

---

# Fixing an Irrevocable Trust: Decanting and Creative Solutions

**California Society of CPAs**  
May 13, 2015 11:30 am - 2:00 pm  
Olympic Collection

Abby L.T. Feinman  
Partner  
Katten Muchin Rosenman LLP  
2029 Century Park East, Ste. 2600  
Los Angeles, CA 90067  
(310) 788-4722

Laura K. Zeigler  
Principal, Fiduciary Counsel  
Bessemer Trust  
10250 Constellation Boulevard, Ste. 2600  
Los Angeles, CA 90067  
(213) 892-0900

## Is the Irrevocable Trust Irrevocable?

---

- The Irrevocable Trust offers dual benefits of potentially reducing estate taxes while currently transferring wealth.
- In exchange for these benefits, the grantor relinquishes the ability to amend and revoke the trust.
- Although the trust is irrevocable, it is not immutable and can be modified to adapt to changes in circumstances.

# Why Change the Trust?

---



## **Correct Mistakes, Address Ambiguities, and Change Administrative Provisions:**

- Correct a scrivener's error
- Modernize trust provisions
- Change trust situs and/or governing law
- Change administrative terms – i.e., directed trust, dividing decision responsibility
- Divide or merge trusts
- Reduce administrative costs
- Convert a domestic trust to a foreign trust or vice versa

## Beneficiary Related Reasons to Modify the Trust

---

- Grant or limit beneficiary power of appointment.
- Limit the beneficiary's rights to receive information. Delaware permits restricting the Trustee's duty to provide information.
- Eliminate a beneficiary.
- Move to jurisdiction that provides asset protection for self-settled irrevocable trusts.
- Change from pot trust to separate shares.
- Transfer assets to special needs trust.
- Address change in circumstances – creditor, marital or health (substance abuse or other unproductive behavior).

## Tax Reasons to Modify the Trust

---

- Change from a grantor trust to a non-grantor trust or vice versa.
- Minimize state income taxes.
- Division of trusts for marital deduction or GST planning.
- Use grantor's or beneficiary's GST exemption.

## Choice of Law – Which State Law Governs the Trust?

---

- The trust's governing law generally applies. The Restatement (Second) Conflicts of Laws: Trusts §§ 268(1), 272(a) (1971).
- The law governing construction and administration of a trust may be different. *See* Restatement (Second) Conflicts of Laws §§ 268, 277. Uniform Trust Code §107 (2010 rev.).

## What if the Trust is Silent?

---

- The Restatement (Second) Conflicts of Laws: Trusts §§ 268(2), 270(b), 272(b) (1971), Uniform Trust Code § 107 (2010 rev.) and California – Probate Code Section 21103.
- Trust is silent.
  - Trust administration versus dispositive matters.
  - Trust administration = principal place of administration.
  - Dispositive matters = laws of the state that the settlor would have desired to be applicable.

## Which State Law Governs?

---

- The UTC provides that the trust is governed by the law specified in the trust instrument unless the designated governing law's jurisdiction is overridden by another jurisdiction having the most significant contacts to the issue.
- In the 29 states that have adopted the UTC and in the District of Columbia, the settlor is free to designate the governing law of any state for matters of construction.
- The Restatement (Second) of Conflicts of Laws and the UTC provide that issues related to trust administration are governed by the laws of the state where the principal place of administration takes place.

## Administrative Changes

---

- Certain changes are considered administrative in nature. For example, dividing or merging a trust.
- Other changes may not be as clear if those changes affect beneficial interests. Look to the state law for this determination.

## How Do You Make the Change?

---

Historically, because trusts were viewed as inalterable, often the grantors or trustees would resort to draining them to avoid undesirable consequences. But, there are a number of alternatives to this approach.

