

Making Irrevocable Trusts More Flexible-Powers We Wish We Had

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- I. Introduction-How do we address changes in:
 - A. Laws
 - B. Circumstances re Settlers, Trustees and beneficiaries
 - C. Objectives of Settlers-do the Settlers want a trust to be broad and flexible regardless what we may think.
 - D. Knowledge
 - E. Discretionary Foreign Situs Trust
- II. There are a number of different tools to make an Irrevocable Trust more flexible and they are not all mutually exclusive.
 - A. Drafting options
 - B. Decanting-Not merging but actually creating a new trust. Allows the Trustee to create a new trust and pour over old trust to the new trust. Can mean new administrative provisions, but can also to alter governing provisions.
 - C. Changing administration without changing the terms of the trust.
 - D. Trust amendment and reformation by agreement or judicial action.
- III. Drafting Options
 - A. Independent Trustees and Trust Protectors-This covers an independent Trustee who is not a family member or a person beholden to the Settlers who otherwise has full powers or a Special Trustee or Trust Protector who is also unrelated but who has more limited powers.
 - 1. Power to modify or terminate the trust.
 - 2. Add or modify powers of appointment
 - 3. Creation of separate shares for special assets

4. Change governing law
 5. Terminate small trusts
 6. Add beneficiaries
 7. Amend administrative or distributive provisions
 8. Turn Grantor Trust status on or off
- B. Trustee succession, removal and appointment. Delegation is not appointment of a Trustee and would normally be limited to things that the Trustee is not reasonably required to perform (and if delegation, is there some kind of exoneration for so doing).
1. Division of Trustee powers- Is this allowable under California law and if so, can the other Trustees be exonerated from liability. *Claypool v. Wilson* (1992) 4 Cal. App. 4th 646.
 2. Does a non Trustee holder of a power act in a fiduciary capacity-Is the power holder acting for the benefit of the beneficiary or for the benefit of the power holder? Review Restatement (3rd) of Trusts Sec 75. If you are going to have someone in this capacity, be careful to clearly delineate if a duty to anyone and the limitations on the duties of the full Trustee. Also review the Uniform Trust Code at Sec 808.
 3. How are fees determined
 4. Filing vacancies
 5. Are there notice and consent provisions and are these trumped by “emergency” actions.
- C. Powers of Appointment
- D. Broader and more flexible powers for distribution (Incentive language?) or power to delay distribution-This can be for positive reasons or negative reasons. If suspension of distribution, may want to consider requirement of court order if for an extended period.
- E. Power to change trust situs and Governing Law
- F. Sale of life insurance policies
- IV. Decanting Trust Property-the ability to appoint assets from one trust to another. This must be done under statute and statutes require that the Trustee have some measure of discretionary authority over principal distributions. Some states treat as a power of appointment in the hands of the Trustee like a limited power of appointment. California

does not have such a statute so this power thus depends on (i) common law rules permitting modification, (ii) Trustee having a power of appointment to create an additional trust, and (iii) an express grant of authority in the trust document. There some things to consider with other state statutes and therefore if drafting in California.

- A. Notice and/or consent required?
 - B. Who may be the beneficiary of the recipient trust?
 - C. Safeguards and restrictions imposed on exercise of the power-Do not want to lose any tax benefits, including loss of marital deduction, generation skipping transfer benefits, Sub S qualification or Grantor Trust status. In addition, may want to limit whose benefits can be changed. Should also be careful re the Rule Against Perpetuities and coordinating so that decanting documents not inadvertently disqualify the original trust.
 - D. Who can amend.
 - E. Any limitations on the purpose of the exercise-to change situs? to change governing law? to obtain or preserve tax benefits? SNT issues? Adjust for future tax law changes?
- V. Change in Administration of Irrevocable Trust Without Changing Terms of the Trust.
- A. Disclaimer
 - B. Principal and Income Adjustments and Unitrust conversions
 - C. Use of LLC's and other entities
- VI. Trust amendment and reformation by agreement or Judicial Action
- A. State statutory requirements re consent or judicial approval
 - B. Consent of minors and virtual representation
 - C. Changed circumstances, ambiguity, error or mistake
 - D. Public policy or illegality
 - E. Petitions for instruction or construction
 - F. Cy Pres.
- VII. Suggested Additional Sources-
- A. Buford and Char, Renegotiating the Irrevocable Trust: Amending, Decanting, and Judicially Modifying, ALI-ABA Course Study Advanced Estate Planning Techniques, February 19-21, 2009.

- B. Howard, Building Flexibility Into Your Estate Plan, 31st UCLA-CEB Estate Planning Institute, May 2009.
- C. Hoffman, Divided Trustee Duties, 28th UCLA-CEB Estate Planning Institute, May 2006
- D. Culp and Bennett, Use of Trust Decanting to Extend the Term of Irrevocable Trusts, 37 Estate Planning Journal no 6(June 2010)