

By Rashad Wareh & Eric Dorsch

Decanting: A Statutory Cornucopia

How to choose the jurisdiction with the best fit and level of flexibility

In certain circumstances, trustees may want to change the terms of an irrevocable trust. This can be accomplished by decanting, which typically refers to a pour over of funds from one trust to another, usually with different terms, through a trustee's action. Decanting statutes allow a trustee to exercise distribution authority to modify the terms and conditions upon which trust property is held for its beneficiaries, including limiting or changing trust beneficiaries. The result is to change an otherwise irrevocable trust without the judicial process and proofs required for traditional options such as equitable deviation, modification or reformation.¹ Authority to decant was originally found in the common law of some states. Beginning with New York in 1992, many states adopted a legislative solution.² Currently, 13 states have enacted statutes and Colorado, Illinois, Kentucky, Michigan and Virginia are considering legislation.³ Given the significant differences among those statutes, it can be a challenge for diligent settlors and trustees to select the most appropriate situs.

We'll provide perspective on the choice of trust jurisdiction in light of the varying decanting statutes and the issues they raise. We assume that the trust doesn't expressly preclude use of a decanting statute and that the trust is silent on the issues raised below. "State Laws at a Glance" (p. 26) summarizes our analysis and depicts the range of variation in how each statute answers key questions. Certainly, the states differ in the degree to which questions are resolved by statute rather than left to the judicial process. Possibly of greater importance,

the states also differ in the scope of the changes that can be made in a decanting without judicial approval. In some states, trusting the trustee was considered the most appropriate response to the need for flexibility.

Applying New State's Law

May a trust from one state take advantage of another state's decanting statute? In our experience, courts in the new state will apply their decanting statute on the ground that the trustee's power is one of administration to be governed by the new state (unless the trust agreement provides otherwise). Nevertheless, when moving a trust, it's helpful to move to a state that explicitly addresses the issue, such as Alaska or South Dakota. It remains to be seen whether there will be any challenge to this by an involved party, such as a beneficiary, relying on the prior state's law to set up a conflict-of-laws issue and prevent a decanting.

For instance, Alaska's and New York's statutes provide that if a qualified person is appointed as the trustee or a co-trustee of a trust, then the trustees of that trust may use the decanting statute, but only if the majority of the trustees select the state as the principal place of administration of the trust.⁴ Similarly, Arizona, Missouri, Ohio and South Dakota provide that their decanting statutes may be used by any trust "whose governing jurisdiction is transferred" to the state.⁵ Delaware makes the decanting statute "available to any trust that is administered in" Delaware.⁶ Florida, Indiana, New Hampshire, Nevada, North Carolina and Tennessee are silent as to when their decanting statutes apply, instead relying on their broader law of conflicts.

Beneficiary Consent or Notice

Must an uncooperative beneficiary consent to or be given notice of a decanting? No state requires beneficiaries to consent to a trust decanting, and



Rashad Wareh, far left, is a partner, and Eric Dorsch is an associate, at Kozusko Harris Duncan in New York

Alaska, Arizona, Delaware, New Hampshire and Tennessee go further by not requiring notice to beneficiaries.⁷ Nevada expressly permits, but doesn't require, notice to beneficiaries.⁸ Beyond these states, the landscape is more complex—and potentially less amenable for this purpose. Florida, Indiana, North Carolina, Ohio and South Dakota require that the trustee give between 20 and 60 days notice to the beneficiaries of the first trust.⁹ New York has adopted a significantly more expansive notice requirement mandating that a copy of the decanting instrument and the second trust be sent to: 1) the creator of the first trust, 2) any person with a right to remove the trustee of the first trust, and 3) any person interested in the first or second trust.¹⁰ Even when a state has a strong virtual representation statute, an expansive notice requirement can often lead to challenging compliance issues when the trust has an open class of beneficiaries spread across the globe. Kentucky's statute would require notice to all current beneficiaries and members of the oldest generation of the remainder beneficiaries of the first trust.¹¹ Interestingly, Missouri requires that the trustee notify the permissible beneficiaries of the second trust, but not of the first.²

Although it's possible to avoid notifying a beneficiary of a decanting, it's not necessarily good policy to do so. One argument for not requiring notice is that notice to a beneficiary isn't required before making a discretionary distribution from a trust to another beneficiary. Assuming the trust isn't a quiet trust (that is, a trust that doesn't require notice to beneficiaries),¹³ however, a beneficiary is much more likely to question the decanting if he was deliberately kept in the dark. A trustee planning a wholesale decanting should consider whether it's best to voluntarily provide notice to all beneficiaries (or at least those who are aware of the trust), in view of the magnitude of the impending action and the trustee's duty of loyalty to consider the interests of all beneficiaries under the trust's purposes.