- Exercise of General Trust Powers
- Non-Judicial Modification
- Judicial Modification
- Decanting

# Exercise of General Trust Powers to Alter Trust or to Move Assets from One Trust to Another

---

- Power of substitution
- Power of revocation or termination
- Trustee succession, removal, appointment
- Trustee power to delay distribution
- Change governing law
- Turn grantor trust powers on or off
- Divide a trust
- Change trust situs
- Power of amendment
- Disclaimer
- Powers of appointment
- Conversion to unitrust
- Sale of trust assets
- Merge similar trusts

## Changing Trust Situs

---

- Changing the law governing the administration of the trust to another jurisdiction may not always be clear.
- The Delaware Supreme Court has provided guidance on this issue as to a trust moving to Delaware.
- In the *Peierls* decisions, the court concluded that Delaware law will generally govern the administration of any trust that permits a successor trustee to be appointed unconstrained by geography. Thus, if a Delaware trustee is appointed, the trust is then administered in Delaware. *In the Matter of Peierls Family Inter Vivos Trusts*, No. 16812 (Del. Oct. 4, 2013).
- Exception: If the trust provides that another state's law always governs the administration of the trust.

## Dividing Trusts

---

- Dividing a trust may be helpful for both tax and non–tax reasons.
- Tax Reasons:
  - Obtaining the marital or charitable deduction.
  - Utilizing the generation-skipping transfer tax exemption (e.g., qualified severance).
  - Create a trust that has grantor trust status versus one that does not.
  - Qualify for QSST treatment.
- Non-Tax Reasons:
  - Asset protection.
  - Different investment goals or different fiduciaries.
  - Accelerate a portion of a charitable trust for the benefit of charity.

## Dividing Trusts – Tax Concerns

---

- Dividing a trust should not result in the recognition of gain or loss. See Priv. Ltr. Rul. 200723014 (June 8, 2007), Priv. Ltr. Rul. 200607015 (February 17, 2006).
- Division on a fractional basis = pro rata share of income, deductions, losses and basis to each of the resulting trusts.
- Treatment as a single trust for income tax purposes under certain circumstances. IRC § 643(f).

## Non-Judicial Trust Modification

---

- Modification or termination of a trust without court approval can be accomplished under certain circumstances if all of the parties (i.e., grantor, beneficiaries) consent.
- Action can even be in opposition to trust's purpose.
- If a beneficiary refuses to consent, modification by consent is unavailable.
- IRS may not be bound by the agreement. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). The IRS is not bound by a matter unless that matter has been determined by the highest state court.

## Judicial Trust Modification

---

- Trustee or beneficiary brings action to modify the trust.
- Useful when grantor cannot or will not consent to an action proposed by the beneficiaries.
- Unlike consent modification, the modification or termination cannot frustrate a material purpose of the trust, unless the need for the modification or termination substantially outweighs the material purpose of the trust.

## Judicial Trust Modification (Continued)

---

- Modification of charitable trusts is allowed only if charitable purpose is frustrated, impossible, illegal or obsolete. State Attorney General may need to be involved.
- Process includes the trustee, the beneficiaries and other interested parties. The grantor may also be involved.
- Court's decision is generally respected by government authority. IRS may require a State Supreme Court decision to be bound (*Bosch* case).

## Construction Proceeding

---

Where trust is ambiguous or trust did not provide for the happening of a particular event.

- Patent ambiguity
- Latent ambiguity

IRS position - If consistent with state law, then the change is retroactive back to the date the original trust was effective.

## Reformation Proceeding

---

Proceeding where a court addresses unambiguous language which when interpreted literally would create an unintended result.

- Scrivener's error.
- Alter trust to achieve the result intended by the settlor.
- Alter trust to achieve the result the settlor would have wanted based on certain circumstances or changes in the law.

Correcting drafting error, a settlor's mistake of fact or law, or changes in law or circumstances can be cured by reformation. The Restatement (Third) of the Law of Property (Wills & Other Donative Transfers) § 12.1.

## Federal Tax Consequences of Trust Modification

---

- *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967) – IRS may not be bound by a state court decision unless the matter has been decided by the highest state court.
- Completed Transaction Rule – Reformation or modification of a trust may not be effective to change the tax consequences as written under the trust instrument even if the reformation or modification is permitted by state law.
- State court decisions before the taxable event has occurred are binding on the IRS even if such decision is inconsistent with state law. Rev. Rul. 73-142.

