

The Do Over Trust: Protecting Your Adult Children from Themselves

Once an irrevocable trust is set up with the best of intentions for your children, it's set in stone, and you're out of luck if circumstances change ... or are you? In some cases, you may be able to undo, or "decant," the trust.



By Jeffrey M. Verdon, Esq.

Wealthy parents and grandparents who have dutifully planned ahead for their children's futures should consider this cautionary tale.

It's 1998:

You accumulated sizable estate assets and you and your lawyer created an irrevocable dynasty trust for your infant son to protect his legacy and provide him a long-term financial safety net. You

were a thoughtful and loving parent.

It's 2018:

A lot has happened over the past 20 years. The business world has changed and the path to independent adulthood lies obscured in your son's generation's new definition of success: Do what makes you happy, when it makes you happy. Within this paradigm, your son turned into a somewhat lazy young adult with a recent college degree in the History

of the Ottoman Empire. Yes, it's a just BA, and no, there is no Ph.D. in his future. With a résumé full of throwaway summer jobs, your son moved back home with no career prospects.

Then, the icing on the cake: Your estate planning attorney calls to remind you she will be making the first sizable distribution from your son's trust this month. Hearing you groan, she gently reminds you that he can use the money

Continued on following page

Continued from previous page

in any manner he sees fit. You rightfully worry that he will quit looking for a job the minute he gets the money and become a “trust fund baby.”

You ask your estate planner to stop the distribution and beg her to save your son from himself. If he gets this money now, he'll never get a job and move out. Unfortunately, the trust you asked her to prepare is irrevocable and cannot be amended.

You Are Not Alone

Sound familiar? You and thousands of Americans are in the same boat, looking to protect your adult children from themselves.

Thirty years ago, conventional wisdom was to draft irrevocable trusts. Estate planners didn't foresee that changing economic and societal circumstances could backfire on the client. No one did.

Until recently, changing an irrevocable trust was next to impossible in most states. Fortunately, that's starting to change. At the end of 2018, 25 states have “decanting” statutes allowing a broken trust to be fixed. And on Jan. 1, 2019, California joined the club with legislation that just went into effect allowing you to fix a broken irrevocable trust – at least in part and for very limited situations.

All decanting statutes are not created equal. Many states' decanting laws, like California's new statute, are quite restrictive and have onerous notice requirements, frustrating some who wish to change the trust provisions but find the requirements to be impractical. Therefore, if the broken trust contains a “change of situs” provision (as most well-drafted trusts do), consider moving the trust situs to another state, like Nevada, Delaware or South Dakota, which have much more flexibility, and then decant under that state's laws.

The process known as decanting lets you “pour” the assets out of an old inadequate irrevocable trust into a new irrevocable trust with more suitable administrative and dispositive provisions for the changed circumstances. This “Do-Over Trust” can rectify unwanted provisions of an old trust with new terms in a new trust.

Why You May Want to ‘Decant’ a Trust

Besides the foregoing example, additional reasons to decant a trust include:

- Extending the term of the trust: For extended protection to trust assets, if, for example, the old irrevocable trust was set to end at the death of the creator's children. Say the trust has significant assets now. The creator may wish to keep the assets in trust for multiple generations – a dynasty

trust. Nevada's trust statute allows a trust to last for 365 years before it must end.

- Changing a support trust to a discretionary trust: Changing distributions from “mandatory” to “discretionary” could protect against pending liabilities, creditor claims, tax liens or marriage dissolutions.
- Correcting a drafting error: Perhaps the trust doesn't contain Special Needs Provisions for a beneficiary who is disabled. Now, the trust may be changed to include special needs provisions allowing the beneficiaries to receive these important provisions.
- Changing the governing law: For example, to avoid state income tax.
- Combining trusts for greater efficiencies: Trust administration can be costly in payment of trustee fees and tax compliance fees. Combining trust may create more efficiencies in administration.
- Qualifying a trust to hold S Corporation shares: Allowing valuable estate planning and asset protection opportunities.

Decanting is a relatively new concept, and the legal community is just discovering what planning opportunities exist to fix poorly drafted or antiquated irrevocable trusts previously thought to be non-correctable. This is a positive option many are now considering.



Jeffrey M. Verdon, Esq. is the founder and Managing Partner of Verdon Law Group, LLP, a Trusts & Estates, and risk mitigation boutique law firm located in Newport Beach, California. With more than 40 years of experience in designing and implementing comprehensive estate planning and asset protection structures, the law firm serves affluent families and successful business owners in solving their most complex and vexing estate tax, income tax, and asset protection goals and objectives. Please call us for a consultation.

4695 MacArthur Court, Ste. 1100, Newport Beach, Ca. 92660
949-333-8150 • www.verdonlawgroup.com