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COMMENTS

Save the Wealth! Trust Decanting and Oklahoma*

I. Introduction

The year is 1948. Amidst the post-World War II boom, the lumber industry is thriving. A lumber baron decides to take some of his profits to establish a trust for his grandchildren so that they will not have to experience the same financial worries that he suffered during the Great Depression. As a proud member of the American lumber industry, he creates a trust that requires the assets to be invested in domestic timber companies.

Fast forward to present day. You are the beneficiary of that trust, but the investment restriction does not permit diversification of the trust assets. In the midst of an economic recession and slumping U.S. timber stocks, you are left with an asset that yields no return. Your financial adviser recommends trust decanting to better provide for your financial future. Because the state where you live allows trust decanting, your adviser transfers the assets from the existing trust into a new trust that allows for diversification, despite the original intent of your lumber baron ancestor to limit the sources for investment.

If this scenario occurred in Oklahoma, you would not have this option. Oklahoma does not have a decanting statute, and current Oklahoma trust law raises issues with enacting a trust decanting law. Without trust decanting, your grandfather's prudent sacrifice of his own funds for your benefit will be for naught. This Comment provides an overview of trust decanting and an analysis of existing trust decanting statutes, outlining the benefits to be gained by reforming current Oklahoma trust law to allow decanting.

Part II outlines the history, types, and purposes of trusts. It introduces trust decanting and describes common issues that arise with existing irrevocable trusts that could prompt the need for decanting. Part III surveys the states that currently have trust decanting statutes, including a summary of the differences in common provisions between the various state statutes.

Part IV explains the provisions of Oklahoma's current trust statutes and analyzes Oklahoma-specific considerations, including tax consequences

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and the impact of Oklahoma's rule against perpetuities on a potential decanting provision. It also examines the societal, familial, and economic impacts of a trust decanting statute. Part V provides a recommendation for future statutory action.

Examining statutes enacted by other states highlights the potential pitfalls and benefits of enacting similar legislation in Oklahoma. Ultimately, such an examination shows that the benefits of trust decanting outweigh its faults. Oklahoma should adopt a statute allowing trust decanting.

II. Overview of Trusts and Trust Decanting

A. Trust Basics

For the uninitiated, many legal concepts may be dizzying. Even those concepts that should be familiar by virtue of common occurrence are often convoluted and confusing. Trust and estate law suffers from this phenomenon.

A will expresses a decedent's desired restraints for disposition of her accumulated property at death.¹ A decedent's control over future generations as exercised through written intent is often referred to as the "dead hand" of the past.² As one author notes, "Fundamentally, when the body flatlines, a person's iron grip on 'assets,' all rights of ownership, all powers and authority supported by custom and law, dissolve, turn limp and flaccid; and the wealth, no matter how great, slips out of the person's hands."³ Wills, though simple to create, can have great impact. They can include directions for relatively immediate or eventual disposition of property, instructions for the care of minor children, and even burial requests. A will is the last gasp of a dying person trying to control the acquired things of life.

A trust can substitute for a will but is more involved. At its core, it is a mechanism of preserving wealth for the benefit of another, monitored by a trustee.⁴ The *Restatement of Trusts* gives a more formal definition:

[A] fiduciary relationship . . . arising from a manifestation of intention to create that relationship and subjecting the person

1. JOAN M. BURDA, *ESTATE PLANNING FOR SAME-SEX COUPLES* 52 (2d ed. 2012).

2. LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 4 (2009).

3. *Id.* at 3.

4. *Id.* at 101.

who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.⁵

While a trust can function in much the same way as a will, modifiable until the settlor dies and the terms become final, it can also transfer wealth during life.⁶

Wills, trusts, and estate principles stem from English law.⁷ The roots of trusts stretch hundreds of years into the past.⁸ Ownership of property was at the heart of the English system of wealth, and the amount of land under a person's control was the yardstick against which wealth was measured.⁹ Taxes were assessed against a person's property at death.¹⁰ In a time-honored tradition that continues to this day, wily medieval landowners (and their accountants and lawyers) sought ways to avoid paying taxes whenever possible.¹¹ Trusts became their tool of evasion.¹²

For example, if Duke Humphrey contemplated his death and worried about the effects of taxes on his estate, he might seek the advice of his attorney, Mr. Smith. Mr. Smith would suggest that Duke Humphrey convey his property to his (hopefully trustworthy) friend Atkinson and Atkinson's heirs "for the use of" the Duke's son, Boswell, and Boswell's heirs. While the Duke was still alive, he could use the property as he saw fit. Upon his death, his friend Atkinson would take the *legal* title, meaning that Atkinson would be listed as the owner of the land.¹³ Boswell would hold the *equitable* title, meaning that Boswell would have the right to the fruits and proceeds of the land, unlike Atkinson.¹⁴ This legal trickery essentially gave an estate more than one living owner at a time. When one owner passed on,

5. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

6. WILLIAM P. LAPIANA, *INSIDE WILLS AND TRUSTS: WHAT MATTERS AND WHY* 162 (2012).

7. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 38-39 (3d ed. 1989).

8. RONALD CHESTER, *FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND* 3-4 (2007).

9. David A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History – Part I: The Shared History*, 34 *REAL PROP. PROB. & TR. J.* 143, 171 (1999).

10. LAPIANA, *supra* note 6, at 175.

11. *Id.* at 175-76.

12. *Id.*; see also EDWIN MCINNIS, *TRUST FUNCTIONS AND SERVICES* 11 (1971).

13. LAPIANA, *supra* note 6, at 175-76.

14. It is important to note that "for the use of" only applied to real property that a conveyer actually owned. Life estates or leases, for example, were not eligible to be conveyed via this mechanism. MCINNIS, *supra* note 12, at 10-11.

the surviving owner would deed it to another person. The property would never completely pass at death because there would always be at least one owner alive. This would avoid any taxes that were triggered when a death resulted in a land transfer.

Understandably, such conveyances “for the use of” another became very popular in medieval England, so “by the time of Henry V (1413-1422) they were the rule rather than the exception in landholding.”¹⁵ This trend continued, and “[b]y the sixteenth century the use was a highly-developed device and vast quantities of English land were held to uses.”¹⁶ The removal of vast tracts of land from the taxation scheme certainly would have been challenging for any treasury.

Enter King Henry VIII. Henry VIII liked to have money to fill his coffers, as kings are wont to do, so deprivation of a large portion of his tax base was a problem.¹⁷ At his urging, the English Parliament reluctantly passed the Statute of Uses in 1535.¹⁸ After its passage, the Statute still permitted transferring land “to Atkinson and his heirs for the use of Boswell and his heirs,” but mandated that whoever held the “use” (the equitable title) also held the legal title.¹⁹ By requiring a single landowner to receive both titles, the land once again fully transferred at death. This result was very bad news for Duke Humphrey, his friend Atkinson, and the Duke’s son Boswell. Boswell was once again required to pay taxes. Henry VIII undoubtedly was pleased—after all, he had a succession of wives to support and a country to run.²⁰

A few critical exceptions to the Statute of Use’s applicability gave rise to the modern trust.²¹ Like the uses of old, “[i]n the modern trust, the trustee takes the legal title but must hold it for the benefit (use) of the beneficiary, who thus has equitable title.”²² Hence, a fiduciary relationship exists, meaning a trustee has a duty to act in the best interest of the one who is benefiting from the trust.²³

15. GEORGE T. BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 2 (3d ed. 2008).

16. CRIBBET & JOHNSON, *supra* note 7, at 71.

17. LAPIANA, *supra* note 6, at 175.

18. CRIBBET & JOHNSON, *supra* note 7, at 72.

19. Thomas, *supra* note 9, at 182.

20. *See generally* 2 WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH SPEAKING PEOPLES* 27-84 (1956).

21. 2 EDWARD F. KOREN ET AL., *ESTATE TAX AND PERSONAL FINANCIAL PLANNING* § 19.2 (2012).

22. CRIBBET & JOHNSON, *supra* note 7, at 73.

23. BOGERT ET AL., *supra* note 15, at §§ 1-2; TAMAR FRANKEL, *FIDUCIARY LAW* 4-5 (2011).

Trusts are used for many purposes. For example, the property or money held in a trust reduces an estate's assets, decreasing the amount of tax levied on an estate at a trustor's death.²⁴ Trusts are generally not a matter of public record, so including property in an irrevocable trust helps to "avoid the expense, delay, claims, and publicity of probate."²⁵ By avoiding the probate process, a trust may not be subjected to potentially unfavorable judicial interpretation.²⁶ Trusts also can benefit family members who are unable to take care of themselves.²⁷ These family members could include minors, people with debilitating disabilities, or family members that tend to be inept at managing their own money.

Issues often arise with trusts because the person creating the trust can only account for possibilities that she imagines. Situations involving money or relationships may change over time, but irrevocable trusts are not intended to be flexible. Instead, they are drafted to express and enforce the desires of the person who grants the trust and fills it with assets.²⁸ The creator of an irrevocable trust intends the trust to be the means of carrying out his future wishes after exercising direct control becomes impossible.²⁹

B. Introduction to Trust Decanting

"Trust decanting" deliberately evokes the method of decanting wine. After a fine wine sits and ages, impurities develop within the bottle.³⁰ When wine is decanted, the old wine is transferred into a new container, thereby removing sediment and oxygenating the wine to improve its clarity and taste.³¹

The concepts of decanting wine apply to decanting trusts. A trust decanting statute acts as a filter that removes the old, unfavorable terms.³²

24. KOREN ET AL., *supra* note 21, §§ 19.54, 19.56.

25. *Id.* § 19.55; *see also* A. James Casner, *Estate Planning-Avoidance of Probate*, 60 COLUM. L. REV. 108, 123 (1960).

26. KOREN ET AL., *supra* note 21, § 19.55.

27. *Id.* §§ 19.17, 19.55.

28. Julia C. Walker, Law Summary, *Get Your Dead Hands Off Me: Beneficiaries' Right to Terminate or Modify a Trust Under the Uniform Trust Code*, 67 MO. L. REV. 443, 443-45 (2002).

29. *Id.* at 444.

30. Eric Asimov, *Middle Ground in Decanting*, N.Y. TIMES, Mar. 5, 2012, at D6, available at <http://www.nytimes.com/2012/03/07/dining/decanting-the-flavor-options.html>.

31. Joseph Nase, *Proper Transference Makes Wine Taste Better. So Pour It Out!*, N.Y. MAG., <http://nymag.com/restaurants/articles/wine/essentials/decanting.htm> (last visited Oct. 31, 2013).

32. Anne Marie Levin & Todd A. Flubacher, *Putting Decanting to Work to Give Breath to Trust Purpose*, ESTATE PLANNING, Jan. 2011, at 3, 3.

The assets of the original trust are transferred to a new trust, leaving the detrimental terms behind as sediment and breathing new life into the trust's purpose.³³

Trusts implicated in trust decanting are either initially irrevocable trusts or revocable trusts that become irrevocable upon the death of the trustor.³⁴ An irrevocable trust has "some period of time [in which] no individual has the authority to terminate [it]."³⁵ By contrast, a revocable trust can be cancelled.³⁶ Testamentary trusts are revocable during a trustor's life, utilizing "pour-over wills" to transfer assets after the trustor's death.³⁷ Once the trustor dies, the created trust is irrevocable.³⁸

Many problems can arise over time with trusts. Issues tend to fall into three general categories: (1) problems with the trust itself, whether the actual trust document or the assets held within the trust; (2) problems with the trustee; and (3) problems with the beneficiaries.