# Federal Tax Concerns With Construction and Reformation Proceedings

---

- Consent may result in a gift in certain circumstances.
- Self dealing concerns with changes to a charitable trust.
- Implication of a construction decree.
  - Consistent with state law = respected by the IRS as if terms had been in the original trust instrument.
  - Consent or lack thereof is not an issue in this instance.
  - Marital deduction cases – Court cases have construed in favor of allowing a marital deduction even where trust instrument did not contain the appropriate language. *Mittleman v. Comm’r*, 522 F.2d 132 (D.C. Cir. 1975); *Estate of Sawyer v. Comm’r*, 73 T.C. 1 (1979) In *Sawyer*, the Tax Court held that “a testator’s normal interest would be to maximize deductions and minimize tax liability...”

# Federal Tax Concerns With Construction and Reformation Proceedings (Continued)

---

- Possible loss of GST exempt status if there is a change to a beneficial interest but otherwise GST status is retained.
- Pursuant to Treas. Reg. § 26.2601-1(b)(4)(i)(C), GST exempt status of a trust should not be impacted by a judicial construction proceeding to correct a scrivener's error or to clarify an ambiguity in the trust instrument provided that two factors are met:
  - Court proceeding involved a bona fide issue **and**
  - Construction is consistent with state law.

# Decanting to Modify Irrevocable Trusts

---



- Ultimate amendment power.
- Allows single party (the trustee) to modify the trust without court involvement or beneficiary consent.
- Decanting is the process of exercising a fiduciary power to distribute assets from one trust to another (like pouring wine from one bottle to another).
- Trustee transfers existing trust assets to a new trust with more favorable terms.
- Power granted by the terms of the trust, case law or state statute.
- Whether decanting a trust will be the ideal/preferred technique for modification depends on the motivation behind altering the trust's terms.

## Decanting Authority Under Common Law

---

- Decanting first originated at common law in Florida in 1940 with the *Phipps v. Palm Beach Trust Company*, 196 So. 299 (Fla. 1949).
- Decanting exists under the common law of several states. *See also*, *In Re: Estate of Spencer*, 232 N.W.2d 491 (Iowa 1975); *Wiedenmayer v. Johnson*, 254 A.2d 534 (N.J. Super. Ct. App. Div. 1969); *Morse v. Kraft*, 466 Mass. 92 (2013).
- These states permitted trustees to decant to a new trust through the exercise of a broad discretionary distribution power.
- The theory is that decanting is embedded in the trustee's broad discretionary distribution power under common law.

## Decanting Authority Under Restatements

---

The Restatement (Second) of Property: Donative Transfers §§ 11.1, 19.4 states that unless the trust provides otherwise, the trustee's discretionary power to distribute trust property is akin to a power of appointment which includes the power to:

- Make distributions in trust for permissible beneficiaries and
- Create new powers of appointment over trust assets in favor of permissible appointees of the original power.

Restatement (Third) of Property similarly supports this concept but does not treat the power to invade as a special power of appointment because of the fiduciary obligations of a trustee. *See* Restatement (Third) of Property (Wills and Other Donative Transfers) § 17.1.

## Restatements (Continued) and UTC

---

- Similarly § 75 of the Restatement (Third) of Trusts provides that a Trustee with absolute discretion is still subject to standards of good faith and reasonableness where a non-fiduciary is not.
- Decanting provisions are not part of the UTC.
- The UTC contains provisions for trust modification and trust reformation.

## NY – First Decanting Statute

---

- In 1992, New York was the first state to enact a decanting statute.
- Trustee with absolute discretion to invade principal can distribute trust property further in trust.
- 22 states have enacted decanting statutes. Many more states are considering enacting them.

## States With Decanting Statutes

---

- New York – 1992
- Alaska – 1998
- Delaware – 2003
- Tennessee – 2004
- Florida and South Dakota – 2007
- New Hampshire – 2008
- Nevada, Arizona and North Carolina – 2009
- Indiana – 2010
- Missouri – 2011
- Ohio, Kentucky, Virginia, Michigan and Rhode Island – 2012
- Illinois, Texas, Wyoming and South Carolina – 2013
- Wisconsin – 2014

Other states are also proposing decanting statutes.