Need for Court Approval

Only one state—Ohio—requires court approval before decanting and, even then, only in limited circumstances. Ohio requires that a testamentary trust created by an Ohio decedent may only be decanted with approval

from the court that has jurisdiction over the trust.¹⁴ New York, which doesn't require court approval, requires that a copy of the decanting instrument be filed with the court if the trust has ever been subject to a surrogate's court proceeding.¹⁵ Under some circumstances, a trustee may, in fact, want court approval before decanting to preclude later disruptive disputes with beneficiaries. Arizona, Nevada, New York and North Carolina expressly provide that the trustee may seek

Trustees should consider which states offer them the most protection from a challenge to exercise the power to decant.

court approval.¹⁶ As with other trustee decisions, however, a trustee always should be able to seek court approval even if it's not expressly provided for in the decanting statute.

Protection from Challenge

Trustees should consider which states offer them the most protection from a challenge to exercise the power to decant. In other areas of trust law, when decisions are left to a trustee's discretion, courts don't readily substitute their judgment for that of a trustee, but intervene only when there's been an abuse of discretion.¹⁷ Since decanting is typically considered the exercise of a discretionary distribution power, it should be governed by the same standard of review. Although there's no reason to conclude that the standard of judicial review of a trustee's exercise of its authority to decant should be different, statutory guidance on the standard can be helpful, even if stated in general terms. For instance, New York states that a decanting trustee must act "in the best interests of one or more proper objects of the exercise of the power . . . and as a prudent person [would]."¹⁸ Further, the exercise of the decanting

power can't be contrary to the creator's intent. Missouri and South Dakota dictate that the trustee should determine if a decanting is appropriate by "taking into account the purposes of the first trust, the terms and conditions of the second trust, and the consequences of the distribution."¹⁹ Certain states offer guidance by including in their statute a specific standard of care and liability applicable to a decision to decant a trust.²⁰ South Dakota provides the trustee with the greatest specificity, noting that any decanting under a trust that either doesn't impose a distribution standard or imposes only one that isn't a support standard will be reviewed only for dishonesty, improper motive or failure to act if under a duty to do so, and a decanting under a support standard will be reviewed under the same standard and also for reasonableness.²¹ It's to the trustee's advantage to select a state whose decanting statute gives guidance on the applicable standard.

Permissive Decanting

Which states allow decanting under the most common circumstances? All states with decanting statutes permit decanting when the trustee has absolute discretion to distribute principal and income. **Not all states, however, permit decanting under more restrictive distribution standards.** Certain states: (1) permit decanting only if there's authority to make principal distributions,²² (2) permit decanting under either principal or income distribution authority,²³ or (3) are silent as to whether the distribution authority is for principal or income.²⁴ Likewise, certain states (1) expressly provide that distribution authority permits decanting whether or not it's limited by a standard,²⁵ (2) expressly provide that distribution authority permits decanting only under absolute distribution discretion (not limited by a standard),²⁶ or (3) are silent and simply require discretion to make distributions without referencing the existence of a standard (thus by implication permitting decanting whether or not distribution discretion is subject to a standard).²⁷ Those six states that permit decanting under either principal or income distribution authority and whether or not limited by a standard are the most flexible—of which New Hampshire, Nevada and South Dakota are most frequently viewed as potential jurisdictions for trusts established by non-state residents.

No Need for Distribution

Another important issue is whether decanting is possible even if there's no present need to make a distribution.

Some states have addressed the potentially troublesome issue facing trustees seeking to decant with a limited distribution power. For instance, a trustee who has the discretion to distribute principal under a health, education, maintenance and support (HEMS) standard may be concerned that decanting to a new trust to make an administrative change isn't consistent with the HEMS standard. Alaska, North Carolina and Ohio all permit decanting "whether or not there is a current need to distribute principal or income under any standard provided" in the first trust.²⁸

Changing Beneficiaries

A trustee may want to eliminate a beneficiary for a range of reasons, from changed financial circumstances to mental health issues; or a trustee may want to accelerate the interest of a beneficiary who currently has a future interest. Missouri and South Dakota offer the greatest flexibility by permitting the trustee to decant not only in favor of one or more of the current beneficiaries, but also to accelerate a beneficiary with a future or contingent interest to be a current beneficiary.²⁹ Generally, other decanting statutes either explicitly provide that the second trust may be for "one or more" of the current beneficiaries³⁰ or simply state that the second trust may be for beneficiaries or proper objects of the first trust.³¹ **In either case, they effectively permit removal of some of the current beneficiaries without addressing remainder or contingent beneficiaries. Only a minority of the decanting statutes expressly address the treatment of future or contingent beneficiaries.**³² While some states may prefer not to permit advancing future or contingent beneficial interests, it would be best for all decanting statutes to specifically address this issue. **No state permits the direct addition of a new beneficiary, which is why the authority to include a power of appointment (POA) is integral.**