Problems with the trust document include drafting errors and ambiguities.³⁹ Asset issues include trusts with terms that impede the generosity of the grantor. For example, a trust may be locked into an unfavorable situs, resulting in higher taxes than otherwise could be obtained in jurisdictions that reduce or eliminate taxes.⁴⁰ Trusts with investment limitations do not allow trustees to diversify, resulting in a lack of flexibility that hinders asset maximization.⁴¹ Decanting could extend a trust's expiration date⁴² or allow perpetual trusts if permitted by a state's

33. *Id.*

34. See Thomas E. Simmons, *Decanting and Its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. REV. 253, 254 (2010) ("[D]ecanting has also been called the 'ultimate' in trust amendment powers for otherwise irrevocable trusts.").

35. GEORGE M. TURNER, IRREVOCABLE TRUSTS 19 (1985).

36. LAPIANA, *supra* note 6, at 248.

37. KOREN ET AL., *supra* note 21, § 18:44.

38. *Limb v. Aldrige*, 1999 OK CIV APP 31, ¶ 4, 978 P.2d 365, 367.

39. William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 14 (2010).

40. William R. Burford, *Practical Prescriptions for Fixing a Broken Trust*, ESTATE PLANNING, Sept. 2009, at 9, 12 (2009); see also Culp & Mellen, *supra* note 39, at 15.

41. See RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. d (2003); Christopher P. Cline, *The Uniform Prudent Investor and Principal and Income Acts: Changing the Trust Landscape*, 42 REAL PROP. PROB. & TR. J. 611, 636-37 (2008); Trent S. Kiziah, *The Trustee's Duty to Diversify: An Examination of the Developing Case Law*, 36 ACTEC L.J. 357, 358 (2010).

42. Diana S.C. Zeydel & Jonathan G. Blattmachr, *Tax Effects of Decanting - Obtaining and Preserving the Benefits*, 111 J. TAX'N 288, 291 (2009).

rule against perpetuities,⁴³ both of which would afford the trustee more flexibility to maximize trust assets on behalf of the beneficiaries.

Next, trustee issues include inadequate compensation, too many restrictions on trustee powers, or limitations on who can act as a trustee.⁴⁴ For example, a trustee may not be equipped to handle the investments of the trust asset, so a modification may allow for the trustee to appoint an adequate financial manager.⁴⁵

Finally, a change in a beneficiary's life may provide the impetus for trust alterations. One example is the need for a spendthrift clause that may not be evident at the trust's creation.⁴⁶ Not all beneficiaries use trust assets wisely, so a spendthrift clause prevents creditors from claiming a beneficiary's interest in the trust⁴⁷ and also prevents a beneficiary from transferring his interests to others.⁴⁸ For example, Grandpa sets up a trust with the intent of benefiting his daughter and her child. However, his daughter potentially could use up the trust principal, leaving nothing for the child or exposing the trust assets to outsiders' claims. The addition of a spendthrift clause to a trust would prevent this occurrence. If a person's living situation changes, such as becoming disabled, an alteration of the trust terms could assist the beneficiary.⁴⁹

Trust decanting holds obvious appeal for both trustees and beneficiaries. However, problems exist, including those involving (1) trustee responsibilities, (2) trustor intent, and (3) lack of oversight.

Decanting statutes, by their nature, grant trustees a large amount of discretion. This potentially could generate conflict between much-desired "efficiency and flexibility in trust administration" and "fulfilling the settlor's intent."⁵⁰ Trusts can replace or expand the terms of a will, despite the public policy of allowing a person the largely uninhibited right to

43. William R. Culp, Jr. & Briani L. Bennett, *Use of Trust Decanting to Extend the Term of Irrevocable Trusts*, ESTATE PLANNING, June 2010, at 3, 3.

44. Jeffrey A. Kern & H. Allan Shore, *So You Left Your Trust at Home When You Moved to Florida*, FLA. B. J., May 2009, at 56, 56.

45. Culp & Mellen, *supra* note 39, at 14.

46. Levin & Flubacher, *supra* note 32, at 9.

47. Richard Ploss, *Reviewing the Client's Assets and Objectives in Developing an Estate Planning Strategy*, in BEST PRACTICES FOR STRUCTURING TRUSTS AND ESTATES: LEADING LAWYERS ON DRAFTING A FLEXIBLE PLAN, PROTECTING THE CLIENT'S ASSETS, AND LEVERAGING TAX STRATEGIES 4 (2011), available at 2011 WL 6431200.

48. Levin & Flubacher, *supra* note 32, at 9.

49. Culp & Mellen, *supra* note 39, at 14.

50. Joseph T. La Ferlita, *New York's Newly Amended Decanting Statute Typifies Trend Toward Greater Flexibility*, PROBATE & PROPERTY, July/Aug. 2012, at 34, 35.

dispose of assets gained during life in the way she chooses.⁵¹ Imagine if Grandpa loves the state of Michigan and desires that his progeny remain connected with the state. If his will established a trust requiring his beneficiaries to reside in Michigan at least six months of the year in order to receive the trust proceeds, the current law would allow Grandpa to know that his wishes will be carried out. Trust decanting would remove this certainty.

Additionally, allowing decanting could directly contradict the trustor's desires. Just as a trust could be decanted to implement a spendthrift provision, decanting could also *remove* a spendthrift provision put in place by the original trustor. A decanting provision could even impact prior agreements made by the trustor outside of the trust context. For example, by changing beneficiaries, decanting could alter trust provisions in a way that materially modifies a divorce agreement or decree.

Another problem is that decanting may be accomplished without court approval. This leaves no one to oversee the trustee. A trustee possesses a fiduciary duty towards the beneficiaries of trusts that he administers, but he may not always adequately fulfill that duty.⁵² While a trustee may eventually have to answer for his actions in a court of law, irreversible damage already may have occurred.⁵³ For example, a beneficiary may lack the capacity to know that a trustee's changes might not serve the beneficiary's best interests. Decanting could also allow a trustee to change the amount of his personal compensation,⁵⁴ resulting in a clear conflict of interest between administering the trust and his own financial gain. Despite the competing objectives of trust law, decanting is gaining ground.

III. Fifty-State Survey

The pace of decanting started slowly. New York is the clear innovator in the field, enacting the first decanting provision in 1992.⁵⁵ Six years later, Alaska became the second state to pass a decanting statute, followed by

51. FRIEDMAN, *supra* note 2, at 4.

52. "A trustee is a fiduciary of the highest order in whom the hope and confidence of the settlor are placed with the expectation that the trustee will exercise the obligations of the office for the exclusive benefit of the [beneficiary]. To the [beneficiary] a trustee always owes *uberrima fides* (utmost good faith)." State *ex rel.* Okla. Bar Ass'n v. Clausing, 2009 OK 74, ¶ 13, 224 P.3d 1268, 1274-75.

53. See, e.g., Mires v. United States, 372 F. Supp. 2d 1265 (W.D. Okla. 2005), *aff'd*, 466 F.3d 1208 (10th Cir. 2006); Brown v. Batt, 1981 OK CIV APP 39, 631 P.2d 1346.

54. Levin & Flubacher, *supra* note 32, at 8.

55. Culp & Bennett, *supra* note 43, at 4.

another lull until Delaware's 2003 enactment of its statute.⁵⁶ Then a torrent of legislative decanting provisions began, with eight states adding statutory decanting provisions in the first decade of the twenty-first century.⁵⁷ Seven states enacted decanting provisions in 2011 and 2012 alone.⁵⁸ Last year, South Carolina, Texas, and Wyoming joined this trend, passing decanting statutes that took effect in 2013 or early 2014.⁵⁹

As of January 2014, twenty-one states have passed decanting provisions, including Alaska, Arizona, Delaware, Florida, Illinois, Indiana, Kentucky, Michigan, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wyoming.⁶⁰ Since these enactments, several of these states have amended their decanting statutes, some within a relatively short time after passing the initial decanting statute.⁶¹

The enactment trend, although increasing, is not universal. Not every state that has considered allowing trust decanting has followed through with enactment. Colorado considered a decanting statute, but its provision may

56. Simmons, *supra* note 34, at 272.

57. Tennessee (2004), Florida (2007), South Dakota (2007), New Hampshire (2008), Arizona (2009), Nevada (2009), North Carolina (2009) and Indiana (2010). *Id.* at 272-73.

58. Missouri and Ohio in 2011; Illinois, Kentucky, Michigan, Rhode Island, and Virginia in 2012. *See infra* note 60.

59. S.B. 0143, 120th Gen. Assem., Reg. Sess. (S.C. 2013-2014), available at http://www.scstatehouse.gov/sess120_2013-2014/prever/143_20130516.htm; H.B. 2913, 83rd Leg., Reg. Sess. (Tex. 2013), available at <http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/HB02913F.pdf>; H.B. 139, 62d Leg., Gen. Sess. (Wyo. 2013), available at <http://legisweb.state.wy.us/2013/Enroll/HB0139.pdf>.

60. ALASKA STAT. § 13.36.157 (2012); ARIZ. REV. STAT. ANN. § 14-10819 (2012); DEL. CODE ANN. tit. 12, § 3528 (2007); FLA. STAT. § 736.04117 (2012); 760 ILL. COMP. STAT. 5/16.4 (LexisNexis Supp. 2010); IND. CODE § 30-4-3-36 (2011); KY. REV. STAT. ANN. § 386.175 (LexisNexis Supp. 2012); MICH. COMP. LAWS §§ 556.115a, 700.7103, 700.7820a (2013); MO. ANN. STAT. § 456.4-419 (West Supp. 2012); NEV. REV. STAT. ANN. § 163.556 (West Supp. 2012); N.H. REV. STAT. ANN. § 564-B:4-418 (LexisNexis Supp. 2012); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (Consol. Supp. 2012); N.C. GEN. STAT. ANN. § 36C-8-816.1 (West Supp. 2012); OHIO REV. CODE ANN. § 5808.18 (LexisNexis 2013); R.I. GEN. LAWS § 18-4-31 (Supp. 2012); S.C. CODE ANN. § 62-7-816A (West Supp. 2014); S.D. CODIFIED LAWS §§ 55-2-15 to 55-2-21 (2012); TENN. CODE ANN. § 35-15-816 (2007); TEX. TRUST CODE §§ 112.071-112.089 (2013); VA. CODE ANN. § 64.2-778.1 (2012); WYO. STAT. ANN. § 4-10-816(a)(xxviii) (2013). For a helpful chart, see M. Patricia Culler, *State Decanting Statutes Passed or Proposed*, ACTEC.ORG (July 1, 2013), http://www.actec.org/public/Documents/Studies/Culler_Decanting_Statutes_07_01_2013.pdf.

61. *E.g.*, ALASKA STAT. § 13.36.157 (amended in 2008 and 2013), ARIZ. REV. STAT. ANN. § 14-10819 (amended in 2011), N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (amended in 2001 and 2011).

be permanently stalled due to concerns over potential abuses of power, especially in divorce situations.⁶²

The popularity of decanting statutes continues to grow. With the current fervor for trust decanting statutes, evidenced by the ever-increasing number of enactments and the record-setting pace of decanting provisions passed within the last several years, this trend will likely continue and possibly even accelerate.

Despite acting contemporaneously with other states, each state's statutory language differs slightly. These language variances impart potentially immeasurable consequences for presently existing as well as future trusts. Legislatures must be aware of ambiguities in drafting statutory provisions and the rippling aftereffects caused by unclear language. When courts are left to interpret vague statutes without legislative guidance, it increases the uncertainty of practitioners and trust creators who are intent on drafting documents that must remain clear for future generations. Moreover, trust decanting is relatively new, so limited precedent exists. Reviewing the plain meanings of current decanting provisions in place across the states reveals the variety of reasonable interpretations that can be drawn from statutory language.