## Premise Behind Decanting Statutes & Uniformity

---

- State decanting statutes vary in detail. All operate from the same premise. Power to invade principal = power to appoint principal to a new trust for some or all of the beneficiaries.
- Uniform Law Commission = trying to create a uniform decanting law.
- Uniform Powers of Appointment Act
  - Contrary position  $\neq$  Power of Appointment
  - Power of appointment = non-fiduciary power
- Decanting = Power of Amendment

## What if the Trust is Located in a State that Does Not Have a Decanting Statute?

---

Change situs to a jurisdiction with favorable decanting rules.

- Trust provides for change of situs.
- Trust provides for changing trustee – changing trustee can invoke nexus with the state.
- State law permits changing situs.
- Petition court to change situs.

## Threshold Considerations in Decanting

---

- Consistent with fiduciary duties?
- Prohibited or permitted in the trust agreement?
- If the trust agreement is silent, does state law provide for decanting?
- Statutory requirements satisfied?

## Existence of Decanting Power

---

- If a trust agreement does not provide for decanting but the trust's state governing law provides for decanting, then the state statute will apply.
- Most states provide that the state's decanting statute will apply to a trust that moves its situs to that state.
- Need to determine which state has best decanting statute for you.
- Each state that has enacted a decanting statute has defined the degree of discretionary authority over distributions that a trustee must have in order to exercise the statutory power to decant (i.e., absolute discretion, any discretion).
- Some state statutes prohibit or limit a trustee from having the power to decant if the trustee is also a beneficiary.

## What Can Be Decanted?

---

- Trustee must have the power to make discretionary distributions.
- All states that have enacted decanting statutes permit the decanting of trust principal.
- Some state statutes limit decanting to trust principal and not income.
- Many state statutes allow for the decanting of both trust income and principal.

## **Limitations on Trustee's Authority**

---

- All decanting statutes require the exercise of the decanting power in favor of one or more of the beneficiaries of the original trust.
- Trustee cannot add beneficiaries.

## Granting Power of Appointment Over New Trust

---

- None of the state statutes prohibit the trustee from granting the beneficiaries a power of appointment over the new trust.
- Granting a power of appointment to a beneficiary of the original trust may allow the decanting to indirectly add beneficiaries.

## Altering Trustee's Discretion in New Trust

---

State statutes vary on altering the trustee's discretion in making discretionary distributions in the new trust.

- Some states provide that the standard cannot be less restrictive than the old trust.
- Some states provide that, if the old trust has health, education, maintenance and support, then the new trust needs the same standard.

# Elimination of Beneficiaries' Rights in Trust

---

Some state statutes prohibit the elimination of certain beneficiaries' rights over the trust:

- Annuity or unitrust interests.
- Fixed income interests – e.g. mandatory distributions of income.
- Annual exclusion gifts.
- Necessary provisions to qualify for the marital or charitable deduction.
- Withdrawal powers (i.e., Crummey withdrawal, 5x5 power).
- Extend the IRC § 2503(c) vesting period (beyond 21 years).
- Provisions to avoid estate tax inclusion (Nevada and New Hampshire).
- Specific property allocations and values (Nevada).