POA

It's important to determine if the statute allows the trustee to grant a beneficiary of a decanted trust a POA. **The core principle of decanting under common law, which generally has been codified by the decanting statutes, is that a decanting is the exercise of a trustee's distribution authority, which itself is the equivalent of a special POA over trust property.** A holder's authority to exercise a POA is unlimited, except to the extent the trust imposes limits. Thus, a trustee making a decanting distribution should be able to grant POAs to one or

State Laws at a Glance

Here's how each statute treats key questions

State	Decanting Statute	Explicit Choice-of-Law Rule	Notice to Beneficiaries Required	Explicit Standard of Review	Required Invasion Authority; Minimum Distribution Standard	Change Beneficiaries	Expressly Authorizes Adding Power of Appointment	May Change Distribution Standard*	Extend Past Original Perpetuities Period**	Gift and Estate Tax Prophylactic
Alaska	Alaska Stat. Section 13.36.157	Yes (one step)	Silent	No	Principal invasion only; limited distribution standard	Yes	Silent	No	No	Yes
Arizona	A.R.S. Section 14-10819	Yes	Silent	No	Silent as to invasion authority; limited distribution standard	Yes	Silent	Silent	Yes	Yes
Delaware	12 Del. C. Section 3528	Yes	Silent	Yes	Principal invasion only; silent as to distribution standard	Yes	Yes (broader power)	Silent, except not if open class	Yes****	Yes
Florida	Fl. Stat. 736.04117	No	Yes	No	Principal invasion only; absolute discretion only	Yes	Silent	Silent	No	Limited***
Indiana	Ind. Code Ann. Section 30-4-3-36	No	Yes	No	Principal invasion only; absolute discretion only	Yes	Silent	Silent	No	No
Missouri	R.S.Mo. Section 456.4-419	Yes	Yes	Yes	Widest coverage (principal or income); limited distribution standard	Yes (accelerate future interests)	Silent	Silent	No	Yes
Nevada	Nev. Rev. Stat. Ann. Section 163.556	No	Permits, but doesn't require	No	Principal or income invasion; silent as to distribution standard	Yes	Yes (broader power)	Silent	Yes	Yes
New Hampshire	NH R.S.A. Section 564-B:4-418	No	Silent (except notice required for charitable trusts)	No	Silent as to invasion authority; silent as to distribution standard	Yes	Yes	Silent	Yes	Yes
New York	NY CLS EPTL Section 10-6.6	Yes	Yes (expansive)	Yes	Principal invasion only; limited distribution standard	Yes	Yes	Only after original trust term	No	Yes**
North Carolina	N.C. Gen. Stat. Section 36C-8-816.1	No	Yes	No	Widest coverage (principal or income); limited distribution standard	Yes	Yes (broader power)	May not change limited standard	No	Yes**
Ohio	O.S.C. Section 5808.18	Yes	Yes	Yes	Principal invasion only; limited distribution standard	Yes	Yes (broader power)	Silent, except not if limited standard	No	Limited***
South Dakota	S.D.C.L. Section 55-2-15 to 55-2-21	Yes	Yes (but may opt out)	Yes (very detailed)	Widest coverage (principal or income); limited distribution standard	Yes (accelerate future interests)	No, but legislation pending	Silent	No	Yes (most advanced)
Tennessee	Tenn. Code Ann. Section 35-15-816	No	Silent	No	Principal invasion only; silent as to distribution standard	Yes	Silent	Silent	No	Limited***

* We believe that if the statute is silent, it should be permissible to change the distribution standard of the trust through a decanting.

** This column relates only to the perpetuities period and not to whether a trust with a shorter term may be extended (but within the perpetuities period).

*** Doesn't limit the trustee's exercise of decanting authority when the beneficiary has a power to remove and replace the trustee.

**** Delaware doesn't permit extension of the perpetuities period if the trust is a generation-skipping transfer tax-exempt trust.

— Rashad Wareh and Eric Dorsch

more beneficiaries of the new trust, but for limitations in the original trust agreement.³³ Nevertheless, it's helpful if the state statute explicitly addresses this issue.

