

DECANTING ISSUES MEMO
UNIFORM TRUST DECANTING DRAFTING COMMITTEE
FALL 2014

I. Decanting Power (without the article “the”)

II. Charitable Trusts

- A. See revision to Section 102(4).
- B. See new Section 110A and comments.
- C. Do we need to define “charitable purposes”?
- D. Charitable Trust.
 - 1. Should we define “charitable trust” as a trust held solely for charitable purposes and then define “first trust” to exclude a “charitable trust?”
 - 2. A wholly charitable trust with no named charitable beneficiary could not be decanted because there is no current beneficiary. This is, however, a subtle point.
 - 3. We should delete 202(d) or modify it to say “the Attorney General has the rights of a qualified beneficiary with respect to a charitable interest [[that is not held by an expressly designated charitable organization but] that, if it were held by an expressly designated charitable organization, would make such charitable organization a qualified beneficiary].
 - 4. Do we want to give the AG the right to block a decanting by objection? The GST safe harbor under § 26.2601-1(b)(4)(A) requires that the decanting be permitted without the “consent or approval of any beneficiary.”
- E. Discretionary Charitable Interest.
 - 1. If a trust permits distributions to charity in the discretion of the trustee but the trustee also has discretion to make distributions to noncharitable beneficiaries, and the trustee has expanded discretion, should the trustee be permitted to decant and eliminate the charitable interest?

III. Animal Trusts

- A. Review comment to 110B (separate handout).
- B. See new Section 110B (separate handout).

- C. If 110B is acceptable in concept, pieces of it may be moved to other sections.
- IV. **Decanting of Revocable Trusts.** See comment to definition of “first trust.”
- V. **Good Faith.** A commissioner wanted us to consider a definition of “good faith.” The term “good faith” is used in UTC section 801 and 105(b)(2) without definition. No change was made in the Act.
- VI. **Notice** (Section 105)
- A. A commissioner was concerned that the section 105 notice requirement would be taken as a change in the law (i.e., discretion is exercised without notice to or consent of a beneficiary or approval of a court). An addition was made to the comments.
- VII. **Judicial Powers** (Section 107)
- A. A commissioner was concerned that the act may be taken as establishing a requirement that the court instruct if petitioned for same. The Act says a court “may” take any of the listed actions. An addition was made to the comments.
- VIII. **Compensation** (Section 112)
- A. A commissioner expressed concern that 112(d) will in fact increase compensation. See change to the language in the Act.
- IX. **Removal** (Section 114)
- A. A commissioner suggested adding the words “or more” after the word “one.” We did not make this change.
- X. **Partially Impermissible Decanting (Putting the Wine Back in the Bottle)** (Section 118)
- A. A commissioner suggested replacing the word “presumed” with the word “deemed.” We made this change.
- XI. **Fiduciary Duty** (Section 124)
- A. A commissioner suggested replacing “failing” with the words “deciding not.” The idea here is, I believe, that use of the word “failing” will protect an authorized trustee who does not exercise discretion in the sense that the trustee does not even consider the facts and circumstances bearing on the purposes of the trust. The words “deciding not” imply that the trustee has considered the facts and circumstances and purposes of the trust but having done that has decided not to exercise the power. A trustee cannot possibly consider all the possible ways in which a trust could be improved by decanting. While it may be tempting to say that there is some duty when a beneficiary proposes a decanting, we want to steer

clear of suggesting that decanting is something that beneficiaries ask for and the trustee implements. The Committee discussed this previously.

- B. Material Purposes – See Nancy McLaughlin letter.

XII. Term of Second Trust (Section 116)

- A. Sitkoff improvements.

XIII. Supplemental Needs Trusts

XIV. Uniform Act Innovations

- A. Savings Clause
- B. Charitable Trusts
- C. Recognition of Out-of-State Decanting
- D. Delineation of Role of Court
- E. Decanting by “Restatement”
- F. Disposition of Claims Against First Trust

XV. Tax Savings Clauses and Serial Decanting

- A. If state law or a trust permits a change of jurisdiction for the trust, the possibility of decanting under all such jurisdictions theoretically could be considered in determining whether a trust meets “governing instrument requirements” for tax purposes or QSST purposes.
- B. This just emphasizes the need for uniformity.
- C. Practitioners will not accept limiting decanting to the law of the state governing construction.