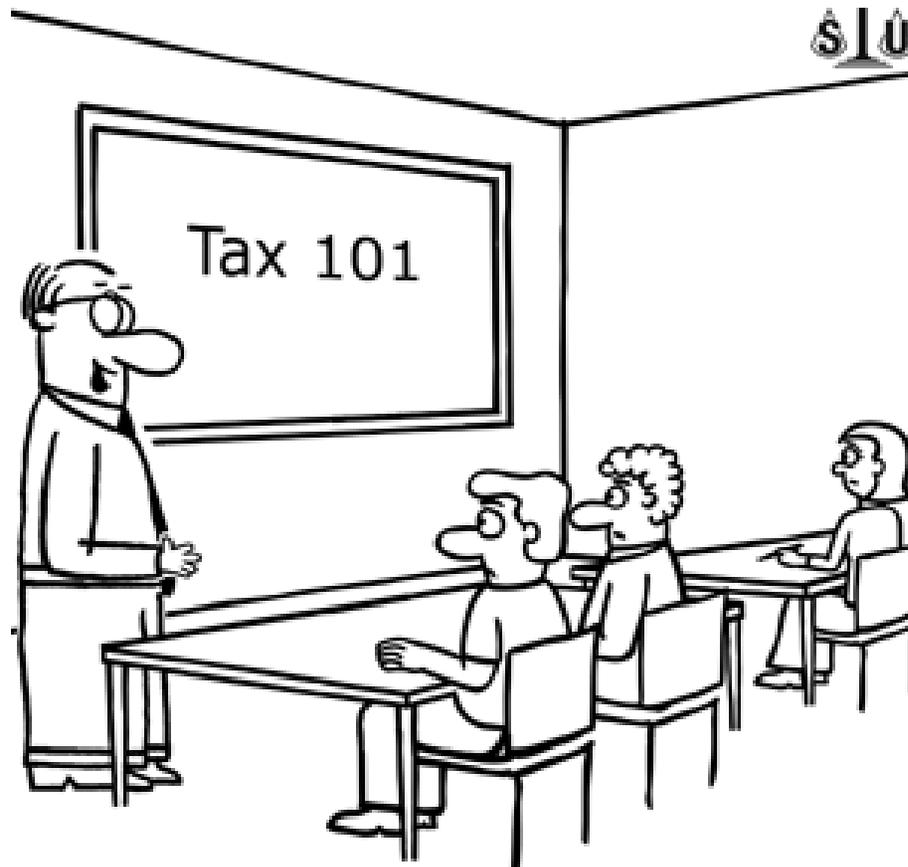
## Notice Requirements

---

- Some states require that the trustee give notice of the decanting to the original trust's beneficiaries.
- Must be a writing about the anticipated decanting signed by the trustee.
- Court approval or consent not required, although permissible.
- The omission of beneficiary consent helps avoid potential adverse tax consequences.
  - Concern – Beneficiary consent  $\approx$  taxable gift

# Careful Tax Planning is Required When Decanting

---



The Internal Revenue Code is absurdly complex or, as we lawyers say, a goldmine.

## IRS' Position on Decanting

---

- In Rev. Proc. 2011-3 the IRS placed decanting on its no-ruling list.
- Section 5 of the Rev. Proc. provides a specific list of matters that it will not rule on such as:
  - Decanting giving rise to a IRC § 661 deduction or inclusion in gross income under IRC § 662.
  - Decanting resulting in a taxable gift.
  - Decanting causing the loss of GST exempt status or a taxable event under IRC § 2612.
- Decanting was put on the IRS' 2011-2012 priority guidance plan but was later removed from the IRS' 2012-2013 plan and omitted from the 2013-2014 plan.
- Current status: IRS is still working on these issues.

## Income Tax Issues

---

- In general, decanting assets from one trust to another should not result in income tax consequences to the trust or its beneficiaries.
- Key income tax issues:
  - Decanting power and IRC § 671 treatment.
  - Decanting from one trust to another and DNI.
  - Decanting and gain recognition under IRC § 1001.

# Decanting Power and IRC § 671 Treatment

---

## Grantor trust status IRC § 674(a).

- Power to add beneficiaries.
- Is new trust a new beneficiary?
- Beneficiary = Any one or more of the old trust beneficiaries and not the trust itself.
- Delaware statute (like others) requires that the beneficiaries of the new trust are also beneficiaries of the old trust.
- Delaware does permit the adding of a power of appointment to the new trust.

## Decanting Power and IRC § 671 Treatment (Continued)

---

- **Who is the grantor?**
  - If the new trust is a continuation of the old trust, the original grantor remains the grantor of the new trust.
  - Exception for the exercise of a power of appointment.
- **Other grantor trust issues.**
  - Transfer from one grantor trust to another grantor trust should have no income tax effect. Rev. Rul. 85-13, 1985-1 C.B. 184.; Rev. Rul. 2007-13, 2007-11 I.R.B. 684.
  - Non-grantor trust to a grantor trust should have no income tax effect. Rev. Rul. 85-13 and 2007-13; Chief Counsel Advice 200923024.