Although some states have included an express power to add a POA in their decanting statutes, they vary in their extent. Delaware, Nevada, New Hampshire, North Carolina and Ohio state that the permissible appointees of the POA don't need to be permissible beneficiaries of the decanted trust.³⁴ New York has a more complicated approach under which the new trust may continue to grant a POA that's identical to that which existed under the first trust, and the new trust may grant a new POA to any beneficiary who, under the original trust, might have received an outright distribution of principal.³⁵

Change of Distribution Standard

Another factor is whether decanting can change the distribution standard of the trust. Most states are silent on this issue, so presumably the standard can be changed through decanting. Subject to tax issues, if a state permits the second trust to include a new POA, the power can be used in some cases to change the standard of distribution for some beneficiaries. There are a number of states, however, that restrict the trustee's power to change the distribution standard: Alaska, Delaware, New York, North Carolina and Ohio.³⁶ North Carolina mandates that if the first trust contains an ascertainable standard, then the second trust must have the same standard exercisable in favor of the same current beneficiaries. Alaska, addressing the possible negative tax consequences of a broad power to change the distribution standard, adopts a more stringent approach and mandates that, in all circumstances, the second trust must have "the same standard for invading principal" that's in the first trust.³⁷

Extending Length of Trust

With the exception of Delaware, every decanting statute expressly permits or is silent as to a trustee's ability to extend the trust term, so it appears that it's generally permissible to extend the term of the trust.³⁸ New York expressly permits extension of the trust term.³⁹ South Dakota, whose stat-

ute is now silent as to extension of trusts, previously amended its decanting statute to remove the prohibition on extending a trust with contributions that have qualified for the gift tax exclusion under Internal Revenue Code Section 2503(b).⁴⁰ Delaware, by contrast, requires that if the second trust has an open class of beneficiaries, then its terms must permit distributions only "when and to the extent permitted" by the first trust.⁴¹ Under any circumstance, however, careful attention must be paid to the tax and, in particular, generation-skipping transfer (GST) tax consequences of extending the trust's term.

Extending Perpetuities Period

In Arizona, Nevada, New Hampshire and, in some circumstances, Delaware, the decanted trust, pursuant to general state trust law, may have a new (and potentially unlimited) perpetuities period.⁴² In these states, the perpetuities period for a trust created by the exercise of a limited POA runs from the irrevocable exercise, not the creation, of the POA. Indiana, New York, Ohio, South Dakota and Tennessee, likely concerned about the latent problems with allowing an extension of the perpetuities

HERITAGE

THE WORLD'S THIRD LARGEST AUCTION HOUSE

GLOBAL AUCTIONS, PRIVATE SALES AND APPRAISAL SERVICES FOR ESTATES, TAXES & INSURANCE

- Market Leader in Rare Coins and Collectibles – with 33 sale categories including fine art and jewelry.
- Dedicated USPAP Compliant Appraisal Services Department
- Always full and on-time payments
- Clear and concise settlement statements – with automated online tracking and reporting
- Dallas headquarters with offices/auctions in New York and California

Request a sale proposal or appraisal from Heritage and exceed your fiduciary responsibilities

Trusts & Estates Department
214-409-1632 • Estates@HA.com

Email your contact information to Estates@HA.com and we'll mail you up to 10 free copies of The Collector's Handbook (value \$15) which you can give as a benefit to your clients with collections.

1829 \$5
Large Date PR64
PCGS Secure. CAC.
Breen-6489, BD-1, R.7
Sold For: \$1,380,000,
January 2012
HA.com/1166*4681



Annual Sales Exceed \$800 Million • 700,000+ Online Bidder-Members
3500 Maple Avenue • Dallas, Texas 75219 • 800-872-6467 • HA.com

DALLAS | NEW YORK | BEVERLY HILLS | SAN FRANCISCO | PARIS | GENEVA

HERITAGE
AUCTIONS HA.com

period, have chosen to restrict their decanting statutes by forbidding the extension of the perpetuities period beyond that of the first trust.⁴⁵ Some state decanting statutes are silent as to extension of the period, but effectively prohibit doing so under their general trust law.⁴⁴ Note, in addition to concerns about the GST tax, states seem anxious to avoid the Delaware tax trap. However, in the context of decanting, there's an argument that a prohibition on the extension of the perpetuities period is unnecessary.⁴⁵

Preventing Latent Tax Complications

There are some tax issues that may arise from merely creating a trust in or moving a trust to a jurisdiction with a decanting statute.⁴⁶ Some states, seeking to ameliorate these concerns, have adopted prophylactics to prevent potential latent tax complications.