A. Trustor Intent

Trust decanting statutes can still protect trustor intent. Many states with decanting provisions begin their decanting statutes with a phrase similar to "unless the terms of the instrument [or trust] expressly provide otherwise"⁶³ Under a plain reading, this allows future trustors to create trusts that are specifically exempt from the power of decanting statutes. This provides flexibility for future trustors but does not aid a trustor whose written desires have already vested through death or the irrevocable nature of a trust. Past trustors would have had no reason to contemplate that future generations would be able to interfere with their final wishes.

Almost all the states with decanting provisions require a trust instrument to "expressly" list the objection to decanting or distribution.⁶⁴ This favors a presumption that decanting is acceptable unless a clear contrary intent

62. See *infra* Part IV.C; see also Colo. Bar Ass'n Trust & Estate Section Statutory Revisions Comm., Minutes (Oct. 15, 2009), available at http://www.cobar.org/repository/Inside_Bar/TrustEstate/SRC/SRC%20October%20Minutes.pdf; Richard I. Zuber, *Greetings from the Chair*, FAM. L. NEWSL. (Colo. Bar Ass'n, Denver, Colo.), May 2011, available at <http://www.cobar.org/index.cfm/ID/192/subID/27005/FAMILY/>.

63. E.g., ALASKA STAT. § 13.36.157(a); MO. ANN. STAT. § 456.4-419.1.

64. E.g., N.H. REV. STAT. ANN. § 564-B:4-418(a); OHIO REV. CODE ANN. § 5808.18(A).

exists. Interestingly, Nevada is the only state that does not require a trust to “expressly provide otherwise.”⁶⁵ Rather, the language of the statute just says “provide otherwise.”⁶⁶ This opens the door for courts to infer the original grantor’s favor or disfavor of trust decanting from the existing trust terms, even though the concept of trust decanting would have been unanticipated at the time of the original granting.

Even more troublesome are the decanting statutes passed by New York and North Carolina, which contain no provision for the original grantor to “provide otherwise,” whether expressly or not.⁶⁷ The lack of this language suggests that the trust laws in these states no longer allow a trustor to have true discretion in the settlement of her assets at death. Virginia’s newly enacted statute goes even farther by allowing a trustee to exercise decanting power “regardless of whether the original trust . . . prohibits amendment or revocation of the original trust.”⁶⁸ Confusingly, the Virginia statute then goes on to suggest language for the trust document that would show a trustor’s intent to prohibit decanting.⁶⁹ However, this language benefits future trustors, but countermands the intent of past trustors. These statutes show a society that is moving away from the traditional guardianship of a trustor’s expressed wishes to a more modern, dead-hand-rejecting culture that favors the living, breathing client across the table.

B. Trustee Duties and Authority

A trustee’s duty is to administer a trust faithfully in the best interests of the beneficiaries, but a question arises as to when, or even if, a trust should be decanted when those duties conflict. Without further guidance, this issue could rapidly develop into a minefield, even for a conscientious trustee. A trustee might have reasons to avoid changing the terms of an irrevocable trust, even when such an avoidance might expose the trust to short-term losses. Responding to this concern, several state laws dictate that decanting is a function of trustee discretion.⁷⁰

Missouri’s statute reassured trustees of how decanting fits within the fiduciary framework by providing that no affirmative duty to decant exists

65. NEV. REV. STAT. ANN. § 163.556(1).

66. *Id.*

67. N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (Consol. Supp. 2012); N.C. GEN. STAT. ANN. § 36C-8-816.1 (West Supp. 2012).

68. VA. CODE ANN. § 64.2-778.1(E)(4) (2012).

69. *Id.* § 64.2-778.1(K).

70. *E.g.*, ALASKA STAT. § 13.36.157(a) (2012); N.C. GEN. STAT. ANN. § 36C-8-816.1(b) (West 2007).

within a trustee's fiduciary obligations.⁷¹ This means that a trustee who chooses not to decant, even if decanting would financially benefit the trust or its beneficiaries, does not violate his fiduciary duties. Other states also employ this concept.⁷² South Dakota, in contrast, specifically requires that decanting be "necessary or desirable."⁷³ Its provision stands out among the states by providing flexibility in the form of decanting, while putting a specific check on a trustee acting within his fiduciary capacity to submit that decanting would be "necessary and desirable." This safeguards trustees and beneficiaries in an area of uncertain parameters.

Court approval also may be desirable for oversight of trusts and trustee actions. Some states have enacted decanting provisions that do not require trustees to obtain court approval before invading trust principal.⁷⁴ However, many of the remaining states are silent on the issue of court approval.⁷⁵ Nevada is somewhat unusual in that a trustee "*may* petition a court for approval."⁷⁶ This language does not indicate a clear duty to provide notice or gain court approval before taking action, instead leaving the trustee to wonder what his fiduciary duty entails.

The downside of requiring court oversight is its restraint on a trustee's independent ability to decide what actions would most benefit the trust corpus and the beneficiaries it supports. With the ever-increasing volume of cases in the legal system, especially in times of economic turmoil and limited resources, requiring court approval for trustee changes could be seen as both an unnecessary burden on the courts and a hindrance to trust management.

Exercising powers received under decanting statutes without court oversight undoubtedly grants trustees an enormous amount of control. Perhaps recognizing this, decanting statutes indicate what kind of authority the trustee must have under the terms of the testamentary instrument or trust in order to decant the assets. The amount of authority varies. Some statutes just say "a trustee who has authority."⁷⁷ Other statutes specifically indicate the trustee must have discretionary authority.⁷⁸ Yet another set of statutes

71. MO. ANN. STAT. § 456.4-419.4-.5 (West Supp. 2012).

72. *E.g.*, KY. REV. STAT. ANN. § 386.175(8) (LexisNexis 2012).

73. S.D. CODIFIED LAWS § 55-2-15 (2012).

74. *E.g.*, N.C. GEN. STAT. ANN. § 36C-8-816.1(b); VA. CODE ANN. § 64.2-778.1(B).

75. *E.g.*, N.H. REV. STAT. ANN. § 564-B:4-418 (LexisNexis Supp. 2012).

76. NEV. REV. STAT. ANN. § 163.556(5) (West Supp. 2012) (emphasis added).

77. *E.g.*, ALASKA STAT. § 13.36.157(a) (2012); TENN. CODE ANN. § 35-15-816(b)(27)(A) (2007).

78. *E.g.*, ARIZ. REV. STAT. ANN. § 14-10819(A) (2012); DEL. CODE ANN. tit. 12, § 3528(a) (2007).

maintain that a trustee must have “absolute power” or “unlimited discretion” to decant.⁷⁹

Although states have described trustee authority using different terms, they generally do not outline what these terms mean. Ohio, however, chose to define a trustee’s “absolute power” as including “any power to make distributions of principal that is not limited by reasonably definite standards or ascertainable standards, whether or not the word ‘absolute’ is used in the trust instrument.”⁸⁰ New York uses “unlimited discretion” and has defined this term as “the unlimited right to distribute principal that is not modified in any manner.”⁸¹ This echoes Ohio’s definition of “absolute power” in that both statutes reflect the idea that trustee power extends as far as the limits of fiduciary duty will stretch.

A vision of trustee authority need not remain static. New York, the pioneer of decanting, originally included language that required trustees to use reasonable care, diligence, and prudence in choosing to decant,⁸² but only trustees who were granted absolute discretion by the trustor had the authority to decant.⁸³ However, with subsequent revisions, “decanting in New York became fully discretionary for trustees of certain trusts . . . although the statute preserved the ability of a trustee to seek either the beneficiaries’ consent or a court’s permission *if the trustee saw fit to do so*.”⁸⁴ By decreasing the authority required from “absolute” to “discretionary” for certain trusts, the statute’s tight controls slackened, rendering it “among the nation’s most progressive decanting statutes.”⁸⁵ Because of the lowered discretionary requirement and removal of the filing requirement with the court, trustees with greater authority benefit from the

79. *E.g.*, IND. CODE § 30-4-3-36(a) (2011) (“absolute power”); N.Y. EST. POWERS & TRUSTS § 10-6.6(b) (Consol. Supp. 2012) (“unlimited discretion”); OHIO REV. CODE ANN. § 5808.18(A)(1) (LexisNexis Supp. 2012) (“absolute power”).

80. OHIO REV. CODE ANN. § 5808.18(A)(2)(a). Illinois and Rhode Island, two of the more recent states to pass decanting statutes, have also chosen to define “absolute” trustee power. *See* 760 ILL. COMP. STAT. ANN. 5/16.4(a) (LexisNexis Supp. 2010) and R.I. GEN. LAWS § 18-4-31(a)(2) (Supp. 2012).

81. N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(s)(9).

82. Joseph T. La Ferlita, *New York’s Newly Amended Decanting Statute*, TR. & EST. L. SEC. NEWSL. (N.Y. State Bar Ass’n, Albany, N.Y.), Winter 2011, at 10, 11, available at <http://www.farrellfritz.com/wp-content/uploads/article-495.pdf>.

83. La Ferlita, *supra* note 50, at 35.

84. *Id.* (emphasis added).

85. *Id.* at 34.

increased flexibility of the amended statute.⁸⁶ As always, trustees retain the duty to act in the best interest of beneficiaries regardless of the exact statutory depiction of duties, but these states have wisely taken steps to define their vision of trustee power.

C. Beneficiary Protections and Concerns

Beneficiary protection provisions should be carefully contemplated in any statutory decanting language. Provisions to consider include limitations on beneficiary changes, notice of alterations to trust terms or investments, method of recording, and review of financial implications. Because of trustees' vast power in states that allow decanting, statutes should provide clear structure and guidelines, not indistinct and undefined language, to safeguard asset security.

As an initial matter, states must decide who is entitled to benefit from decanting. Because of the potential to marginalize or completely exclude beneficiaries from a decanted trust, a change of beneficiary provision has the potential to be the most explosive and contentious issue in any trust fight. Language of statutory provisions varies widely among the states that have enacted decanting laws, and ambiguity abounds.

Some states, like Indiana, require the beneficiaries of the first trust to be the *same* beneficiaries under the decanted (second) trust.⁸⁷ This has the benefit of clarity. However, with clarity, some flexibility could be lost. Rigidity might be in keeping with public policy or it could be the element that hinders a trust from fully benefiting those it is designed to help.⁸⁸

Other states' statutes indicate that new beneficiaries cannot be added but do not explicitly state that the beneficiaries of the new trust must include the same beneficiaries as the old trust. For example, North Carolina only allows beneficiaries of the original trust to be beneficiaries of the second trust, but does not indicate that "all" or the "same" beneficiaries must be provided for.⁸⁹ Nevada's statute specifies that the decanted trust cannot include a beneficiary that was not named in the first trust, but on its face, the statutory language says nothing about using decanting to remove an

86. Warren R. Gleicher, *Challenges for the New York Trusts and Estates Attorney*, in STRATEGIES FOR TRUSTS AND ESTATES IN NEW YORK: LEADING LAWYERS ON ANALYZING RECENT DEVELOPMENTS AND NAVIGATING THE ESTATE PLANNING PROCESS IN NEW YORK 1, 2 (Michaela Falls ed., 2012), available at 2012 WL 191162.

