



# WHAT'S NEW IN DECANTING

# TERMINATION OF TRUSTS AND USE OF RELEASES

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# CHANGES TO THE MISSOURI DECANTING STATUTE

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# What is Decanting?

- A distribution of assets from one trust to another trust as a result of the exercise of a trustee's power to distribute income or principal
- The rationale underlying decanting is that a trustee who has the discretion to make an outright distribution of assets to or for a beneficiary, the trustee has a special power of appointment over the assets of the trust, allowing the trustee to distribute the assets to another trust for the benefit of the beneficiary
- Trustee's power to decant can be given by statute, common law, or in the governing instrument

# Missouri - Decanting

- Decanting statute became effective August 28, 2011
- Decanting statute updated effective August 28, 2022
- Decanting statute is a codification of common law of Missouri- see RSMo. § 456.4-419.10
- Decanting may be viewed as a modification of the terms of a trust and as an alternative to RSMo. § 456.1-111, RSMo. § 456.4-411A, and RSMo. § 456.4-411B

# Most Significant Clarifications/Changes to RSMo. § 456.4-419

- (1) Do not need to move assets to a new trust, can modify the current trusts - prevents retitling of assets and possible obtaining a new EIN
- (2) Removed restrictions for trusts not limited by ascertainable standard
- (3) Second trust must have a permissible distributee
- (4) Cannot add a permissible distributee if grantor is living and the trust is not a grantor trust for income tax purposes
- (5) May retain, create or modify powers of appointment
- (6) Specific language regarding Special Needs Trusts
- (7) More robust tax savings clauses- marital deduction, charitable deduction, annual exclusion, exempt trusts, QSST, RAP provision
- (8) Notice must be given to permissible distributees of the first trust and the second trust

# COMMON REASONS TO DECANT

- Address drafting errors or ambiguities, resolve interpretation questions
- Add or remove provisions for tax purposes – carry out Settlor's intent
- Extend trust terms to delay distributions
- Remove a beneficiary
- Provide successor trustees when trust instrument doesn't provide
- Change trust situs to avoid state income tax on trust income, asset protection planning
- Special Needs Trust language for qualification purposes
- Basis Step-Up Planning (see next slides for example and discussion of the clarification/change in the Missouri decanting statute)

# TRUST MODIFICATION OPTIONS

- Non-Judicial Settlement Agreement (“NJSA”). This is a Uniform Trust Code (“UTC”) concept that is now available in most states. R.S.Mo. Section 456.1-111
- Trust Amendment by Settlor and All Beneficiaries, R.S.Mo. Section 456.4A-411
- Court action to Reform Trust, R.S.Mo. Section 456.4B-411
- Authorization Provided in Trust Instrument
- Decanting Transaction, R.S.Mo. Section 456.4-419

# IS DECANTING THE BEST MODIFICATION OPTION?

- If the Trust Instrument provides a way to achieve the modification the best option is usually to rely on the authority provided in the Trust Instrument (such as action by a Trust Protector or Trustee).
- If the Trust does not provide authorization then a Decanting distribution by the Trustee is almost always the way to achieve the modification provided the Trustee is willing to decant. Decanting does not require court approval.
- Prior to the 2022 changes to the Missouri's Decanting Statute there was some concern that a Trustee could not add a power of appointment in the new trust. Now with the changes to the statute it is clear that a power of appointment can be added.



# DECANTING FOR BASIS PLANNING

- How to maximize both continuing changes to the transfer tax exemption and achieve basis step-up
- Trustee decants to a new trust the appointment of a trust protector who can have the ability to appoint a formula general power of appointment to the beneficiary (or later remove the general power, if necessary)
- The general power, if exercised, would appoint to one or more creditors of the beneficiary's estate and cause estate tax inclusion, thus allowing step-up in basis
- The mere existence of the power causes estate tax inclusion
- If the power is testamentary, under current Missouri law a creditor would have no rights to compel the exercise of the general power

# DECANTING FOR BASIS PLANNING CONTINUED

- Since the 2017 TCJA is temporary and future legislation could change the transfer tax exemption the general power of appointment needs to be a formula
- The formula would provide that the general power of appointment would be effective only if the beneficiary does not have a taxable estate at death, and the step-up basis laws when the beneficiary dies would benefit the estate

# Protection of Trustee From Liability On Termination of Trust

# Termination of Trust

## And § 456.8-817

- May send proposed schedule of distribution
- Trustee shall expeditiously distribute property
- Management during winding up focused on preservation of property
- Receipt and Release

# MUTC § 456.8-817.1

- *In Re: Matter of Wilma G. James Trust*, 487 SW3d 37 (Mo. Ct. App. S.D. 2016)
- Schedule of Proposed Distribution Provided to Beneficiaries
  - Advised beneficiaries of statutory right to object to proposed distribution and 30 day period for objecting
  - Beneficiaries failed to object in that 30 day period
  - No Release was ever requested by the Trustee or signed by the Beneficiaries
  - Failure to object constituted a waiver of the right to object to the form or amount of the distribution

# Wilma G. James Trust Take-Away

- Send beneficiaries a schedule of proposed distribution
- Include in schedule of proposed distribution a notice of statutory right to object for 30-day period
- Provides some protection for Trustee

# MUTC § 456.8-817.2

- On occurrence of event terminating a trust, Trustee must “proceed expeditiously to distribute trust property”
  - Beneficiaries can file petition to compel termination if Trustee unduly delays
- Trustee has right to retain reasonable reserve for payment of debts, expenses, and taxes
  - What is reasonable?
  - Comments suggest reserve can be large depending on circumstances

