

Missouri's Flexibility with (ir)Revocability

AUTHOR: CARL LOTHMAN

If you haven't had the pleasure of administering someone's trust estate yet, you are likely to either be involved in such an administration someday, or will have someone administering yours for you in the future. Many trusts being administered today, however, were drafted in the 80's and 90's and were never updated or revisited once they were put into place. This leaves children and grandchildren struggling to administer trust estates subject to terms that are either outdated or simply don't make sense anymore for their families.

Until relatively recently, there was no easy way around frustrating situations like these, and all too often people were left feeling handcuffed by an old trust or having to spend a decent portion of the estate to get court approval just to change the trusts' terms while the main purpose of creating the trust in the first place was to avoid court involvement.

The State of Missouri, however, recently passed Section 456.4-419 of the Revised Missouri Statutes to allow a Trustee of a Missouri trust to create a second trust and pour over assets from the first trust to the second trust. This law essentially allows one to modify a trust's terms without having to petition the court or obtain consent from the beneficiaries of a trust.

The decanting statute is a simple answer to a multitude of complicated problems. For example, previously many families were stuck with distributions going to beneficiaries with special needs, and those distributions negatively impacted the public benefits the beneficiary was receiving. Now, if a beneficiary of a trust becomes disabled and the trust includes no provisions for special needs, decanting allows the trustee to create a special needs trust and to decant all provisions in favor of the disabled beneficiary into the special needs trust. This enables the distribution to be used for the disabled persons' supplemental needs without impacting that person's benefits. Similarly, decanting will allow the flexibility needed to change a trust's terms for problems involving creditor or tax issues, divorce, addiction, drafting errors, and our ever changing laws.

The decanting law is not without its limitations, however. In order for decanting to be allowed, the original trustee of the first trust must have discretion to make distributions. Additionally, any beneficiary of the second trust must also be a beneficiary of the first trust and the trust terms must be nearly identical. The Trustee thus cannot increase distributions to a beneficiary with the right to replace the trustee with a relative, employee, or agent. Finally, decanting may not be used to increase trustee powers to make discretionary distributions or to avoid fiduciary liabilities.

Overall, however, the ability to decant offers enhanced flexibility for trust administrations in Missouri and in the many other states that have enacted decanting statutes. Having the ability to modify an otherwise irrevocable trust through the use of decanting is an extremely useful tool, not only for dealing with problematic trust agreements, but also for changing key trust terms such as the situs of a trust. Finally, these statutes also potentially offer significant planning opportunities for federal and state income, gift and estate taxes as well as for appreciating trust property.