Granting an unrestricted decanting power to a trustee/beneficiary or a trustee of a trust over which a beneficiary has a power to replace the trustee may cause the trust to be included in the estate of the beneficiary. To eliminate this danger, New York and North Carolina have enacted outright prohibitions on decanting when the trustee is also a beneficiary.⁴⁷ Florida, Ohio and Tennessee have the same prohibition in their general trust law.⁴⁸ Other states have sought the same tax protection, while providing significantly more flexibility to the trustee. Alaska, Arizona, Delaware, Missouri, Nevada, New Hampshire and South Dakota provide, essentially, that a trustee/beneficiary can't exercise the decanting power unless the distribution power in the second trust is limited by an ascertainable standard.⁴⁹ Oddly, Florida, New York, North Carolina, Ohio and Tennessee have prohibited decanting when the trustee is a beneficiary, but are silent as to the decanting power when a beneficiary has the power to remove the trustee. Finally, perhaps displaying the most advanced approach to the gift/estate prophylactic, South Dakota limits the decanting, but removes the limitations when the trust, trustee and beneficiaries wouldn't be subject to U.S. estate or gift tax.⁵⁰ The other decanting statutes don't include limitations to address this issue.

If the trustee can decant to a trust that removes the vesting conditions for a gift that qualified as a present interest under IRC Section 2503(c), there's a concern that the Internal Revenue Service may treat the transfer as a future interest (regardless of whether the trust is ever decanted). With that in mind, many

states require that a minor beneficiary's interest, which previously qualified under Section 2503(c), must vest no later than the date on which it would have vested under the first trust.⁵¹

Almost every state statute contains a provision that prohibits changing a trust term necessary for qualifying for the marital or charitable deduction.⁵² Only Alaska and Tennessee lack such provisions.⁵³ Most state statutes mandate that a decanting can't reduce a fixed income, annuity or unitrust interest.⁵⁴ Missouri and Ohio prohibit changing trust terms necessary to qualify as an electing small business trust or qualified Subchapter S trust.⁵⁵ Ohio also prohibits changes that would jeopardize a trust's exemption under the GST tax or tax treatment under IRC Section 401.⁵⁶

The laundry list approach to tax prophylactics adopted by most states is risky. By listing numerous prohibitions, a state creates the potential for the IRS to argue that any non-enumerated action is permitted (permission by omission). Instead, it's safer and more comprehensive to have a catchall, like Ohio does, prohibiting the omission or inclusion of any provision that would jeopardize an express or implied tax benefit of the first trust. This general approach, however, reduces the potential flexibility for the trustee, as it could be argued that a simple change, such as shifting from a grantor to a non-grantor trust, jeopardizes an implied tax benefit of the first trust.

Need for Flexibility

Decanting statutes clearly respond to a need, or perceived need, to provide flexibility, since they're now available in over a dozen jurisdictions (including the most popular trust jurisdictions) and, yet, were relatively rare only five years ago. It would have been difficult to predict at the outset that decanting statutes would make irrevocable trusts in the United States so readily amendable. As we move forward, states will need to be attentive to the uses, and potential abuses, of their decanting statutes and amend them as needed to clarify the process, restrict trustee overreaching and address needs still unmet.

Endnotes

1. See generally Rashad Wareh, "Trust Remodeling," *Trusts & Estates* (August 2007) at p. 17.
2. In light of the increasing use of decanting statutes, the Internal Revenue Service has requested comments regarding the tax implications. IRS Notice 2011-101.

