

# **Analysis of Selected Trust Decanting Statutes**

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## New York

Codified at: [N.Y. Estates, Powers, and Trusts Code § 10-6.6](#)

Enacted: 1992; significantly amended by [A.B. 8297](#) in 2011

Uniform Trust Code state: NO

Discretion required to decant: A trustee with unlimited discretion to invade trust principal may decant to a new trust benefitting one or more of the current beneficiaries. N.Y. EST. POWERS & TRUSTS § 10-6.6(b) (2011). A trustee with the power to invade trust principal but without unlimited discretion may decant to a new trust provided that the beneficiaries and some terms of the old trust remain unchanged. N.Y. EST. POWERS & TRUSTS § 10-6.6(c) (2011).

Treatment of trustee-beneficiaries: Not specifically addressed, but subsection (h) imposes fiduciary duties on the decanting trustee, and prohibits decanting when there is substantial evidence of a contrary intent by the old trust's creator. N.Y. EST. POWERS & TRUSTS § 10-6.6(h) (2011).

Notice: Under subsection (j), a copy of the instrument exercising decanting power, along with a copy of both the old and the new trust, must be delivered to (A) the trust creator, if living, (B) any person having the right to remove and replace the trustee under terms of the old trust, and (C) all persons interested in either trust. N.Y. EST. POWERS & TRUSTS § 10-6.6(j)(2) (2011). Notice must be delivered by registered or certified mail, return receipt requested, by personal delivery, or in any other manner directed by the court having jurisdiction over the old trust. *Id.* Consent not required, but an interested person may object within 30 days of receiving notice. N.Y. EST. POWERS & TRUSTS § 10-6.6(j)(4) (2011).

Filing: Required to file with the court having jurisdiction of the old trust. N.Y. EST. POWERS & TRUSTS § 10-6.6(j)(6) (2011).

Fiduciary duties: An authorized trustee exercising the power to decant has a fiduciary duty to exercise the power in the best interests of one or more of the proper objects of the power using a prudent person standard. N.Y. EST. POWERS & TRUSTS § 10-6.6(h) (2011). May not decant if there is substantial evidence of the creator's contrary intent. *Id.* The provisions of the old trust alone do not constitute substantial evidence of a contrary intent unless they specifically prohibit the trustee from exercising the power of appointment in the manner intended. *Id.* There is no duty to decant. N.Y. EST. POWERS & TRUSTS § 10-6.6(l) (2011). A trustee has the duty to consider tax implications of decanting. N.Y. EST. POWERS & TRUSTS § 10-6.6(o) (2011). A trustee may not decant to change a trustee's compensation without a court order. N.Y. EST. POWERS & TRUSTS § 10-6.6(q) (2011).

Permissible beneficiaries of the new trust: If the trustee has unlimited discretion to invade principal: (i) the beneficiaries of the new trust must include at least one beneficiary of the old trust, (ii) the new trust

may grant discretionary powers of appointment to a beneficiary that was entitled to receive the principal outright under the old trust, provided that the power of appointment may only exclude as permissible appointees certain persons listed in subsection (b)(2), and (iii) the new trust may duplicate any power of appointment that was included in the old trust. N.Y. EST. POWERS & TRUSTS § 10-6.6(b) (2011). If the trustee does not have unlimited discretion: (i) all current, successor, and remainder beneficiaries must be identical under both trusts, (ii) the new trustee must have the same limited powers of distribution as the old trustee, (iii) if the term of the new trust extends beyond the term of the old trust, the new trustee may have unlimited discretion to invade principal during the extended term, (iv) any class beneficiaries shall include present and future members of the class, and (v) any power of appointment in the terms of the old trust must be included in the new trust with an identical list of permissible appointees. N.Y. EST. POWERS & TRUSTS § 10-6.6(c) (2011).

Situs: Unless the old trust expressly provides otherwise, the statute applies to (i) any trust governed by the laws of NY, including a trust whose governing law was changed to NY, and (ii) any trust having a trustee domiciled in NY or with an office in NY, provided a majority of the trustees agree in writing that NY is the situs for primary administration. N.Y. EST. POWERS & TRUSTS § 10-6.6(r) (2011).

