise of a (special) power of appointment. N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (West 2011)(f); ALASKA STAT. § 13.36.157(c) (West 2011); DEL. CODE ANN. tit.12, § 3528(c) (West 2011); FLA. STAT. ANN. § 736.04117(3) (West 2011); N.C. GEN. STAT. ANN. § 36C-8-816.1(e)(1) (West 2011); 2011 Ariz. Sess. Laws (H.B. 2403) § 14-10819(C) (amending ARIZ. REV. STAT. ANN. § 14-10819) (West 2011); 2011 Nev. Stat. (S.B. 221) § 163.556(8) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011); IND. CODE ANN. § 30-4-3-36(d) (West 2011).

¹³⁹ Culler, *supra* at 5.

¹⁴⁰ *Id.*

trust.¹⁴¹ A few states deal squarely with the reverter issue. Alaska, Delaware, and Nevada all have provisions that allow for the second trust to continue in such a circumstance.¹⁴² However, those states do not permit the interests of the beneficiaries who were not objects of the power to be altered by a decanting.¹⁴³ According to the statutes, the governing instrument of the second trust may provide that “after a time or an event specified,” the trust assets of the second trust will be held for the beneficiaries of the first trust on terms that are substantially identical to the terms of the first trust.¹⁴⁴

Most of the state statutes, however, seem to permit the second trust to have provisions for remainder beneficiaries, effectively accelerating those interests.¹⁴⁵ South Dakota has the only statute that specifically addresses remaindermen, allowing for the second trust to include “beneficiaries of the first trust...to or for whom a distribution of income or principal may be made in the future from the first trust or at a time or upon the happening of an event specified under the first trust.”¹⁴⁶

G. Trust Situs

Despite the fact that a majority of the state statutes do not address trust situs,¹⁴⁷ issues relating to situs are among the most significant with regard to decanting.¹⁴⁸ In a state without a

¹⁴¹ *Id.* “[T]hat limits the utility of common law decanting, particularly if the class of current beneficiaries is small.” *Id.*

¹⁴² N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(d) (West 2011); DEL. CODE ANN. tit.12, § 3528(a) (West 2011); 2011 Nev. Stat. (S.B. 221) § 163.556(6)(b) (amending NEV. REV. STAT. ANN. § 163.556) (West 2011).

¹⁴³ Culler, *supra* at 6.

¹⁴⁴ It is unclear exactly what the term “after a time or event specified” means and what its implications are. (“For example, would it be possible to decant for one of several current beneficiaries for a short period of time (a day, a month, a year), after which the provisions for the remainder beneficiaries of the original trust would apply, thereby cutting off current beneficiaries and accelerating remainder beneficiary interests?”) Culler, *supra* at 6.

¹⁴⁵ This seems to be true so long as the second trust does not have as beneficiaries anyone who is not a beneficiary of the first trust. Culler, *supra* at 5.

¹⁴⁶ 2011 S.D. Session Laws Ch. 212 (H.B. 1155) § 55-2-15(1)(b) (amending S.D. CODIFIED LAWS § 55-2-15) (West 2011)

¹⁴⁷ New York, Delaware, Tennessee, Florida, New Hampshire, North Carolina, Nevada, and Indiana do not address the issue of situs in their decanting statutes.

decanting statute, a trustee may want to change the situs of a trust to a state with a decanting statute (or with a more favorable decanting statute).¹⁴⁹ Or, in a state with a decanting statute, the statute itself may be used to change the situs of the trust.¹⁵⁰ There are a number of tax and non-tax reasons for wanting to change a trust's situs through decanting. For example, it may be necessary for a foreign trust to be converted to a US person for federal tax purposes.¹⁵¹ This can be accomplished through decanting.¹⁵² It is also possible that an irrevocable self-settled trust was created at a time when asset protection trusts did not exist or in a jurisdiction that did not allow them.¹⁵³ In such a case, the trust could be decanted to a new trust that conforms to the requirements of the applicable asset protection trust statutes in a jurisdiction that allows such trusts.¹⁵⁴ Decanting a trust from one state to another may also allow a trust to avoid state income tax on any undistributed income or capital gains.¹⁵⁵

The three states that do address this issue- Alaska, South Dakota, and Arizona- do so similarly.¹⁵⁶ The text of all three affirm that the statute applies to a trust “governed by the laws of this state,” including a trust “whose governing jurisdiction is transferred to this state.”¹⁵⁷ Alaska's statute goes a bit further, stating that the statute also applies to a trust that has a trustee

¹⁴⁸ Practitioners should be aware of the choice of law rules applicable to the trust before and after the decanting, noting that in some circumstances the law designed will not be respected if it runs contrary to strong public policy in the state having the strongest relationship to the trust. Culp & Mellen, *supra* at 25.

¹⁴⁹ *State Decanting Statutes*, PRACTICAL DRAFTING, U.S. Trust, Bank of Am. Private Wealth Mgmt., 13-14 (2008); See also Culp & Mellen, *supra* at 24-25.

¹⁵⁰ *State Decanting Statutes*, PRACTICAL DRAFTING, U.S. Trust, Bank of Am. Private Wealth Mgmt., 13 (2008) (“This assumes, however, that the decanting statute permits creation of the second trust to be governed by the law of another state.”) *Id.*

¹⁵¹ Levin & Flubacher, *supra* at 9.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Benjamin H. Pruett, *Tales From the Dark Side: Drafting Issues From the Fiduciary's Perspective*, 35 ACTEC J. 331, 340 (2010).

¹⁵⁶ ALASKA STAT. § 13.36.157(b) (West 2011); 2011 S.D. Session Laws Ch. 212 (H.B. 1155) § 55-2-15(10) (amending S.D. CODIFIED LAWS § 55-2-15) (West 2011); 2011 Ariz. Sess. Laws (H.B. 2403) § 14-10819(B) (amending ARIZ. REV. STAT. ANN. § 14-10819) (West 2011).

¹⁵⁷ *Id.*

who is a “qualified person” and a majority of the trustees sign an instrument providing that the primary administration of the trust will be located in Alaska.¹⁵⁸ In addition, under the statute, that instrument must be acknowledged by oath or affirmation under the laws of Alaska or under equivalent provisions of the laws of another jurisdiction.¹⁵⁹

V. CONCLUSION

Despite the indistinctness that typifies the common law and restatement view of decanting, as more and more states adopt statutes, it seems clear that trust decanting is here to stay. Allowing for the remodeling of old trusts in need of renovation and aiding settlors of today in crafting trusts that can amply deal with future situations, decanting is a unique and powerful tool. Finding the best way to restrain the power that decanting provides while offering freedom enough to allow decanting to remain a valuable tool has been a big challenge for state decanting statutes. As a result, there are many unanswered questions about decanting, even in states with decanting legislation. It may take some time, but as new states add decanting statutes to their codes, states with decanting legislation continue to fine-tune their statutes, and courts of law interpret those statutes, questions about decanting will slowly but surely be answered.

¹⁵⁸ ALASKA STAT. § 13.36.157(b) (West 2011).

¹⁵⁹ *Id.* For a step-by-step account of a decanting that changed the trust’s situs from Massachusetts to Alaska, *see* Cushing, *supra* at 4.