3. In some states without decanting statutes, it may be possible to rely on common law. Although Wyoming doesn't have a decanting statute, trusts in Wyoming are regularly decanted by court order.
4. Alaska Stat. Section 13.36.157(b)(2); NY CLS EPTL Section 10.6-6 (r).
5. S.D.C.L. Section 55-2-15; A.R.S. Section 14-10819(B); R.S.Mo. Section 456.4-419(6) (decanting statute applies to any trust governed by the laws of Missouri, including a trust whose principal place of administration is Missouri); O.S.C. Section 5808.18(O) (same as Missouri).
6. 12 Del. C. Section 3528(f).
7. New Hampshire requires notice to the director of a charitable trust. NH R.S.A. Section 564-B:4-418(d).
8. Nev. Rev. Stat. Ann. Section 163.556(4).
9. S.D.C.L. Section 55-2-18 (notably, South Dakota's statute permits the settlor, trust advisor or trust protector to eliminate the notice requirement); Ind. Code Ann. Section 30-4-3-36(e); Fla. Stat. Section 736.04117(1)(b)(4); N.C. Gen. Stat. Section 36C-8-816.1(f)(2); O.S.C. Section 5808.18(F).
10. NY CLS EPTL Section 10.6-6(j)(2).
11. Proposed Kentucky House bill 12 R. S. BR 341.
12. R.S.Mo. Section 456.4-419(3) (Missouri's general trust law requires a trustee to send the beneficiary a report at the termination of the trust).
13. See Donald D. Kozusko, "In Defense of Quiet Trusts," *Trusts & Estates* (March 2004) at p. 20.
14. O.S.C. Section 5808.18(K).
15. NY CLS EPTL Section 10.6-6(j)(6).
16. NY CLS EPTL Section 10.6-6(j)(1); N.C. Gen. Stat. Section 36C-8-816.1(h); Nev. Rev. Stat. Ann. Section 163.556(4); A.R.S. Section 14-10819(D).
17. See *Restatement (Third) of Property* Section 50; see also 12 Del. C. Section 3528(e) ("exercise of such authority shall be held to the standard of care and the standard of liability applicable . . . [to] outright distributions").
18. NY CLS EPTL Section 10-6.6(h).
19. R.S.Mo. Section 456.4-419(1) (uses the word "purposes" instead of "conditions"); S.D.C.L. Section 55-2-15.
20. See, e.g., 12 Del. C. Section 3528(e) (Delaware holds a trustee to the standard of care applicable when making a distribution to one or more permissible distributees); S.D.C.L. Section 55-2-15(10); R.S.Mo. Section 456.4-419(1); O.S.C. Section 5808.18(I) (a trustee who acts reasonably and in good faith is presumed to have acted in accordance with the terms and purposes of the trust and the interests of the beneficiaries).
21. S.D.C.L. Section 55-2-15(10).
22. NY CLS EPTL Section 10-6.6; 12 Del. C. Section 3528(a); Alaska Stat. Section 13.36.157(a); Ind. Code Ann. Section 30-4-3-36(a); O.S.C. Section 5808.18(A)(1) and (B); Fla. Stat. Section 736.04117(1)(a); Tenn. Code Ann. Section 35-15-816(27)(A). Notably, Alaska provides decanting authority to a trustee who has authority to invade trust principal for the benefit "of a beneficiary who is eligible or entitled to the income of the trust...." Alaska is the only state to use this phrasing, which appears to limit the authority to a principal distribution standard (assuming at least one principal beneficiary is also entitled to trust income).
23. S.D.C.L. Section 55-2-15; R.S.Mo. Section 456.4-419(1); Nev. Rev. Stat. Ann. Section 163.556(1); N.C. Gen. Stat. Section 36C-8-816.1(a)(2).
24. NH R.S.A. Section 564-B:4-418(a); A.R.S. Section 14-10819(A).
25. N.C. Gen. Stat. Section 36C-8-816.1(b); A.R.S. Section 14-10819(A); S.D.C.L. Section 55-2-15; R.S.Mo. Section 456.4-419(1); Alaska Stat. Section 13.36.157(a) ("whether or not there is a current need to invade the principal under any standard"); NY CLS EPTL Section 10-6.6(c) (but if under limited distribution authority, then restrictions apply—for example, current and remainder beneficiaries may not change, distribution standard may not change during original trust term and power of appointment (POA) appointees are restricted); O.S.C. Section 5808.18(B) (but if under limited distribution authority, then the second trust may not materially change interests of the beneficiaries of the first trust).
26. Fla. Stat. Section 736.04117(1)(a); Ind. Code Ann. Section 30-4-3-36(a) and (b).
27. Tenn. Code Ann. Section 35-15-816(27)(A); NH R.S.A. Section 564-B:4-418(a); Nev. Rev. Stat. Ann. Section 163.556(1); 12 Del. C. Section 3528(a).
28. N.C. Gen. Stat. Section 36C-8-816.1(b); see also Alaska Stat. Section 13.36.157(a); O.S.C. Section 5808.18(B). Kentucky's proposed decanting statute includes a similar provision. Proposed Kentucky House bill, *supra* note 11.
29. S.D.C.L. Section 55-2-15(1) (the statute allows the second trust to include either current beneficiaries or remainder beneficiaries of the first trust, or both); R.S.Mo. Section 456.4-419(2)(1). North Carolina specifically prohibits the ability to advance the interests of a future beneficiary (whether vested or contingent). N.C. Gen. Stat. 36C-8-816.1(c)(2); Proposed Kentucky House bill, *supra* note 11 (same as North Carolina).
30. Fla. Stat. Section 736.04117(1)(a)(1); Ind. Code Ann. Section 30-4-3-36(a) (but language says the beneficiaries of the second trust must be the same as the beneficiaries of the first trust, rather than that the beneficiaries "may include only" beneficiaries of the first trust, which creates some ambiguity); O.S.C. Section 5808.18(A)(1) (but a trust must not materially change the beneficial interests of the beneficiaries if the decanting is done pursuant to a limited distribution standard); NH R.S.A. Section 564-B:4-418(a); Nev. Rev. Stat. Ann. Section 163.556(1); NY CLS EPTL Section 10-6.6(b) (but the beneficiaries must remain the same if the decanting is done pursuant to a limited distribution standard); N.C. Gen. Stat. Section 36C-8-816.1(a)(2).
31. Alaska Stat. Section 13.36.157(a)(2); A.R.S. Section 14-10819(A)(3); Tenn. Code Ann. Section 35-15-816(27) (A)(ii); 12 Del. C. Section 3528(a).
32. NY CLS EPTL Section 10.6-6(b) (requiring that the remainder beneficiaries of the second trust be one or more of the remainder beneficiaries of the first trust). Certain other states permit the second trust to revert to the beneficiaries of the first trust at a certain time or event. 2 Del. C. Section 3528(a)(4); Nev. Rev. Stat. Ann. Section 163.556(5)(b); O.S.C. Section 5808.18(A)(3)(b) (section applies only to decanting done with absolute power; otherwise, the decanting can't materially change the interests of the beneficiaries); Alaska Stat. Section 13.36.157(d).
33. See Wareh, *supra* note 1, endnotes 8 through 13 and related text.
34. Nev. Rev. Stat. Section 163.556(5); N.C. Gen. Stat. Section 36C-8-816.1(c)(8); O.S.C. Section 5808.18(A)(3)(a) (providing the right to create a POA in the