87. IND. CODE ANN. § 30-4-3-36(a)(1) (LexisNexis 2011).

88. See *infra* Part IV.C (analysis of social considerations and family structure).

89. N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(1) (West Supp. 2012).

original beneficiary.⁹⁰ However, Nevada requires trustees to receive consent in writing when a beneficiary would not be receiving the same property under the decanted trust as she had under the original trust.⁹¹ This provision acts as a check against abuse by a trustee.

Missouri employs curious language for its beneficiary provisions.⁹² Its statute provides that the decanted trust “may have as beneficiaries only one or more of those beneficiaries of the first trust” or “one or more” beneficiaries that may have received a distribution from the trust in the future.⁹³ A plain reading implies that the legislature intended for decanting to be able to alter the number and specific recipients of trust proceeds, despite the language employed by the trustor.

Even small words can have a big impact. Arizona requires the decanted trust terms to benefit “a” beneficiary of the original trust.⁹⁴ Without specifying that the decanted trust needs to benefit “all” beneficiaries of the original trust, a trustee could decant in a way that benefits some beneficiaries but disadvantages others. Perhaps having this risk in mind, North Carolina’s decanting statute does not allow a trustee who is also a beneficiary to decant a trust.⁹⁵ Missouri’s statute employs similar language to deny a decision of this magnitude to someone who is both a trustee and beneficiary.⁹⁶ These provisions could act as a check on trustee power and provide safeguards for listed beneficiaries.

Delaware has equally problematic language. Its statute requires trustees to decant for the benefit of “beneficiaries who are proper objects of the exercise of power.”⁹⁷ Tennessee’s statute echoes the language of “proper objects.”⁹⁸ While case law may be able to clarify who qualifies as a “proper object” of a trust, the statutory language is almost guaranteed to introduce confusion and lack of clarity into trust formation and administration.

New York’s statutory provision attempts a balanced approach. The 2011 amendments allow a trustee with discretionary authority, as opposed to absolute authority, to decant to the *same* beneficiaries of the original trust.⁹⁹

90. NEV. REV. STAT. ANN. § 163.556.2(a) (West Supp. 2012).

91. *Id.* § 163.556.2(e).

92. MO. ANN. STAT. § 456.4-419.2(1) (West Supp. 2012). South Dakota employs similar language. S.D. CODIFIED LAWS § 55-2-15(1) (2012).

93. MO. ANN. STAT. § 456.4-419.2(1).

94. ARIZ. REV. STAT. ANN. § 14-10819(A) (2012).

95. N.C. GEN. STAT. ANN. § 36C-8-816.1(d) (West Supp. 2012).

96. MO. ANN. STAT. § 456.4-419.2(2)(a).

97. DEL. CODE ANN. tit. 12, § 3528(a)(1) (2007).

98. TENN. CODE ANN. § 35-15-816(b)(27)(A)(ii) (2007).

99. N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(c) (Consol. Supp. 2012).

A New York trustee with unlimited discretion, however, “can decant the original trust to a new trust which benefits only *some* of the beneficiaries of the original trust.”¹⁰⁰ Because of the sensitivity of beneficiary allotment, the hybrid language is a nuanced accommodation that recognizes the differing levels of authority held by a trustee.

Beyond deciding who will be a beneficiary, almost all decanting statutes contain a notice provision that requires the trustee to notify specific beneficiaries prior to the effective date of decanting.¹⁰¹ The required time period varies between twenty days, as in South Dakota¹⁰²; thirty days, as in New Hampshire and Ohio¹⁰³; and sixty days in many of the other states.¹⁰⁴ Some states, such as Alaska and Arizona, have declined to include a specific notice provision in decanting statutes.¹⁰⁵ Nevada only indicates that a trustee “may give notice” prior to decanting but does not couch this as a requirement or include a timeframe for guidance in its decanting statute.¹⁰⁶

Tracking modifications is of vital importance for practitioners and beneficiaries. Some states provide a method for recording changes in trusts when decanting occurs. A common provision requires changes to be in writing, signed by the trustee, and filed with the records from the original trust.¹⁰⁷ Other states do not specifically provide for a method of recording.¹⁰⁸ When no process is specified, it is reasonable to infer that whatever method is mandated for the original recording of a trust also could be used for any amendments. However, beneficiaries receive better protection when states indicate a standard method for keeping track of modifications.

As a practical matter, beneficiaries should be concerned with the effect of decanting on income earned from a trust as well as the tax implications

100. Gleicher, *supra* note 87, at 2 (emphasis added); *see also* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b).

101. *E.g.*, N.C. GEN. STAT. ANN. § 36C-8-816.1(f)(2) (West Supp. 2012).

102. S.D. CODIFIED LAWS § 55-2-18 (2012).

103. N.H. REV. STAT. ANN. § 564-B:4-418(d) (LexisNexis Supp. 2012); OHIO REV. CODE ANN. § 5808.18(F) (LexisNexis Supp. 2012).

104. *E.g.*, R.I. GEN. LAWS ANN. § 18-4-31(d) (West Supp. 2012); VA. CODE ANN. § 64.2-778.1(G) (2012).

105. ALASKA STAT. § 13.36.157 (2012); ARIZ. REV. STAT. ANN. § 14-10819 (2012).

106. NEV. REV. STAT. ANN. § 163.556.5 (West Supp. 2012).

107. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3528(b) (2007); 760 ILL. COMP. STAT. ANN. 5/16.4(r) (LexisNexis Supp. 2010); KY. REV. STAT. ANN. § 386.175(7)(a) (LexisNexis Supp. 2012).

108. *See, e.g.*, ALASKA STAT. § 13.36.157; MO. ANN. STAT. § 456.4-419 (West Supp. 2012); S.D. CODIFIED LAWS § 55-2-15 (2012).

that follow. One limitation that states consistently agree upon is for the beneficiaries' income to remain the same after decanting.¹⁰⁹ Another common provision only allows decanting if changing the original trust will not alter tax implications or introduce adverse tax consequences for beneficiaries.¹¹⁰ For example, Arizona prohibits decanting if such an action would alter the income or payment received from the trust or cause an adverse tax effect.¹¹¹ Most of the other states use similar language.¹¹²

Other states, such as Tennessee, only require the income from the decanted trust to be the same as a beneficiary received from the original trust, without addressing the tax implications.¹¹³ New York also protects beneficiaries, but recognizes that tax implications may not be controllable as a static element during decanting.¹¹⁴ Consequently, the New York statute requires that a trustee "consider" the tax implications, but its plain language does not restrict decanting to situations where the taxes on the trust or its beneficiaries remain unchanged after decanting.¹¹⁵

Trust decanting is intended to maximize the welfare of beneficiaries who are supported by a trust's assets.¹¹⁶ Mindful of this goal, careful statutory language coupled with considerations of desired social policy allow decanting to be utilized in a beneficial manner.

IV. Analysis: An Argument for Decanting

A. Oklahoma's Current Trust Statute

In Oklahoma, trusts are created through written documents or by operation of law.¹¹⁷ Formation of a trust also can be presumed based on the

109. See, e.g., FLA. STAT. § 736.04117(1)(a)(1)-(2) (2011); IND. CODE § 30-4-3-36(a)(2)-(3) (2011); NEV. REV. STAT. ANN. § 163.556.2(b)-(c); N.H. REV. STAT. ANN. § 564-B:4-418(b)(2)-(3) (LexisNexis Supp. 2012); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(n)(1), (o) (Consol. Supp. 2012); N.C. GEN. STAT. ANN. § 36C-8-816.1(c)(3)-(4) (West Supp. 2012); VA. CODE ANN. § 64.2-778.1(C)(4)-(5) (2012).

110. See, e.g., OHIO REV. CODE ANN. § 5808.18(C)(2)-(3) (LexisNexis Supp. 2012); R.I. GEN. LAWS ANN. § 18-4-31(a)(3) (West Supp. 2012).

111. ARIZ. REV. STAT. ANN. §§ 14-10819(A)(1)-(2), (5) (2012).

112. See, e.g., 760 ILL. COMP. STAT. ANN. 5/16.4(n)(1), (p); KY. REV. STAT. ANN. § 386.175(4)(c)-(d) (LexisNexis 2012).

113. TENN. CODE ANN. § 35-15-816(b)(27) (2007); see also ALASKA STAT. § 13.36.157(a)(1) (2012); DEL. CODE ANN. tit. 12, § 3528(a)(3) (2007); MO. ANN. STAT. § 456.4-419.2(5).

114. N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(o) (Consol. Supp. 2013).

115. *Id.*

116. See KOREN ET AL., *supra* note 21, § 1:11.

117. 60 OKLA. STAT. §§ 136, 175.6 (2011).

actions of two parties.¹¹⁸ Assets held in trust can consist of real or personal property.¹¹⁹ Trustors can amend revocable trusts with the written consent of all its vested or contingent beneficiaries.¹²⁰ If the trustor reserves power of amendment, she can “add duties . . . privileges, or powers to those imposed or granted by [statute].”¹²¹ The amending provision does not apply to irrevocable trusts.¹²² It is unclear if the trustor’s current statutory power of amendment would stretch to the extent necessary to allow trust decanting without statutory support.

Broadly speaking, an Oklahoma trustee can “do any lawful act in relation to the trust property which any individual owning the same *absolutely* might do.”¹²³ The power of the trustee is not personal but rather is a function of his fiduciary position.¹²⁴ The Oklahoma Statutes grant broad powers to a trustee “[i]n the absence of contrary or limiting provisions,”¹²⁵ but prohibit a trustee from borrowing funds or lending monies to affiliates using trust assets.¹²⁶ Trustee power includes the ability “to carry on and conduct any lawful business designated in the instrument of trust”¹²⁷ and to appoint a different trustee to oversee any portion of a trust that is in a different situs.¹²⁸ Oklahoma law also dictates the property in which a trustee may invest¹²⁹ and allows a trustee to retain any property originally received as well as any substitution for the original property.¹³⁰ Specific remedies are included for a trustee who breaches his fiduciary duty and acts in bad faith towards trust beneficiaries.¹³¹

When the trust has fulfilled its function, it terminates.¹³² In Oklahoma, expiration of a trust does not mean that remaining trust assets will automatically escheat to the state.¹³³ Instead, the Oklahoma Statutes provide

118. *Id.* § 137.

119. *Id.* § 175.2.

120. *Id.* § 175.41.

121. *Id.* § 175.21.

122. *Id.* § 175.41.

123. *Id.* § 171 (emphasis added).

124. *Id.* § 175.16.

125. *Id.* § 175.24.

126. *Id.* §§ 175.9, 175.11, 175.12.

127. *Id.* § 171.60; *see also id.* § 175.24.

128. *Id.* §§ 175.54, 175.55.

129. *Id.* § 161.

130. *Id.* § 163.

131. *Id.* § 175.57.

132. *Id.* § 175.49.

133. *Id.* § 175.42.

that at the failure or termination of a trust, the trustor may indicate to whom the remaining property will be transferred or devised.¹³⁴ If a beneficiary predeceases the distribution of trust assets, the assets will go to the “lineal” descendants.¹³⁵

Oklahoma should consider any changes to its current trust law in light of the best interests of its citizens and its future goals for prosperity and stability. As such, analyzing the implications of trust decanting must include its impacts on wide-ranging concerns—the impact of the rule against perpetuities, societal implications, matters dealing with family structure, tax consequences, and broad economic impacts.