## Decanting from One Trust to Another and DNI

---

- Uncertainty over old EIN number for new trust. PLR 200607015; PLR 200736002.
- Interplay between IRC §§ 661 and 662.
- Trust can be a beneficiary under these sections. *Lynchburg Trust and Savings Bank v. Comm'r.*, 68 E.2d 356 (4<sup>th</sup> Cir. 1934); *Duke v. Comm'r.*, 38 BTA 1265 (1938).
- Tax attributes of new trust should be the same.
- The new trust's distributable net income (DNI) should be shifted to the new trust, including capital gain. Treas. Reg. § 1.643(a)-3(e).
- Unused carryovers and deductions carry over to the new trust. IRC § 642(h)(2).

## Decanting and Gain Recognition Under § IRC 1001

---

- Decanting should not result in recognition of gain or loss in most circumstances.
- Under IRC § 1001, gain is recognized when an asset is sold or disposed of in exchange for property that is materially different. Treas. Reg. § 1.1001-1(a); *Cottage Savings Ass'n v. Comm'r.*, 499 U.S. 554 (1991).
- Trustee authority to decant = no material change.
- Decanting of all old trust assets to the new trust is a modification and not the creation of a new entity for income tax purposes. PLR 200723014; PLR 200607015.
- Watch out for negative basis assets! *See, Crane v. Comm'r.*, 331 U.S. 1 (1947).

# Decanting from Domestic Trust to Foreign Trust and Vice Versa

---

- Transfer of domestic trust assets to a foreign trust is a recognition event. IRC § 684.
- However, the domestic trust is entitled to a deduction for any income generated in decanting all of its assets to a foreign trust. IRC § 661(a).
- Gain is recognized once the grantor trust status of the foreign trust terminates. Treas. Reg. § 1.684-2(e).
- Decanting foreign trust assets to domestic trust.
  - Foreign trust's undistributed net income and throwback rules under Subchapter J.
  - Reporting obligation. IRC § 6048.
  - IRS may assert the domestic trust is a new trust if there are substantial modifications.

## Gift Tax Issues

---

- Impact of beneficiary consent or acquiescence.
- Diminished beneficial interests. Gift implications and application of IRC §§ 2036, 2038.
- Existence of decanting power in a marital trust (estate or gift) and effect on marital deduction.

## Gift Tax Consequences

---

- Transfer during lifetime for less than adequate consideration.
- You need an act of transfer = gift.
- Trustee is causing the transfer not the beneficiary.
- Beneficiary consent or acquiescence.
- Beneficiary (acting as trustee) decanting ramifications.
- Use an independent trustee or confer a power of appointment on the trustee/beneficiary to name new beneficiaries or change the interests under the new trust may avoid this result.
- Gift tax only applies to a transfer of a beneficial interest in property.  
Treas. Reg. § 25.2511-1(g)(1).

## Delaware Tax Trap

---

- The exercise, release or lapse of a power of appointment is deemed a transfer of property by the powerholder.
- If a beneficiary exercises a power of appointment to create a new trust and the termination date of the new trust can extend beyond the original trusts' perpetuities period, then the exercise of that power by the beneficiary during his or her lifetime may result in inclusion in the estate of the powerholder. IRC §§ 2514(d) and 2041(a)(3).
- *This is not an issue if the independent trustee exercises the power.*

## Estate Tax Consequences

---

Decanting should not result in estate inclusion for federal estate tax purposes unless:

- Decanting results in the beneficiary making a gift.
- Beneficiary's exercise of a power of appointment was treated as an incomplete gift. When the beneficiary dies the gift is then complete and inclusion results. IRC §§ 2036 or 2038.
- Grantor's or beneficiary's implied control over the trust assets.
- Beneficiary's power to remove and replace the trustee does not result in estate inclusion unless they could appoint himself or herself or someone who is related or subordinate to the beneficiary.
- *Beware:* Moving a trust from a self settled trust state to a non-self settled trust state. This could cause inclusion.

## GST Tax Consequences

---

- Special consideration must be given to decanting grandfathered GST trusts.
- Irrevocable trusts established on or before September 25, 1985 are exempt from GST and are thus called “grandfathered GST trusts”.
- The Treasury Regulations distinguish between powers of appointment and decanting.