# MUTC § 456.8-817.2

➤ *In The Matter of Joseph H. Keevan Revocable Trust Dated 12-13-06, 541 SW3d 732 (Mo. Ct. App. E.D. 2018)*

- Trust directed distribution of trust property to 7 children on death of Settlor
- Death of Settlor is the event that triggered termination of trust
- When a trust has terminated, the Trustee has duty to wind up the administration of the trust expeditiously



# MUTC § 456.10-1009

- Beneficiary can
  - Consent to a breach of fiduciary duty
  - Release a Trustee from liability for breach of fiduciary duty
  - Ratify a Transaction constituting a breach of fiduciary duty
- Consent, Release or Ratification are each affirmative acts by the beneficiaries
- Result of consent, release or ratification is that Trustee is not liable to beneficiary executing such consent, release, or affirmation

# Optimum Process For Valid Release

- *In the Matter of Frank A. Lee, Deceased*, 153 A.D.3d 831, 61 N.Y.S. 3d 555 (NY Sup.Ct., App. Div. 2017)—in order to be valid when signing a release
  - Beneficiaries should be made fully aware of nature and legal effect of release, or
  - Beneficiaries should be represented by counsel and sign release after negotiation

# MUTC § 456.10-1009

- Some limitation on power to consent to breach of fiduciary duty on behalf of minor
- In the Matter of: T. R. Potter, Jr. Exempt Trust, 593 S.W.3d 556, 567-568 (Mo. Ct. App. E.D. 2019)
  - Mother of minor consented on behalf of minor child to distribution that was in breach of Trustee's fiduciary duty
  - Consent tainted and ineffective to protect Trustee from liability for breach of fiduciary duty because mother benefited financially from distribution

# MUTC § 456.10-1009

## And § 456.8-817.3

- Release invalid and ineffective in providing Trustee protection from liability if:
  - Induced by Trustee's improper conduct, or
  - At the time, beneficiary did not know rights or material facts relating to breach of fiduciary duty

# MUTC § 456.10-1009

## And § 456.8-817.3

- What constitutes “Improper Conduct” of a Trustee sufficient to invalidate a Release, Consent, or Ratification?
- *Estate of Worrall vs. J.P. Morgan Bank, N.A.*, 2022 WL1284044 (KY)
  - KRS 386B.8-170 identical to UTC 817.1
  - But Trustee did not send a schedule of proposed distribution with a notice that the beneficiary had 30 days to object.

# MUTC § 456.10-1009

## And § 456.8-817.3

- *Estate of Worrall vs. J.P. Morgan Bank, N.A.*
  - Instead, Bank request beneficiary to sign a receipt, release and indemnification agreement, or absent that, Bank would proceed with a formal accounting action
  - Beneficiary refused to sign receipt, release and indemnification
  - KRS 386B.8-180(5) specifically prohibits Trustee from requesting “that any beneficiary indemnify the trustee against loss in exchange for the trustee forgoing a request to the court to approve its accounts at the time the trust terminates”
  - KY court ruled that procedure set out in UTC 817.1 would have sufficiently protected Bank and request for indemnification was improper

# “Improper Conduct” Violated UTC § 802

## Duty of Loyalty

- *Callaway v. Willard*, 830 S.E.2d 464 (Ga. App. 2019)
- On termination of trust, Trustee has a mandatory duty to distribute trust property expeditiously
  - Trustee offered to distribute property contingent on beneficiaries signing a release of Trustee from liability
  - Expressly conditioning the fulfillment of a mandatory duty to distribute trust property on obtaining a complete release of liability was a breach of the duty of loyalty and was improper

# *Hastings v. PNC Bank, N.A.*, 54 A.3d 714 (MD Ct. App. 2012)

- PNC Bank, N.A. sent beneficiaries letter with complete accounting and a “Waiver, Receipt, Release and Indemnification Agreement”
- Letter stated would distribute when received all Releases
- Release Agreement stated
  - Trust has terminated
  - Beneficiaries requested PNC to distribute without formal court accounting
  - Had opportunity to consult an attorney
  - Had reviewed the records of the trust
  - Approved PNC’s handling of trust, and
  - Released and Indemnified PNC



# *Hastings v. PNC Bank, N.A.*, 54 A.3d 714 (MD Ct. App. 2012) and Duty of Loyalty

- Beneficiaries objected to PNC's request for the Release and Indemnification
- PNC explained that execution of Release Agreement not required for distribution, but provided a means for settling trust without court approval of its accounts
- Beneficiaries filed petition challenging request for Release
- Court ruled that requesting a Release and Indemnification did not breach a duty of loyalty
- Release Agreement terms were within scope of what PNC could obtain in a formal court approved accounting
- A Trustee may choose to seek court approval of its accounting, and is generally entitled to indemnity for expenses

# Best Practices

- On termination, send Proposed Schedule of Distribution, which clearly states that beneficiary has 30 days to object
- Release should include statements that beneficiary
  - (1) received and had opportunity to review accountings
  - (2) approves handling of trust,
  - (3) receive Proposed Schedule of Distribution and no objection was asserted within 30 days,
  - (4) had opportunity to consult counsel
  - (5) prefers distribution without formal court accounting
- Deal separately with ability to render court accounting—the distribution should not be contingent on a release
- Carefully consider whether indemnification is needed

# Key Takeaways

- UTC provides for release agreements but not expressly for indemnification agreements.
- Trustees much use caution to avoid violation of Duty of Loyalty pursuant to UTC 802.
- Request for release in exchange for expediting distributions and reducing cost to Trust are generally acceptable.
- Distributions conditioned on the receipt of release and/or indemnification are generally suspect.



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