- second trust only when the trustee has absolute discretion); NH R.S.A. Section 564-B:4-418(b)(1) (implies the right to create a POA in the second trust); 12 Del. C. Section 3528(4). Pending legislation in South Dakota would amend its decanting statute to expressly permit a POA to be granted in the new trust and for the potential appointees to be any person (whether a beneficiary of the first trust). S.D. HB No. 1045 (2012).
35. NY CLS EPTL Section 10-6.6(2) and (3),(c)(4).
 36. N.C. Gen. Stat. Section 36C-8-816.1(c)(7); NY CLS EPTL Section 10.6-6(c)(1) and (2) (by which New York requires that the appointed trust contain the same language authorizing trustee distributions during the term of the first trust); 12 Del. C. Section 3528(a)(4) (if the beneficiaries of the second trust consist of an open class, then the second trust may only permit distribution under the same standard as the first trust); O.S.C. Section 5808.18(B) (if decanting is done pursuant to limited distribution standard, then the second trust can't "materially change the interests of the beneficiaries").
 37. Alaska Stat. Section 13.36.157(a)(4).
 38. By "trust term," we mean the period before the trust terminates by virtue of the terms of the trust agreement, independent of the perpetuities period (and likely shorter than the perpetuities period). For example, decanting is one means to extend the termination date of a trust created for a minor, which terminates when the minor reaches age 21.
 39. NY CLS EPTL Section 10-6.6(e) (if the second trust is created through the exercise of a limited distribution standard, it may include language providing the trustees with unlimited discretion to invade principal after the termination date of the first trust).
 40. S.D.C.L. Section 55-2-15(5).
 41. 12 Del. C. Section 3528(4).
 42. Nev. Rev. Stat. Section 111-1039; 25 Del. C. Section 501 and 503 (but Section 504 prohibits extension of the perpetuities period for any generation-skipping transfer (GST) tax-exempt trusts); A.R.S. Section 14-2905, NH R.S.A. Section 64-24 (allows a trustee to elect to have the trust be exempt from the common law rule against perpetuities).
 43. Tenn. Code Ann. Section 35-15-816(27)(C) (prohibition is by reference to O.S.C. Sections 2131.08 and 2131.09 to the extent they're applicable); O.S.C. Section 5808.18(E); S.D.C.L. Section 55-2-20; Ind. Code Ann. Section 30-4-3-36(d); NY CLS EPTL Section 10.6-6(p).
 44. Fla. Stat. Section 689.225 (perpetuities for a trust created by a limited POA runs from the creation of the POA, not the exercise); N.C. Gen. Stat. Section 41-23; Alaska Stat. Section 34.27.051; R.S. Mo. Section 456.025. Note, Missouri's traditional perpetuities statute continues to apply to trusts created in Missouri before Aug. 28, 2001 or that were created in other states before that date (assuming such other state hadn't repealed its perpetuities statute).
 45. Generally, the lifetime exercise of a limited POA to create a new trust, which itself contains a limited POA, the exercise of which could extend the trust past the original perpetuities period, would cause gift tax under IRC Section 2514(d) (the Delaware tax trap). However, it can be argued that Section 2514(d) and its sister provision, IRC Section 2041(a)(3), were intended to exclude POAs exercised by fiduciaries and, thus, the Delaware tax trap isn't an issue for trusts decanted by trustees. See Sen. Rep. 83-382 (1951).
 46. In addition to the GST tax issues relating to a change in perpetuities period upon decanting, discussed in this article's section, "Extending Length of Trust."