## GST Tax Consequences (Continued)

---

- Actual or constructive additions to the GST grandfathered trust through the beneficiary's release, exercise or lapse of a power of appointment can result in the appointed property being subject to GST tax.
- Numerous private letter rulings hold that if a modification does not result in any change in the quality, value, or timing of any beneficial interest under the trust, a grandfathered GST trust will *not* lose its exempt status.
- Purely administrative changes to the trust should not result in loss of status.

## GST Tax Consequences (Continued)

---

- The regulations focus on whether the exercise of a power of appointment will delay the vesting of a grandfathered trust.
- Treas. Reg. § 26.2601-1(b)(1)(v)(B) provides that if the exercise of a power of appointment extends the vesting beyond the original perpetuities period, then the exercise of the power is treated as an addition to the trust which results in the loss of GST exempt status.
- This only applies to the exercise and not to a release or lapse of the power. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(1).
- The Treasury Regulations provide two safe harbors for decanting. Treas. Reg. § 26.2601-1(b)(4)(i).

## GST Tax Consequences – First Safe Harbor

---

Treas. Reg. § 26.2601-1(b)(4)(i)(A) provides that decanting a GST grandfathered trust will not result in loss of GST exempt status if:

(1) the terms of the trust agreement or local law at the time the trust became irrevocable authorized the trustee to make distributions to a new trust, **without** the consent or approval of a beneficiary or court, **and**

(2) the terms of the new trust do not extend the vesting of any beneficial interest in a way that would suspend or delay the vesting, absolute ownership, or power of alienation beyond the longer of (i) the life of a person in being at the date the original trust became irrevocable plus a period of 21 years, or (ii) a ninety year period beginning on the date of the creating of the original trust.

## GST Tax Consequences – Second Safe Harbor

---

For those grandfathered trusts not meeting the requirements of the first safe harbor, the second safe harbor in Treas. Reg. § 26.2601-1(b)(4)(i)(D) provides that a trust modification will not result in the loss of GST exempt status if the modification:

- (1) is valid under state law,
- (2) does not shift a beneficial interest to a beneficiary who occupies a generation lower than the beneficiary who held the interest prior to the modification, **and**
- (3) does not extend the vesting period of the beneficial interest beyond the perpetuities period of the original trust.

## State and Local Taxes

---

- When moving trusts from one jurisdiction to another, or when changing applicable state law, certain state and local taxes may be avoided, decreased, or increased depending upon the facts of the situation.
- State income tax issues.
  - *Linn v. Department of Revenue*, 2013 IL. App. (4th) 121055. This case supports changing residency of trust for state income tax purposes.
    - State statute supported position that trust should be taxed.
    - Minimum ties for constitutional due process – Illinois failed this prong of the test.
  - Be alert: More than one state may try to tax the trust.
- Property tax reassessment.

## Other Pitfalls

---

- Changing the trust may trigger a no-contest clause.
- Modification may be costly.
- Some jurisdictions will not allow trusts to move if there is a resident trustee or trust property located in that state.
- Privacy issues (Delaware, Alaska and South Dakota offer some privacy).

## Trustee's Fiduciary Duties

---

- When decanting, the trustee must exercise its' fiduciary duties to the beneficiaries.
  - Duty of Impartiality
  - Duty of Loyalty
- Acting upon the beneficiaries' request alone may result in an abuse of the trustee's discretion in some circumstances.
- Exercise of discretion will be upheld, even if unreasonable, if the trustee's actions were not arbitrary or capricious.

# Final Accounting, Preventing Disputes and Final Tax Return

---

- Waiver of accounting.
- Interested parties should have representation.
- Receipts and releases.
- Court approval to settle accounts.
- Final income tax return needs to be filed when original trust terminates.

## Conclusion

---

Any decision on trust modification must weigh the facts and circumstances of such modification or termination and the income, gift, estate and GST consequences of such change.

---

**To ensure compliance with requirements imposed by U.S. Treasury Regulations, Bessemer Trust informs you that any U.S. tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.**