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New York Trust Decanting Law Substantially Revised

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On August 17, 2011, New York Governor Andrew Cuomo signed legislation that substantially revises New York's trust decanting statute, NY EPTL 10-6.6. New York was the first state to enact a decanting law in 1992. The statute offers one effective method to revise or update otherwise irrevocable trusts. The revisions to the statute significantly expand its scope, including the following changes:

"Absolute discretion" standard expanded. Under the old New York law, the trustee had to have "absolute discretion" to invade the trust principal in order to be able to decant the trust. The new law relaxes this requirement.

Under the new law, if the trustee has "unlimited discretion" to distribute the trust principal, the trustee may decant the trust in favor of one or more of the trust beneficiaries, to the exclusion of others.

Similarly, the remainder beneficiaries of the new trust can be one or more of the remainder beneficiaries of the old trust, to the exclusion of others.

For example, if a trust permits distributions to any of four children for the "best interests" of any of them, the trustee could decant the entire trust in favor of only one of the children. The rationale is that such a distribution falls within the trustee's broad discretion under the terms of the trust.

If the trustee does not have “unlimited discretion” – for example, the trust only permits principal distributions according to a “health, education, maintenance and support” standard – then the trustee still may decant the trust, but the beneficiaries of the new trust must be the same as the old trust, and the new trust must contain the same standard regarding principal distributions.

Notification. The revised New York decanting statute still requires that all interested parties be notified of the changes to the trust. In addition, the revised statute provides that, unless the beneficiaries consent, the decanting will become effective 30 days after service of notice.

Feel free to contact us if you have any questions about the pros and cons of decanting a trust, or the application of New York’s decanting statute.

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