#### Other Provisions:

Extended term: Permissible, if the term does not violate the state rule against perpetuities. N.Y. EST. POWERS & TRUSTS § 10-6.6(e) & (p) (2011).

Multiple trustees: Any single trustee with unlimited discretion to invade principal may decant, even if other trustees do not have unlimited discretionary power. N.Y. EST. POWERS & TRUSTS § 10-6.6(f) (2011).

Need to invade principal: Decanting permitted even if there is no current need to invade principal. N.Y. EST. POWERS & TRUSTS § 10-6.6(g) (2011).

Default rules for newly-found trust property: May be includable depending on when found. N.Y. EST. POWERS & TRUSTS § 10-6.6(i) (2011).

Trust may prohibit decanting: The express terms of a trust may prohibit decanting, but a mere statement of irrevocability or a spendthrift clause is insufficient. N.Y. EST. POWERS & TRUSTS § 10-6.6(m) (2011).

Prohibited effects: A trustee may not decant in order to reduce or modify a beneficiary's current right to a mandatory distribution, to decrease a trustee's liability, to eliminate a power to replace the trustee, to fix the value of any trust asset, or to jeopardize any tax benefit. N.Y. EST. POWERS & TRUSTS § 10-6.6(n) (2011).

## Missouri

Codified at: [Missouri Revised Statutes §456.4-419](#)

Enacted: 2011 by [SB 59](#)

Uniform Trust Code state: YES – new section added to Article 4

Discretion required to decant: Discretionary power to make a distribution of income or principal, whether or not limited by an ascertainable standard. MO. REV. STAT. § 456.4-419 ¶ 1 (2011).

Treatment of trustee-beneficiaries: May not decant unless the exercise of discretionary power to distribute is limited by an ascertainable standard. MO. REV. STAT. § 456.4-419 ¶ 2(2)(a) (2011).

Notice: Notice is required sixty days before decanting to the permissible distributees or qualified beneficiaries of the new trust, but not of the old trust. MO. REV. STAT. § 456.4-419 ¶ 3 (2011).

Filing: Not required.

Fiduciary duties: Trustee must take into account the terms and purposes of the old trust, the terms and purposes of the new trust, and the consequences of decanting. MO. REV. STAT. § 456.4-419 ¶ 1 (2011). The trustee remains subject to all fiduciary duties imposed by Missouri law. MO. REV. STAT. § 456.4-419 ¶ 4 (2011). No duty to decant. MO. REV. STAT. § 456.4-419 ¶ 5 (2011).

Permissible beneficiaries of the new trust: One or more of the beneficiaries of the old trust who may receive a discretionary distribution and who are proper objects of the exercise of the power, or one or more of the beneficiaries of the old trust who could have received a future distribution at a time or upon the happening of an event specified in the old trust. MO. REV. STAT. § 456.4-419 ¶ 2(1) (2011).

Situs: Applies to any trust governed by the laws of Missouri, including a trust whose principal place of administration is transferred to Missouri before or after the statute's enactment. MO. REV. STAT. § 456.4-419 ¶ 6 (2011).

### Other Provisions:

Certain trustees prohibited from decanting: A trustee may not decant if any beneficiary has the right to remove the trustee and substitute a "related or subordinate party." MO. REV. STAT. § 456.4-419 ¶ 2(2)(b) (2011).

Present right to withdraw protected. A trustee may not decant trust property subject to a presently exercisable right of withdrawal unless the power is the same under the new trust. MO. REV. STAT. § 456.4-419 ¶ 2(6) (2011).

Trust may prohibit decanting: The express terms of a trust may prohibit decanting, but a mere statement of irrevocability or a spendthrift clause is insufficient. MO. REV. STAT. § 456.4-419 ¶ 2(7) (2011).

Prohibited effects: Unless decanting is necessary for a distribution to a beneficiary under an ascertainable standard, decanting may not increase the distributions to either the trustee of the old trust or to a beneficiary with the power to remove and replace the trustee of the old trust, or remove restrictions on discretionary distributions imposed by the first trust. MO. REV. STAT. § 456.4-419 ¶ 2(3) (2011). Decanting may not extend the vesting period for gifts excluded from the federal gift tax. MO. REV. STAT. § 456.4-419 ¶ 2(4) (2011). Decanting may not reduce the income interest of any beneficiary under a marital trust, CRT, GRAT, or a business trust qualified under I.R.C. § 1361(d) or (e). MO. REV. STAT. § 456.4-419 ¶ 2(5) (2011).