B. Oklahoma’s Rule Against Perpetuities

When considering trust formation, trustors must be aware of one particularly trying provision in Oklahoma law, the rule against perpetuities (RAP).¹³⁶ The RAP is routinely cited as “the bane of all first-year law school students.”¹³⁷ One professor wryly noted that it was “understandable why most lawyers shrink from the Rule against Perpetuities and try to pass it off as merely an exercise in erudition or lock it up securely like a skeleton in a closet.”¹³⁸ It is important to remember that the RAP was designed to facilitate alienability of land because of the lack of frequent transference of land occurring in Henry VIII’s day.¹³⁹ Therefore, if a conveyance of land *could* violate the RAP, it was considered void *ab initio* and the parties were able to start over with a new conveyance immediately.¹⁴⁰

The familiar language of the RAP is that “[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”¹⁴¹ Put simply, the RAP is the rule against

134. *Id.*

135. *Id.* § 175.56. The lineal descendants of a beneficiary are set forth in Oklahoma’s descent and distribution statute. 84 OKLA. STAT. § 213 (2011).

136. Although some other states have abolished the RAP altogether or amended its provisions, Oklahoma retains the classic RAP formulation. *See infra* Part IV.B.4.

137. David M. Grant & Jeremy K. Cooper, *Nevada Laws Provide Top Trust Situs*, NEV. LAW. MAG., May 2010, at 20, 21, available at <http://nvbar.org/articles/content/nevada-laws-provide-top-trust-situs>; see also Edward J. McCaffery et al., *The Advantage of Creating Out-of-State Trusts*, L.A. LAW., Sept. 2005, at 19, 20, available at <http://www.lacba.org/files/lal/vol28no6/2178.pdf>.

138. Olin J. Browder, Jr., *Perpetuities in Oklahoma*, 6 OKLA. L. REV. 1, 1 (1953).

139. *See supra* Part II.A; see also John William Mee, Jr., Comment, *Estates in Land: The Rule Against Perpetuities in Oklahoma*, 17 OKLA. L. REV. 438, 439 (1964).

140. CRIBBET & JOHNSON, *supra* note 7, at 83.

141. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942).

remote vesting.¹⁴² The headaches begin when this simple sentence is broken down into its component parts. However, the potential for negative impacts means the RAP must be understood and accounted for when enacting a trust decanting statute.

1. *Future Interests*

Vested future interests do not trigger RAP provisions.¹⁴³ When an interest is “vested,” there is a person who is (1) born, (2) ascertainable, *and* (3) not subject to a condition precedent.¹⁴⁴ Imagine that Bruce wants to give his farm, Melody Acres, to his only son, Gordon. Gordon is in his mid-twenties, unmarried, and a generally good son. Bruce writes a deed stating, “I, Bruce, owner in fee simple absolute, give Melody Acres to my son Gordon and his heirs in fee simple absolute.” Gordon is born, named, and ascertainable. Additionally, Bruce has not placed any conditions on the gift that Gordon must fulfill prior to inheriting the land. The same transfer works even if Bruce does not specifically name Gordon if the language conveyed the land “to my son.” As Bruce’s only son, Gordon is still ascertainable as the intended recipient of the land. This is a *vested* future interest.

Although vested remainders do not trigger RAP provisions, three types of future interests do implicate the RAP: contingent remainders, executory interests, and vested remainders that are subject to open.¹⁴⁵ These concepts are similar, but each provides a different gloss on a future conveyance.

First, a contingent remainder is the opposite of a vested remainder. An interest is not vested—and therefore is contingent—when there is a person who is (1) not born, (2) not ascertainable, *or* (3) subject to a condition precedent.¹⁴⁶ Imagine if Bruce wishes to leave Melody Acres to his son Gordon but also wants to encourage Gordon to have grandchildren. Bruce conveys Melody Acres to “my son Gordon’s firstborn child” and then dies before Gordon has a child. At this point, no qualified person exists to hold the interest that became available at Bruce’s death because no child has been born and therefore is not ascertainable.

Second, an executory interest vests only upon the occurring or breaking of a condition.¹⁴⁷ The occurrence or breach initiates an automatic transfer

142. W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639 (1938).

143. BOGERT ET AL., *supra* note 15, § 213.

144. JOHN A. BORRON, JR., *THE LAW OF FUTURE INTERESTS* § 165 (3d ed. 2013).

145. *Id.*

146. *Id.*

147. *Id.* § 221.

from the current holder of property to a third person.¹⁴⁸ Imagine if Bruce, our owner of Melody Acres, wants to maintain his family's ties to the land. Concerned about the possibility of his children leaving Page County, he transfers Melody Acres to his son Gordon "so long as none of my children or grandchildren ever step even one toe across the Page County line; and if any of my children or grandchildren ever step across, then Melody Acres goes to the Page County Courthouse preservation fund." Because it is *possible* that Bruce's children or grandchildren could step over the county line—even by just one toe!—this provision would violate the RAP.

Third, a vested remainder subject to open involves a class of people who are all eligible to inherit, rather than just an individual.¹⁴⁹ A few years have passed from the previous scenario. Gordon has met a nice girl named Claudia, settled down, and started a family. Bruce is pleased as punch and decides to convey Melody Acres "to all the children of my son Gordon." Gordon and Claudia have two children at this point, but both of them are young enough to keep adding to the family. If Bruce were to die with this provision in place, the remainder would be vested because the children born of Gordon would meet the conditions set forth. However, the remainder interest would also be subject to open because Gordon and Claudia could keep having children who would also qualify to inherit under the terms of the conveyance. As with the previous two interests, this inheritance would be void under the RAP.

2. A "Life in Being"

A "life in being," another piece of the RAP,¹⁵⁰ means any person who was alive when an interest was created and gradually came to include those who were still *in utero* at the time of the creation of the interest.¹⁵¹ While common sense may suggest that a person with a chance of inheriting from an interest would be used as a measuring life, this is not the case. Rather, "[t]he measuring lives need not be mentioned in the instrument, need not be holders of previous estates, and need not be connected in any way with the property or the persons designated to take it."¹⁵² This could be taken to

148. *Id.*

149. *Id.* § 146.

150. "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." GRAY, *supra* note 142, at 191.

151. CRIBBET & JOHNSON, *supra* note 7, at 83.

152. Leach, *supra* note 143, at 641.

farcical lengths. Practically speaking, this length of time often has been fixed at ninety years.¹⁵³

3. *RAP Time Frame*

The time period of the RAP begins to run when a conveyance is complete and the person making the conveyance is unable to change his mind, whether because of an irrevocable transfer or death.¹⁵⁴ At that point, the interest is created and must vest in those who are to benefit from the conveyance within twenty-one years after the death of the last “life in being” who was alive at the time of the conveyance.¹⁵⁵ The RAP will void a conveyance if the interest created through the formation of an irrevocable trust has not vested within a set time period after its creation. Imagine that Bruce gives Melody Acres to “Gordon for life” and then the remainder to “my grandchildren who reach the age of *twenty* after my death.” Depending on the circumstances, this conveyance might not violate the RAP because the remainder could vest within the perpetuities period. If, however, Bruce gives Melody Acres “to Gordon for life” and then the remainder to “my grandchildren who reach the age of *twenty-five* after my death,” this conveyance would be void because the remainder would not vest within the perpetuities timeframe of twenty-one years.

4. *Current Status of the RAP*

The RAP holds an overlooked position at the heart of ongoing debate over multi-generational wealth accumulation. In 1953, an esteemed professor wrote:

The practitioner’s disdain for the seemingly unreasonable refinements of a perpetuities problem should not cloud the fact that this technical rule, together with other related rules, expresses a major and as yet unquestioned principle of public policy; that is, that persons shall not unreasonably withdraw their property from the channels of commerce.¹⁵⁶

The general population would have no reason to be aware that the RAP historically has been a stopgap measure preventing perpetual wealth

153. For example, Florida’s perpetuities period was ninety years. FLA. STAT. § 689.225(2)(a)(2) (2011) (subsequently lengthened to 360 years by section 689.225(2)(f)).

154. Leach, *supra* note 143, at 640.

155. There are numerous ways to measure the “last” life in being. See BOGERT ET AL., *supra* note 15, § 213.

156. Browder, *supra* note 139, at 1-2.

transfer and growing economic divide. But in this day and age, would a repeal of the RAP truly be a mechanism of “creating an American aristocracy?”¹⁵⁷

Because trust decanting could trigger the RAP, its provisions must be taken into account. The RAP remains significant in a slim majority of the states. One scholarly article counted twenty-one states that, for trust interests, had abolished the RAP at the end of 2005.¹⁵⁸ Another article observed that “[r]ecent developments in modern trust law have seen two major trends that seemingly coincide with a state’s reconsideration of its statutory trust code: the enactment of a trust decanting statute and the repeal of the common law rule against perpetuities.”¹⁵⁹ The same author further noted: “A trust decanting statute that is coupled with a statutory repeal of the rule against perpetuities potentially provides a powerful mechanism to extend the term of irrevocable trusts.”¹⁶⁰ Existence of a RAP provision holds great significance for states that are exploring the possibilities of trust decanting statutes.

Oklahoma still adheres to the RAP, with its provisions contained in both the Oklahoma Constitution and the Oklahoma Statutes.¹⁶¹ The Oklahoma Statutes express the RAP in this way: “The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition plus twenty-one (21) years.”¹⁶² The same prohibition against perpetuities exists in the Oklahoma Constitution. Article 2, section 32 says that “[p]erpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.”¹⁶³ This section of the Oklahoma Constitution is “clearly a product of

157. Debra Cassens Weiss, *States’ Repeal of Rule Against Perpetuities Creates US Aristocracy*, *Law Prof Says*, A.B.A. J. (Jul. 12, 2010, 10:30 A.M.), http://www.abajournal.com/news/article/states_repeal_of_rule_against_perpetuities_creatomg_us_aristocracy_law_prof/ (quoting Professor Ray Madoff).

158. Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 *CARDOZO L. REV.* 2465, 2466 (2006).

159. Culp & Bennett, *supra* note 43, at 3.

160. *Id.*

161. OKLA. CONST. art. II, § 32; 60 OKLA. STAT. § 175.47 (2011).

162. 60 OKLA. STAT. § 31 (2011); *see also* Producers Oil Co. v. Gore, 1980 OK 62, ¶ 8, 610 P.2d 772, 774 (citing Melcher v. Camp, 1967 OK 239, 435 P.2d 107, 111).

163. OKLA. CONST. art. II, § 32.

the Progressive Era, . . . designed to prevent the vast accumulation and retention of property in the hands of private individuals.”¹⁶⁴

The placement of the prohibition in the Oklahoma Constitution, the Oklahoma Statutes, and case law indicates that the Oklahoma founders stood firmly against amassing generational wealth. The opening speech at the state constitutional convention in 1906 reflects this strong viewpoint. In the speech, Oklahoma constitutional convention President-elect William H. Murray gave an address to those gathered to discuss what Oklahoma was, what it desired to be, and how best to reflect that in a document meant for future generations of Oklahomans.¹⁶⁵ During the speech, he spoke out powerfully against perpetual land holdings: “And don’t you think this tendency to divide the great bodies of real estate would destroy the evils of landlordism and promote home-owning in the State of Oklahoma?”¹⁶⁶ The founding fathers of Oklahoma left a strong message for future generations to guard against accumulation of wealth. Indeed, enacting a trust decanting statute while simultaneously repealing the RAP could allow multi-generational retention of wealth to become further entrenched.