 47. NY CLS EPTL Sections 10-6.6(b) and (s)(2); N.C. Gen. Stat. Section 36C-8-816.1(d). Decanting can be done by a co-trustee even if trustee/beneficiary decanting is prohibited.
 48. Fla. Stat. Section 736.0814; O.S.C. Section 5808.14; Tenn. Code Ann. Section 35-15-814.
 49. S.D.C.L. Section 55-2-15(2); R.S. Mo. Section 456.4-419(2)(3); A.R.S. Section 14-10819(A)(4) (can't reduce ascertainable standard when a trustee is the beneficiary and can't adversely affect the tax treatment of the trust or beneficiaries); Nev. Rev. Stat. Ann. Section 163.556(2)(g) and (3); Alaska Stat. Section 13.36.157(a)(4) (by requiring the standard to remain the same in the second trust, the statute makes the trustees keep, in effect, any ascertainable standard from the first trust); NH R.S.A. Section 564-B:4-418(b)(5) and (c); 12 Del. C. Section 3314(c) and (f) (while Delaware doesn't include the prophylactics in its decanting statute, there's a general prophylactic in the trust code). A trustee who's not a beneficiary may also be in a better position to make objective decisions in the decanting process, although, admittedly, families usually seem comfortable with having family members who are also beneficiaries serve as trustees.
 50. S.D.C.L. Section 55-2-15(4).
 51. 12 Del. C. Section 3528(a)(2); N.C. Gen. Stat. Section 36C-8-816.1(c)(5); NY CLS EPTL Section 10.6-6(n)(5) (can't jeopardize a deduction originally claimed under 2503(b)); S.D.C.L. Section 55-2-15(5); NH R.S.A. Section 564-B:4-418(b)(3) (general prohibition against including or omitting terms necessary for qualifying for the gift tax exclusion); Nev. Rev. Stat. Ann. Section 163.556(2)(h) (same as South Dakota); A.R.S. Section 14-10819(A)(5) (broad provision prohibiting adverse tax treatment likely prohibits decanting in a manner that would jeopardize a transfer from qualifying under Section 2503(c)); R.S. Mo. Section 456.4-419(4); O.S.C. Section 5808.18(C)(3). A trust term may be extended, without delaying the vesting of a minor beneficiary's interest, by granting the beneficiary a general POA on the date his interest would have vested under the original trust.
 52. Nev. Rev. Stat. Ann. Section 163.556(2)(c); A.R.S. Section 14-10819(A)(5); O.S.C. Section 5808.18(C)(2); R.S. Mo. Section 456.4-419(2)(5); NH R.S.A. Section 564-B:4-418(b)(3); S.D.C.L. Section 55-2-15(6); NY CLS EPTL Section 10.6-6(n)(5); Ind. Code Ann. Section 30-4-3-36(a)(3); Fla. Stat. Section 736.04117(1)(a)(3); N.C. Gen. Stat. Section 36C-8-816.1(c)(4); 12 Del. C. Section 3528(a)(3).
 53. Alaska's prohibition on reducing fixed income interest and changing the distribution standard of the first trust accomplishes much of the intended prophylactic, but may not cover the entire ground.
 54. Alaska Stat. Section 13.36.157(a)(1); Tenn. Code Ann. Section 35-15-816(27)(A)(i); N.C. Gen. Stat. Section 36C-8-816.1(c)(3); Fla. Stat. Section 736.04117(1)(a)(2); Ind. Code Ann. Section 30-4-3-36(a)(2); NY CLS EPTL Section 10.6-6(n)(1); S.D.C.L. Section 55-2-15(6) (prohibiting the reduction of an income interest for marital, charitable and grantor retained annuity trusts); NH R.S.A. Section 564-B:4-418(b)(2); R.S. Mo. Section 456.4-419(2)(5) (prohibiting reduction of an income interest in marital, charitable, grantor retained annuity and qualifying Subchapter S and electing small business trusts); O.S.C. Section 5808.18(C)(1)(a)(ii); A.R.S. Section 14-10819(A)(2); Nev. Rev. Stat. Ann. Section 163.556(2)(b).