## Kentucky

Codified at: Not yet codified

Enacted: 4/11/2012 by [HB 155 \(Sec. 4\)](#)

Uniform Trust Code state: NO

Discretion required to decant: Discretionary power to distribute income or principal, to or for the benefit of one or more current beneficiaries of the old trust. KY. REV. STAT. § 386.XXX(1)(b) (2012).

Treatment of trustee-beneficiaries: If the trustee is a possible beneficiary and distributions from the old trust are subject to an ascertainable standard, the new trust shall be subject the same or a more restrictive ascertainable standard. KY. REV. STAT. § 386.XXX(4)(h) (2012).

Notice: Notice is required sixty days before decanting to all current beneficiaries of the old trust and all members of the oldest generation of remainder beneficiaries of the old trust. KY. REV. STAT. § 386.XXX(7)(b) (2012). An objection must be filed within 30 days after receipt of the required notice. KY. REV. STAT. § 386.XXX(7)(d) (2012).

Filing: Decanting instrument must be filed with the records of the old trust. KY. REV. STAT. § 386.XXX(1)(b) (2012).

Fiduciary duties: Statute is silent, except to note that there is no duty to decant. KY. REV. STAT. § 386.XXX(8) (2012).

Permissible beneficiaries of the new trust: May include only beneficiaries of the old trust. KY. REV. STAT. § 386.XXX(4)(a) (2012). A future beneficiary's interest may not be accelerated to a present interest in the new trust. KY. REV. STAT. § 386.XXX(4)(b) (2012). The new trust may confer a power of appointment upon a beneficiary of the old trust that was eligible to receive a distribution. KY. REV. STAT. § 386.XXX(4)(i) (2012). Permissible appointees may include persons that were not beneficiaries under the original trust, but the state rule against perpetuities applies. *Id.*

Situs: The statute is silent as to its own applicability, but notes that a new trust may be created or administered under the laws of any jurisdiction. KY. REV. STAT. § 386.XXX(3) (2012).

### Other Provisions:

Present right to withdraw protected. A trustee may not decant trust property subject to a presently exercisable right of withdrawal unless the power is the same under the new trust, or sufficient assets remain in the old trust to satisfy the withdrawal right. KY. REV. STAT. § 386.XXX(4)(f) (2012).

Trust may prohibit decanting: the express terms of a trust may prohibit decanting, but a mere statement of irrevocability or a spendthrift clause is insufficient. KY. REV. STAT. § 386.xxx(6)(c) (2012).

Prohibited effects: Decanting may not reduce any fixed income, annuity, or unitrust interest of any beneficiary under the old trust. KY. REV. STAT. § 386.xxx(4)(c) (2012). If the old trust qualified for a tax deduction, the new trust may not contain any provision that would have reduced or eliminated that deduction. KY. REV. STAT. § 386.xxx(4)(d) (2012). Decanting may not extend the vesting period for gifts excluded from the federal gift tax. KY. REV. STAT. § 386.xxx(4)(e) (2012). The new trust may not prevent or eliminate a small business trust election. KY. REV. STAT. § 386.xxx(4)(g) (2012).

Need to invade principal: Decanting permitted even if there is no current need to invade principal. KY. REV. STAT. § 386.xxx(2) (2012).

Special Fiduciary: The court may appoint a special fiduciary with authority to decant. KY. REV. STAT. § 386.xxx(5) (2012). The statute does not require a reason, but presumably a special fiduciary would be required if the trustee is ineligible or unwilling to decant.

CRTs Excluded: The decanting statute is inapplicable to charitable remainder trusts. KY. REV. STAT. § 386.xxx(9) (2012).

## Virginia

Codified at: Code of Virginia § 55-548.16:1

Enacted: 4/4/2012 by [SB 110](#)

Uniform Trust Code state: YES – Section added to Article 8

Discretion required to decant: Discretionary power to distribute principal or income to or for the benefit of one or more beneficiaries of the old trust. VA. CODE § 55-548.16:1(B) (2012).