Since Oklahoma’s founding, state legislators have modified their stances on multi-generational wealth accumulation. For example, the Oklahoma Statutes specifically exempt application of the RAP when “property is given, granted, bequeathed, or devised to . . . a charitable use; . . . Literary, educational, scientific, religious, or charitable corporations for their sole use and benefit.”¹⁶⁷ In more recent times, the legislature has continued to drift away from the ideals espoused by its Progressive Era originators. The latest legislative attempt to repeal the RAP occurred in 2012, introduced by Senate Bill 1315.¹⁶⁸

A complication arises if the Oklahoma legislature succeeds in its repeal efforts because a repeal triggers the automatic return of common law

164. DANNY M. ADKISON & LISA MCNAIR PALMER, *THE OKLAHOMA STATE CONSTITUTION: A REFERENCE GUIDE* 49-50 (2001).

165. William H. Murray, President-elect, Address Before the Constitutional Convention of the Proposed State of Oklahoma (Nov. 20, 1906), *in* PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF OKLAHOMA 15 (Muskogee Printing Co., 1907).

166. *Id.* at 19.

167. 60 OKLA. STAT. § 175.47.

168. At the close of the 53rd Oklahoma legislature, the bill remained with the Senate Judiciary Committee. *See Bill Information for SB 1315 (2011-2012)*, OKLA. ST. LEGISLATURE, <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB1315&session=1200> (last visited Nov. 2, 2013).

provisions.¹⁶⁹ Because the RAP is a common law provision, the procedure to repeal the doctrine is more complex.¹⁷⁰ The Oklahoma legislature would need to take three contemporaneous actions to maximize the benefits of trust decanting: (1) repeal the current statutory language that invokes the RAP; (2) pass a new statute preventing the common law RAP provision from reviving; and (3) amend the Oklahoma Constitution to remove the RAP provision from Article II.

If insufficient political support to completely repeal the RAP continues, decanting still could be possible if the legislature “substantially [increases] the period during which property may be held in trust,”¹⁷¹ as other states have done.¹⁷² The legislature could also continue to uphold the RAP while carving out a limited exception for trusts. However, this could still result in significant complications for practitioners, trustors, and beneficiaries alike.

As with any decision, the legislature should consider Oklahoma’s history as well as its present conditions. Would reforming the Oklahoma constitutional and statutory provisions to allow increased holding of wealth find approval with the views of the Oklahoma founders? Likely not. The state’s first governing officials stood firm against the idea of generational wealth. However, while history remains an important source of information for decision making, Oklahoma has experienced vast changes since the times of its formation. With the financial pressures of the twenty-first century—including the widening gap between rich and poor,¹⁷³ the disappearance of the middle class,¹⁷⁴ and the “Great Recession”¹⁷⁵—decanting automatically may be viewed in a negative light despite its benefits. Should increasing polarization of wealth encourage the Oklahoma

169. 60 OKLA. STAT. § 175.50.

170. The RAP is traditionally a common law rule. *See* BORRON, *supra* note 145, § 1447. The Oklahoma common law history of the RAP has been somewhat confusing. For a discussion of the statutory changes throughout the last century, see 2 R. ROBERT HUFF & VARLEY H. TAYLOR, JR., OKLAHOMA PROBATE LAW AND PRACTICE § 38.6 (3d. ed. 2012).

171. Zeydel & Blattmachr, *supra* note 42, at 288.

172. *E.g.*, DEL. CODE tit. 25, § 503(b) (2009) (110 years); FLA. STAT. § 689.225(2)(f) (2012) (360 years).

173. Press Release, Ctr. on Budget & Policy Priorities, Wide and Growing Income Gap in Most States, New Report Finds (Nov. 15, 2012), *available at* <http://www.cbpp.org/cms/index.cfm?fa=view&id=3861>.

174. *See* Sabrina Tavernise, *U.S. Income Gap Rose, Sign of Uneven Recovery*, N.Y. TIMES, Sept. 13, 2012, at A21, *available at* http://www.nytimes.com/2012/09/13/us/us-incomes-dropped-last-year-census-bureau-says.html?_r=0.

175. *See generally* Catherine Rampell, “Great Recession”: A Brief Etymology, N.Y. TIMES (Mar. 11, 2009, 5:39 P.M.), <http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology/>.

legislature to maintain the rules inherited from “Ye Olde Englande” in an attempt to encourage economic diffusion? How much should the “dead hand” of the past control present actions? If trust decanting statutes are a sign of times to come, could the lack of such a statute drive business and tax revenue out of the state, potentially hurting the state’s overall economic health and further increasing the problems of economic gaps? Oklahomans must weigh these questions in order to chart the state’s financial path through uncertain times to ensure a prosperous, well-run state for future citizens to enjoy.

C. Social Considerations and Family Structure

Often, trusts are used to ensure security for succeeding generations. With changing social norms, gender roles have shifted over the past century. Additionally, certain groups of people that were previously excluded now fall within societally accepted definitions of family. However, older trusts may exclude potential beneficiaries, even if society would no longer support the view espoused by the original trustor.

1. Women

Historically, men have controlled the earning and management of wealth.¹⁷⁶ When a man died, he would often set up a trust for his widow’s life or until she remarried.¹⁷⁷ Consequently, trusts were created in a way that resulted in women having few options to deal with future concerns.¹⁷⁸ These issues still exist, especially if trusts are “based on outdated tax laws” or “reflect an era when wives had little experience with, or exposure to, financial interests.”¹⁷⁹ Times have changed, but the “dead hand” of the past may still limit the financial opportunities of women. By moving trust assets to a new trust, beneficiaries could receive the full benefits of assets intended for them.

2. Divorce

The prevalence of and easy access to divorce likely was not anticipated or fully appreciated by early trustors. The Colorado Bar’s Family Law section considered a decanting statute and sounded an important cautionary

176. FRIEDMAN, *supra* note 2, at 41.

177. *Id.*

178. See Donald Jay Korn, *Busting Trusts*, FINANCIAL PLANNING, June 1, 2012, at 121, 121, available at 2012 WLNR 11570021.

179. *Id.*

note.¹⁸⁰ It based its objection to trust decanting on the fact that “if approved [a decanting statute] would have allowed trustees to engage in divorce planning by changing or decanting property remainder interests into mere expectancies.”¹⁸¹ For example, a wife could receive her husband’s vested property interest as a part of a divorce settlement. If decanting changed a trust’s terms in a way that made the interest contingent, that would materially harm the wife. Interested parties with no means of intervening in trustee actions could fall victim to this possibility.

Other issues arise when a surviving spouse from a second marriage receives income for life but the bulk of the trust will eventually pass to children from a first marriage.¹⁸² When decanting would require dipping into the trust principal to provide an increased income stream for the surviving spouse, the children could object on the basis that decanting would leave fewer assets in the trust corpus to provide for them in the future.¹⁸³ Trustees are left to mediate between these competing concerns. Beneficiary protection measures, such as notice or a clear means of objection, could ease the potential pitfalls of divorce and decanting while still allowing for flexibility in providing for future needs.¹⁸⁴

3. Adoption and Illegitimacy

Prior to Oklahoma’s Uniform Adoption Act, which “abolished all pre-existing differences between adopted and natural children,” adopted and illegitimate children did not automatically fall within the scheme of intestate inheritance.¹⁸⁵ However, with the enactment of the Act, adopted children became entitled to the same rights and benefits as biological children of a marriage under the descent and distribution statutes.¹⁸⁶

The Oklahoma courts then expounded on the rights of adopted and illegitimate children, holding that adopted children were entitled to receive an allocation of benefits paid through a workers’ compensation death claim.¹⁸⁷ Illegitimate children could also inherit from a biological parent,¹⁸⁸

180. Zuber, *supra* note 63.

181. *Id.*

182. Korn, *supra* note 179, at 121-22.

183. *Id.*

184. *See infra* Part V.C.

185. *In re Estate of Flowers*, 1993 OK 19, ¶ 1, 848 P.2d 1146, 1148.

186. *Id.* The Oklahoma Adoption Act was replaced by the Oklahoma Adoption Code in 1994. *See* 10 OKLA. STAT. § 7501-1.1 cmt. (2011).

187. *Stark v. Watson*, 1961 OK 17, ¶ 34, 359 P.2d 191, 197.

188. *In re Estate of Marriott*, 1973 OK 85, ¶¶ 17-18, 515 P.2d 571, 573; *see also* 84 OKLA. STAT. § 215 (2011); 10 OKLA. STAT. § 55 (repealed 1994).

even in the context of a termination of parental rights.¹⁸⁹ An expanded understanding of the rights of adopted and illegitimate children continues to present day and receives wide, if not universal, acceptance in our society.¹⁹⁰

Because of those evolving views, a trust that limits beneficiaries to “bodily heirs” or “natural issue” undermines current statutory and societal views about adopted and illegitimate children. If the granting language of an earlier trust is general, such as “for the benefit of my son’s children that are alive at the time of my death,” this general language could include adopted or illegitimate children. This language would encompass current societal ideals. Without such general language, trust decanting is necessary to rectify injustices that hold no place in the expanded modern view of family relations. In such a situation, public policy demands that the “dead hand” of the past be thwarted.

4. Same-Sex Relationships

Estate planning is an important undertaking for many people but is essential for same-sex couples seeking to establish legal protections.¹⁹¹ Oklahoma does not perform same-sex marriages or civil unions, nor does it protect domestic partnerships.¹⁹² A trust acts as an important safeguard

189. *Flowers*, ¶ 15, 848 P.2d at 1152.

190. The legal status of children and its impact on their inheritance rights has continued to evolve, but the expanded view remains. *See, e.g., In re Estate of Moore*, 2001 OK CIV APP 76, ¶ 9, 25 P.3d 305, 307 (finding that children retained no intestate inheritance rights after their adoption).

191. *See, e.g.,* Tara Siegel Bernard, *What Gay Unions Don’t Guarantee*, N.Y. TIMES, Nov. 1, 2008, at B8, available at <http://www.nytimes.com/2008/11/01/business/yourmoney/01couples.html>; Carol Abaya, *Living Wills: Critical for Same Sex Unions*, N.J. NEWSROOM (Feb. 11, 2011, 7:01 A.M.), <http://www.newjerseynewsroom.com/healthquest/living-wills-critical-for-same-sex-unions> (medical power of attorney); Fox News 47 Staff, *Gay Couple Obtains Marriage License for Property Rights Protection*, FOX 47 NEWS, <http://www.fox47news.com/multimedia/photos/209321741.html> (last visited Nov. 3, 2013) (joint home ownership).

192. A 2004 amendment to the Oklahoma Constitution limited marriage to one man and one woman. It reads:

A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.

C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

against unexpected circumstances and “may be a better vehicle [than a will] to protect the parties’ intentions” because it is less susceptible to familial or judicial interference.¹⁹³ A trust currently operating only to support “Jim and his legally married wife” would limit the options of same-sex couples in many states. Decanting could provide a vehicle for more certainty within a same-sex domestic setting.

D. Tax Matters

Rules regarding gift, estate, income, and generation-skipping transfer taxes continue to evolve.¹⁹⁴ The IRS acknowledged that “decanting is an emerging issue with tax consequences that are not completely clear under current law.”¹⁹⁵ In fact, the IRS requested comments on the tax implications of decanting when beneficiaries of the original and decanted trusts are inconsistent, indicating that tax ramifications are unsettled.¹⁹⁶ Tax professionals have suggested safe-harbor guidelines as a way to improve certainty about tax consequences.¹⁹⁷ Decanting also could be viewed as merely a function of a trustee’s lawfully granted powers of appointment. Under that reasoning, no adverse tax consequences should result because of its exercise.¹⁹⁸ Unfortunately, “[l]ittle developed law exists regarding the tax consequences of decanting.”¹⁹⁹ Because of the current uncertainty and the variety of potential statutory consequences at both the federal and state

OKLA. CONST. art. II, § 35. A federal district court recently struck down the amendment as unconstitutional, though the decision was being appealed at the time of this Comment’s publication. *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014). Additionally, a small loophole exists when both partners are Native Americans and the tribal law allows same-sex unions. See Elizabeth Dias, *A Gay Marriage Loophole for Native Americans*, TIME MAG., Nov. 1, 2013, <http://nation.time.com/2013/11/01/a-gay-marriage-loophole-for-native-americans>.

