

VA Decanting Law Allows Changes To Irrevocable Trusts

By Michelle Chapin

Virginia recently enacted legislation (§ 55-548.16:1 of the Virginia Code) which allows a trustee granted discretionary power to appoint trust principal or income, with the ability to appoint trust assets into a second trust, even if the second trust was created by the trustee of the first trust. This process is commonly known as decanting.

Under the Virginia decanting statute, if a trustee appoints assets of the original trust to a second trust, the beneficiaries of the second trust may only include beneficiaries of the original trust. However, the terms of the second trust may confer a power of appointment upon a current beneficiary of the original trust, and the permissible appointees of a power of appointment may include people who are not beneficiaries of the original or second trust.

A trustee exercising this power is required to do so in writing. He or she must set forth the terms of the second trust, and give sixty (60) days written notice to the grantor of the original trust, if living. Otherwise that notice must be given to the qualified beneficiaries of the original trust and any trust advisor or trust protector of the original trust prior to such exercise, unless they otherwise waive such notice requirement. This statute will apply to any trust created in the Commonwealth, and will apply retroactively, unless the trust instrument expressly prohibits the exercise of the power.

Decanting can provide flexibility to the trustee of an irrevocable trust if unanticipated circumstances should arise, such as a change in the law. If you had reservations about creating an irrevocable trust because of the inability to make changes to the trust once executed, Virginia's decanting statute may alleviate some of those fears.