Treatment of trustee-beneficiaries: “Interested trustees” (defined in the statute) may not decant, but non-interested co-trustees may decant. VA. CODE § 55-548.16:1(D) (2012). If all trustees are interested, the court may appoint a special fiduciary with the authority to decant. *Id.* Decanting may not be exercised in favor of the trustee individually, the trustee’s creditors, the trustee’s estate, or creditors of the trustee’s estate. VA. CODE § 55-548.16:1(E)(2) (2012).

Notice: Notice is required sixty days before decanting to the grantor of the old trust (if living), to all current beneficiaries of the old trust (excluding the Attorney General) and all persons acting as advisor or protector of the old trust. VA. CODE § 55-548.16:1(G) (2012).

Filing: Decanting instrument must be filed with the records of the old trust. VA. CODE § 55-548.16:1(F) (2012). If accounts for the old trust are filed with the commissioner of accounts, accounts for the new trust must also be so filed. VA. CODE § 55-548.16:1(E)(4) & (K) (2012).

Fiduciary duties: Decanting is subject to the fiduciary duties imposed on the trustee of the old trust. VA. CODE § 55-548.16:1(E)(1) (2012). No duty to decant and no limitation on trustee’s discretion. VA. CODE § 55-548.16:1(H) (2012).

Permissible beneficiaries of the new trust: May include only beneficiaries of the old trust. VA. CODE § 55-548.16:1(C)(1) (2012). A future beneficiary’s interest may not be accelerated to a present interest in the new trust. VA. CODE § 55-548.16:1(C)(3) (2012). The new trust may confer a power of appointment upon a beneficiary of the old trust that was eligible to receive a distribution. VA. CODE § 55-548.16:1(C)(8) (2012). Permissible appointees may include persons that were not beneficiaries under the original trust, but the state rule against perpetuities applies. *Id.*

Situs: The statute applies to all trusts administered under Virginia law, unless prohibited by the terms of the trust. VA. CODE § 55-548.16:1(K) (2012).

Other Provisions:



Present right to withdraw protected. A trustee may not decant trust property subject to a right of withdrawal unless the power is the same under the new trust, or sufficient assets remain in the old trust to satisfy the withdrawal right. VA. CODE § 55-548.16:1(C)(7) (2012).

Trust may prohibit decanting: the express terms of a trust may prohibit decanting, but a mere statement of irrevocability or a spendthrift clause is insufficient. VA. CODE § 55-548.16:1(E)(4) & (K) (2012).

Need to invade principal: Decanting permitted even if there is no current need to invade principal. VA. CODE § 55-548.16:1(B) (2012).

Prohibited effects: Decanting may not reduce any fixed income, annuity, or unitrust interest of any beneficiary under the old trust. VA. CODE § 55-548.16:1(C)(4) (2012). If the old trust qualified for a tax deduction, the new trust may not contain any provision that would have reduced or eliminated that deduction. VA. CODE § 55-548.16:1(C)(5) (2012). Decanting may not extend the vesting period for gifts excluded from the federal gift tax. VA. CODE § 55-548.16:1(C)(6) (2012). The new trust may not prevent or eliminate a small business trust election. KY. REV. STAT. ANN. § 386.xxx(4)(g) (2012).

Special needs trusts: The new trust created may be a special needs trust. VA. CODE § 55-548.16:1(C)(9) (2012).