193. BURDA, *supra* note 1, at 64.

194. Oklahoma repealed its gift tax in 1982 and its estate tax in 2010. 68 OKLA. STAT. §§ 901-909 (repealed 1982); 68 OKLA. STAT. §§ 801-827 (repealed 2010); see also David A. Carpenter, *An Overview of the Oklahoma Estate Tax*, 74 OKLA. B.J. 2613 (2003).

195. William R. Burford, *State Decanting Statutes*, in TAX AND NON-TAX ASPECTS OF DECANTING IRREVOCABLE TRUSTS, 35, 44 (ALI-ABA 2012), available at TSub09 ALI-ABA 35 (Westlaw).

196. Internal Revenue Service, Notice 2011-101 (Dec. 27, 2011), available at <http://www.irs.gov/pub/irs-drop/n-11-101.pdf>.

197. Michael Cohn, *New York CPAs Back Safe Harbor Rules for Trust Decantings*, ACCOUNTING TODAY, May 23, 2012, available at 2012 WLNR 10875010.

198. Jonathan G. Blattmachr, Jerold I. Horn & Diana S.C. Zeydel, *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141, 144 (2012).

199. *Id.* at 150.

levels, a trustee “should exercise [his] statutory authority . . . only after a careful consideration of the potential . . . tax consequences” in any state that allows decanting.²⁰⁰

1. Gift and Estate Taxes

Much of the revenue-requiring civic aims such as funding education or providing safety personnel comes from sources other than the gift and estate taxes. However, both of these taxes provide for public benefits as well and are implicated in the context of decanting. Additionally, the estate tax historically has been “more than a way to fill the government’s coffers. It expressed an important policy: the great dynastic fortunes had to be cut down in size. The ethos was not too different from the notion underlying the rule against perpetuities, or perhaps the rule against accumulations.”²⁰¹

When property is transferred from one person to another *inter vivos* for less than the fair market value of the property, a gift tax could arise.²⁰² Similarly, an estate tax could be implicated when a transfer is made at death rather than in life.²⁰³ These two taxes are discussed together because the federal “gift tax exemption is now unified with the estate tax exemption, and has increased from \$1 million to \$5 million.”²⁰⁴ The increased limit was set to revert,²⁰⁵ but Congress acted to keep the lifetime gift and estate tax exemptions at \$5 million, indexed for inflation.²⁰⁶ For 2013, annual gifts up to \$14,000 are exempt from federal gift tax.²⁰⁷ Transfers in excess of either tax exemption are taxed at a rate of 40%.²⁰⁸

Without clear authority from state statutory schemes, decanting could expose trusts to negative financial ramifications that otherwise could have

200. Levin & Flubacher, *supra* note 32, at 5.

201. FRIEDMAN, *supra* note 2, at 172.

202. The Internal Revenue Code indicates that if property is transferred for less than its fair market value, the excess amount is deemed a gift and includable in the annual calculation. I.R.C. § 2512(b) (2012).

203. *Id.* § 2001(a).

204. Amy J. Guss, *New Strategies for Estate Planning Clients in a Changing Environment*, in STRATEGIES FOR TRUSTS AND ESTATES IN NEW YORK, *supra* note 87, at 1, 3, available at 2012 WL 191166.

205. Gleicher, *supra* note 87, at 5-6.

206. Marshal S. Grant et al., *Fiscal Cliff Averted: Estate, Gift, and GST Tax Changes*, MONDAQ.COM (Jan. 8, 2013), <http://www.mondaq.com/unitedstates/x/215054/tax+authorities/Fiscal+Cliff+Averted+Estate+Gift+and+GST+Tax+Changes>.

207. Deborah L. Jacobs, *After the Fiscal Cliff Deal: Estate and Gift Tax Explained*, FORBES MAG. (Jan. 11, 2013, 2:43 P.M.), <http://www.forbes.com/sites/deborahljacobs/2013/01/02/after-the-fiscal-cliff-deal-estate-and-gift-tax-explained/>.

208. *Id.*

been avoided. For example, the Treasury Regulations imply that decanting could trigger taxing provisions if interests are shifted between different beneficiaries.²⁰⁹ One author posits that this regulation contemplates a voluntary act by the beneficiary.²¹⁰ He maintains that decanting stems from a fiduciary duty, and as an independent act of a trustee stemming from that duty, decanting should not trigger tax implications.²¹¹

However, a state's statutory language determines the amount of discretion granted to a trustee.²¹² Decanting may not be a truly independent act of the trustee. If a state requires beneficiary consent to decant, this consent potentially could be a voluntary act that triggers taxes. Moreover, decanting is intended to create a more favorable situation for its beneficiaries; and as such, decanting could be viewed as a constructively voluntary act of a beneficiary.

Another possibility arises if the trustee *chooses* to decant rather than decanting out of necessity. Receipt of more favorable terms or distributions from the trust could potentially extend beyond a trustee's fiduciary duty and qualify as a gift to the beneficiaries.²¹³ Or, in the case of a trustee who is also a beneficiary, choosing to decant "could be regarded as making a gift if that trustee participates in exercising a decanting power."²¹⁴ This choice could trigger negative tax consequences.

In a state that retains the RAP, taxes might be triggered when decanting extends the vesting period, regardless of a trustee's authority to decant.²¹⁵ Without a repeal of the RAP, potential tax ramifications could detrimentally impact the desire to establish an Oklahoma-based trust, especially as the number of states with decanting provisions but no RAP restrictions continues to increase. Passing a decanting provision without amending or abolishing the RAP could invite more problems than decanting would solve.

2. *Income Tax*

Income tax arises as the result of a sale or exchange of an asset.²¹⁶ In one view, "[d]ecanting to a further trust . . . should not result in a recognition

209. Treas. Reg. § 25.2511-1(c) (1997).

210. Kern & Shore, *supra* note 44, at 59.

211. *Id.*

212. *See generally supra* Part III.B.

213. Blattmachr et al., *supra* note 198, at 151.

214. *Id.* at 161.

215. Kern & Shore, *supra* note 44, at 59.

216. *See* I.R.C. § 61 (2006); Blattmachr et al., *supra* note 198, at 161.

event for income tax purposes . . . [because] it would appear that the transfer to the new trust should carry out distributable net income from the old trust to the new trust.”²¹⁷ However, this may not be the case. It is well settled that “[t]here is, nearly always, the possibility of tax consequences from the transfer of property,”²¹⁸ even when the transfer is an exchange of assets with the same fair market value.²¹⁹ Without clear guidance from the IRS, courts would be guided by precedents that hold that an exchange results in a realization event, and thus, a tax will be imposed.²²⁰ Decanting could be viewed as involving no transfer, or it could be seen as exchanging one set of assets for another. Further clarification is needed on this point before the income tax implications of decanting an existing trust will be fully understood.

3. Grandfathered Exemptions from Generation-Skipping Transfer Tax

The generation-skipping transfer tax (GST tax) is designed to tax wealth in every generation.²²¹ The GST tax levies a tax on a “skip person”²²² who is “two or more generations younger than the transferor”²²³ at the time of a taxable termination. New York was the first to pass a decanting statute, in part because it was attempting to avoid this particular taxation principle.²²⁴

To illustrate the GST Tax, imagine Bruce’s son Gordon is married and has a child, Edward. Bruce owns Melody Acres and sets up a trust to provide support for the life of Gordon, with the remainder to pass to Edward. At Bruce’s death, the assets of Melody Acres form the trust corpus, and Gordon receives this support without paying taxes on it. When Gordon dies, the trust passes to Edward. Normally, property received through a death transfer is exempt from taxation until the receiver sells or otherwise disposes of it.²²⁵ However, in this case, Gordon’s death is a taxable termination and triggers the GST tax. Edward would then be taxed on the transfer, preventing a “skip” in generational tax.

217. Kern & Shore, *supra* note 44, at 59.

218. Zeydel & Blattmachr, *supra* note 42, at 291.

219. *See* Phila. Park Amusement Co. v. United States, 126 F. Supp. 184, 190 (Ct. Cl. 1954).

220. *See, e.g.,* Cottage Sav. Ass’n v. Comm’r, 499 U.S. 554, 556 (1991).

221. LAPIANA, *supra* note 6, at 395.

222. Treas. Reg. § 26.2612-1(a) (2005).

223. LAPIANA, *supra* note 6, at 395.

224. La Ferlita, *supra* note 50, at 35.

225. *See* I.R.C. §§ 61(a), 102(a) (2012).

The GST tax does not apply to grandfathered irrevocable trusts or to trusts that have been allocated a GST tax exemption.²²⁶ The purpose of the GST tax exemption is for “a transfer to an irrevocable trust . . . [to permit] multiple generations to benefit from the property without future wealth transfer tax cost.”²²⁷ The exemption amount of \$5 million (indexed for inflation) can attach to a trust at its inception.²²⁸ Even if the trust principal grows beyond the exemption amount, “*the trust would never be subject to GST tax no matter how large its value at the time of the taxable termination.*”²²⁹ In the example above, with an exemption in place, neither Gordon nor Edward would be taxed on the inherited wealth as long as the original trust amount did not exceed the exemption amount.

Because the tax treatment of decanted trusts is not settled, debate exists about the GST tax and implications arising from decanting. One author cites a Treasury Regulation example²³⁰ and declares that “decanting will not taint the GST-exempt status of a grandfathered trust” if decanting cannot “shift a beneficial interest . . . to a beneficiary at a lower generation [than the persons who held the beneficial interest prior to decanting]” and does not extend the vesting time of the original trust.²³¹ Another scholar declares that “[d]ecanting from a [GST tax exempt] trust . . . potentially could result in a loss of exempt status” because “the regulations provide no general rule regarding what action would cause loss of grandfathered status” and decanting could potentially fail to meet safe-harbor provisions.²³²

A decision to decant could destroy a trust’s grandfathered status or exemption if switching the trust assets from one trust to another is seen as the creation of an entirely new trust. In theory, a trust could keep a tax-exempt status if the terms of the first trust authorized a trustee to make

226. A trust is “grandfathered” if it was “irrevocable on September 25, 1985.” Treas. Reg. § 26.2601-1(b)(1)(i) (2012). The Treasury Regulations indicate an individual GST exemption amount of \$1 million, but this amount has increased to \$5.25 million. *Id.* § 26.2632-1; Barbara E. Little, *2013 Brings Estate, Gift & GST Tax “Permanency” at Last*, MONDAQ.COM (Jan. 21, 2013), <http://www.mondaq.com/unitedstates/x/217094/inheritance+tax/2013+Brings+Estate+Gift+GST+Tax+Permanency+At+Last>.

227. Zeydel & Blattmachr, *supra* note 42, at 288.

228. I.R.C. § 2631(a), (c) (2012); LAPIANA, *supra* note 6, at 396.

229. LAPIANA, *supra* note 6, at 396.

230. Treas. Reg. § 26.2601-1(b)(4)(i)(E), ex. 2 (2004).

231. David A. Diamond, *Delaware Trusts: How They Might Help Your Clients in Various States – Part Two*, GORDON, FURNARIS & MAMMARELLA, P.A., 6-7 (2001), http://www.gfmlaw.com/sites/default/files/pdfs/How-Delaware-Trusts-Might-Help-Your%20Clients-part2_0.pdf.