	<b>New York</b>	<b>Missouri</b>	<b>Kentucky</b>	<b>Virginia</b>
UTC state?	NO	YES	NO	YES
Discretion required	Dual standard for unlimited vs. limited discretion to invade trust principal; power to distribute income is insufficient.	Discretionary power to distribute income or principal to beneficiary, even if limited by ascertainable standard.	Discretionary power to distribute principal or income for benefit of a beneficiary.	Discretionary power to distribute principal or income for benefit of a beneficiary.
Treatment of trustee-beneficiaries	Not specifically addressed, but fiduciary duties apply.	May not decant unless the power to distribute is limited by an ascertainable standard.	If distributions are subject to an ascertainable standard, the new trust must have the same or a more restrictive standard.	No decanting in favor of a trustee, “interested trustee” may not decant even in favor of others.
Notice	Required to trust creator, persons having right to replace trustee, and all parties interested in either trust. 30 days to object.	Required 60 days before decanting to the permissible distributees or qualified beneficiaries of the new trust, but not the old trust.	Required 60 days before decanting to all current beneficiaries and to the oldest generation of remainder beneficiaries of the old trust.	Required 60 days before decanting to the trust grantor, current beneficiaries of the old trust, and trust advisors or protectors.
Filing	Required to file with the court having jurisdiction over the old trust.	Not required.	Required to be filed with the records of the old trust.	Required to be filed with the records of the old trust; if accountings of old trust filed with state, new trust accountings must also be filed.
Fiduciary duties	Duty to exercise power in favor of one or more proper objects using a prudent person standard. Must consider tax implications. May not decant to change trustee compensation. No duty to decant.	Must take into account terms and purposes of both trusts and consequences of decanting. Trustee remains subject to fiduciary duties imposed by law. No duty to decant.	No duty to decant.	Trustee is subject to the fiduciary duties imposed by the old trust. No duty to decant and no limitation on trustee’s discretion.
Permissible beneficiaries	If trustee has unlimited discretion: one or more beneficiaries of the old trust; if trustee has limited discretion: all beneficiaries must remain the same and some terms of the new trust must be identical.	One or more beneficiaries of the old trust.	One or more beneficiaries of the old trust, with powers of appointment. Future interests may not be accelerated to present interests.	One or more beneficiaries of the old trust, with powers of appointment. Future interests may not be accelerated to present interests.
Situs	Any trust governed by NY law, and any trust having a trustee domiciled or officed in NY.	Any trust governed by MO law, including trusts whose administration was transferred to MO.	Statute is silent, but new trust may be administered under the laws of any jurisdiction.	All trusts administered under VA law, unless prohibited by the terms of the trust.

	<b>New York</b>	<b>Missouri</b>	<b>Kentucky</b>	<b>Virginia</b>
Extended term	Permissible, subject to rule against perpetuities.	Permissible, subject to rule against perpetuities.	Permissible, subject to rule against perpetuities.	Permissible, subject to rule against perpetuities.
Co-trustees	Any non-interested trustee with unlimited discretion may decant in favor of an interested trustee.	Not addressed.	Not addressed.	A majority of non-interested trustees may decant in favor of an interested trustee.
Need to invade trust principal	Not required.	Not specifically addressed, but decanting permitted even when distributions are subject to an ascertainable standard.	Not required.	Not required.
Newly discovered property	Provides default rules.	Not addressed.	Not addressed.	Not addressed.
Trust may prohibit decanting	Yes, but mere statement of irrevocability or spendthrift clause is insufficient.	Yes, but mere statement of irrevocability or spendthrift clause is insufficient.	Yes, but mere statement of irrevocability or spendthrift clause is insufficient.	Yes, but mere statement of irrevocability or spendthrift clause is insufficient.
Prohibited effects	May not reduce or modify a current right to distribution, decrease a trustee's liability, eliminate a power to remove trustee, fix the value of an asset, or jeopardize any tax benefit.	Unless necessary for a distribution under an ascertainable standard (i.e. special needs trust), may not increase distributions to the old trustee or to a beneficiary with power to remove the old trustee, remove restrictions on a trustee's discretion, or reduce income to a beneficiary of a marital trust, CRT, GRAT, or business trust.	May not reduce any fixed income, annuity, or unitrust interest, contain terms that would reduce or eliminate a prior tax benefit, extend the vesting period for gifts excluded from federal gift tax, or prevent/eliminate a small business trust deduction.	May not reduce any fixed income, annuity, or unitrust interest, contain terms that would reduce or eliminate a prior tax benefit, extend the vesting period for gifts excluded from federal gift tax, or prevent/eliminate a small business trust deduction.
Removable trustees	Not addressed.	Trustee may not decant if any beneficiary has the right to remove the trustee and replace with a related or subordinate party.	Not addressed.	Not addressed.
Present right to withdraw	Not addressed.	Protected.	Protected.	Protected.
Special fiduciary	Not addressed.	Not addressed.	Permitted.	Permitted.
Trust types	All	All	CRTs excluded	Special needs trusts specifically included.