232. Culp & Mellen, *supra* note 39, at 16-17.

distributions without consent from beneficiaries or the court.²³³ In contrast, if a trustee who is also a beneficiary decants, this could be seen as a beneficiary choosing to form a new trust and gifting himself the benefit of more favorable terms, thereby destroying any exemption.²³⁴ However, assuming state law authorized decanting at the time a trust became irrevocable, the state might determine that that decanting did not form a new trust. This would allow the trust to retain tax-exempt status, assuming the new terms did not extend the vesting time beyond what was permissible. Until the IRS renders a decision regarding the tax implications of decanting, any number of theories could become reality.

E. Economic Impact

The addition of a trust decanting provision coupled with a simultaneous repeal of the RAP could provide a potential economic boom. This effect has been seen elsewhere. For instance, a “prior empirical study . . . found that . . . a state’s abolition of the [RAP] increased its reported trust assets by about \$6 billion and its average trust account size by roughly \$200,000.”²³⁵ Historically low interest rates make establishing trusts an attractive option.²³⁶ One author pointed to his state’s advantageous trust laws, including decanting, as an additional reason to draw retirees to the state besides his state’s natural beauty and favorable tax rates.²³⁷

Oklahoma is poised to take advantage of a population migration, with its reasonable tax rates, excellent employment opportunities, low cost of living, temperate weather, availability of quality healthcare, and sense of community spirit and pride.²³⁸ Relaxing the current trust laws would encourage others to consider the potential benefits of relocating to Oklahoma.

233. 34B AM. JUR. 2D *Federal Taxation* ¶ 146,072 (2013).

234. Blattmachr et al., *supra* note 198, at 161.

235. Schanzenbach & Sitkoff, *supra* note 159, at 2467.

236. Guss, *supra* note 204, at 3.

237. Joseph F. McDonald, III, *Migrating Trusts to New Hampshire: The “Why” and the “How”*, 51 N.H. B. J. 34, 34, 36-38 (2010), available at <http://www.nhbar.org/uploads/pdf/BJ-Winter2010-Vol51-No2-Pg34.pdf>.

238. See, e.g., Eric Francis, *Country Strong*, DELTA SKY MAG., Dec. 2012, at 94, available at <http://www.pageturnpro.com/MSP-Communications/45952-Oklahoma/index.html#1>; Catey Hill, *Retire Here, Not There: Oklahoma*, WALL ST. J. (Sept. 27, 2012, 1:34 P.M.), http://articles.marketwatch.com/2012-09-27/finance/34118530_1_oklahoma-city-oklahomans-tornado-alley.

*V. A Suggested Framework for an Oklahoma Trust Decanting Statute*²³⁹

A. Trustor Intent

Trust decanting introduces uncertainty into an activity that exists precisely to provide certainty. To reduce insecurities caused by the ability to decant, language allowing for continued trustor control must be clear and concise. Ideal language would provide that decanting is allowable “unless the terms of a testamentary instrument or irrevocable trust expressly provide otherwise.” Other state statutes contain similar wording.²⁴⁰ An opt-out provision could allow for older trusts with less socially acceptable provisions to be amended to meet the needs of current beneficiaries but would also permit trustors to retain the certainty of expressing wishes for property after death. Additionally, requiring precise language limits the need for courts to scrutinize circumstances surrounding trust formation to ascertain if a trustor’s words or actions imply a favor or disfavor of decanting.

B. Trustee Authority

First, clarifying the amount of authority given to a trustee and how trustee actions are overseen would provide protections for both beneficiaries and trustees. By setting forth an acceptable framework of expectations, all parties involved in decanting would understand a trustee’s boundaries in making decisions about trust assets. Oklahoma should implement a hybrid system, like New York’s,²⁴¹ that differentiates between levels of trustee authority. If the trust instrument gives a trustee absolute authority, decanting could be considered a logical outgrowth of a trustee’s fiduciary duties. If, on the other hand, a trustee possessed only discretionary authority, court approval could be utilized to function as a check on a trustee’s decision.

Statutorily defining the difference between “absolute” and “discretionary” authority would help determine a trustor’s intent when analyzing the amount of authority granted to a trustee. For example, absolute power could be defined as the “unlimited right to distribute principal that is not modified in any manner.”²⁴² An Oklahoma statute could then provide that “in any trust instrument that does not expressly grant an

239. For Part V only, the author’s suggested statutory language is set apart by quotation marks. When directly attributable to a specific state’s statute, a citation has been included.

240. *See, e.g.*, NEV. REV. STAT. ANN. § 163.556.1 (West Supp. 2012).

241. *See supra* note 101 and accompanying text.

242. *See* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(s)(9) (Consol. Supp. 2012).

absolute or unlimited right to distribute principal, the trustee shall be considered to have discretionary authority.” This establishes that the default level of authority is discretionary, but allows a trustor to include additional authority by granting an “absolute” or “unlimited” right to distribute.

Second, trustees should have clear guidance as to how the ability to decant impacts fiduciary duties. Some states have inserted language that imparts the ability to decant without imposing an affirmative duty to decant.²⁴³ Oklahoma would do well to insert a similar provision. The language could state that “a trustee shall remain subject to all fiduciary duties imposed by Oklahoma law and the terms of the trust, but the option to decant shall not create an affirmative duty on the trustee to decant whenever possible.” This provision would affirm decanting as a function of a trustee’s discretion while shielding the trustee from potential repercussions if he chooses not to decant in the course of administering a particular trust.

Caution may be the better part of valor. If detriment to beneficiaries results from a trustee’s choice to decant, there is no defined mechanism to “re-pour” the assets from the new trust back into the original trust. It actually may be impossible to mimic the original trust after decanting has occurred. Trustees should carefully consider all potential ramifications of decanting before taking any action.

C. Beneficiary Protections

First, Oklahoma would be wise to include a notice provision in any statutory enactment. While trustees have discretion in carrying out a fiduciary duty, this independence does not preclude the possibility of notifying beneficiaries beforehand and allowing time for any potential protest. The Oklahoma legislature could state that “written notice of the proposed action and a copy of the proposed instrument or amendment shall to be given to all existing and future beneficiaries, by certified mail, not less than sixty (60) days prior to an action being taken.” Advance written notice affords an opportunity for objections and court action before an irreversible action is taken.

Second, Oklahoma has an opportunity to address how objections are made. Notice of objection could be provided to a trustee in a variety of ways. Requiring written objection within that sixty-day period would provide more surety than verbal notice. A protective sentence should declare, “Existing and future beneficiaries must make any objections in

243. *See, e.g.*, MO. ANN. STAT. § 456.4-419.5 (West Supp. 2012).

writing to the trustee before the expiration of the notice period. If no objection is received before the expiration of the notice period, the trustee shall be free to exercise such power pursuant to his authority.” Use of notice and objection provisions would serve to inform all parties of actions being taken and ensure fair and open dealings.

Third, changes to a trust should be in writing and filed with the original trust for purposes of clarity. The statute could state: “All changes to the trust implemented under a decanting provision must be in writing and filed with the records of the original trust.” This provides proof of changes, allowing beneficiaries to track previous actions.

Fourth, a provision that prevents a trustee who is also a beneficiary from initiating a decanting action without approval from other beneficiaries is an important safeguard. Imagine a family trust where the benefits of the assets are divided between three siblings, with the eldest acting as the trustee. In some states, if the eldest wanted to decant and had the requisite authority, he could do so without the other two siblings being able to stop his actions. Missouri’s decanting statute provides guidance for including this additional protective measure. Oklahoma’s statute could mimic that of Missouri,²⁴⁴ saying: “No trustee of the first trust may exercise authority to distribute from the first trust to a second trust if such trustee is a beneficiary of the first trust without obtaining written authority from all the beneficiaries of the first trust.” Such a provision protects those affected by a decanting action while allowing necessary or desired changes.

Fifth, the beneficiaries of the new trust should remain the “same” as those of the old trust. To ensure clarity and lessen the chance of legal battles, the beneficiary provision of a decanting statute could state, “The newly-formed trust shall benefit the same beneficiaries as benefited under the previously-existing trust.” However, to maximize both flexibility and certainty, trustors should be allowed to amend the beneficiaries of the original irrevocable trust in the same way already provided for in the Oklahoma Statutes.²⁴⁵ Modeled after the Statutes, the provision should stipulate, “Beneficiaries may be added or removed by the trustee only with the written consent of all living persons having a vested or contingent interest therein.” This permission is especially important because expanding a beneficiary class could implicate the rule against perpetuities or cause adverse tax consequences. While allowing for an expanded beneficiary class could result in uncertainty and litigation, requiring beneficiary

244. *Id.* § 456.4-419.2(2).

245. 60 OKLA. STAT. § 175.41 (2011).

approval should mitigate the potential negative effects. Perhaps more than any other provision, setting forth a beneficiary provision would require the Oklahoma legislature to weigh the demands of society against simplicity.

Lastly, virtually all of the states provide that decanting should not occur unless the pouring-over of the assets implicates no change in the income receivable by the beneficiaries or the tax consequences of the trust.²⁴⁶ Workability and feasibility issues may arise, but the inclusion of such a provision in an Oklahoma decanting statute would protect beneficiaries from unwise decanting by invalidating a unilateral trustee action if it violated statutorily limited authority. To clarify a position of income, the Oklahoma legislature could echo Missouri's statutory language: "The exercise of such authority may not reduce any income interest of any income beneficiary."²⁴⁷ For tax consequences, Oklahoma could mimic Nevada's statute:

[A] trustee may not appoint property of the original trust to a second trust if: . . . A contribution made to the original trust qualified for a marital or charitable deduction for federal or state income, gift or estate taxes or qualified for a gift tax exclusion for federal or state tax purposes and the terms of the second trust include a provision which[,] if included in the original trust[,] would prevent the original trust from qualifying for the tax deduction or exclusion.²⁴⁸

As with any statutory provisions, clarity is key to subsequent implementation. Precise legislative language and a detailed legislative record outlining the benefits and purposes of each provision would help guide regulators, judicial officers, practitioners, and trust administrators in creating flexible yet dependable instruments for future prosperity.

VI. Conclusion

Trends indicate that this far-reaching tide of trust law changes will continue to grow. Trust law in Oklahoma should progress, especially in this era of sweeping statutory reform. Decanting could help to rectify some of the injustices of the past, in keeping with a more modern, liberalized view of society. Furthermore, Oklahoma stands to lose economic benefits to other states if the needs of its residents are not being met under its current

246. *See supra* notes 110-111 and Part III.C.

247. MO. ANN. STAT. § 456.4-419.2(5).

248. NEV. REV. STAT. ANN. § 163.556.2(c) (West Supp. 2012).

laws and can be better met elsewhere. Reforming the RAP provisions found in the Oklahoma Constitution and Statutes might be politically daunting, but such reforms would be worthwhile to keep Oklahoma competitive.

The need to progress, however, should not cause Oklahoma to abandon historic and well-established principles of estate law. Advancement must be accomplished in a deliberate and thoughtful manner, preserving as much of the time-honored certainty inherent in choosing, via trust instruments, how assets earned during a person's life will be treated in the future. With careful stipulations, the spirit of equality found in the desire of the Progressive Era to ensure maximum financial stability for the greatest number of Oklahomans can and should be maintained while also providing flexibility for future wealth stability planning and management.

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