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**Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2372**

**Date:** 07-Jan-16

**From:** Steve Leimberg's Estate Planning Newsletter

**Subject:** [Steve Oshins Releases 3rd Annual Trust Decanting State Rankings Chart, This One Interactive!](#)

*“The [3rd Annual Trust Decanting State Rankings Chart](#) was enhanced this year to provide links to each state’s decanting statute. There are currently 23 states with a decanting statute now that Minnesota has joined the group as of 1/1/2016.*

*The states are ranked based on the ease of use and amount of flexibility provided by their statutes. Many lower-ranked state statutes have flexibilities that higher-ranked state statutes lack and therefore are often better in certain situations. So the reader should not necessarily conclude that a higher-ranked state is always better.”*

Each year, attorney **Steve Oshins** authors a Decanting State Rankings Chart. Now, for the first time, Steve has added links to all states’ decanting statutes and made this new chart interactive in his [3rd Annual Trust Decanting State Rankings Chart](#). If your computer still shows the 2nd Annual Chart at this link, clear your computer’s cache in order for it to be updated, or simply email Steve Oshins at [soshins@oshins.com](mailto:soshins@oshins.com) and request the chart by email.

**Steven J. Oshins, Esq., AEP (Distinguished)** is an attorney at the Law Offices of **Oshins & Associates, LLC** in Las Vegas, Nevada. Steve is a nationally known attorney who was inducted into the NAEPC Estate Planning Hall of Fame® in 2011. He is listed in The Best Lawyers in America®. He has written some of Nevada's most important estate planning and creditor protection laws. Steve can be reached at 702-341-6000, x2 or at [soshins@oshins.com](mailto:soshins@oshins.com). His law firm's web site is <http://www.oshins.com>.

Steve authors three different annual state rankings charts and one state income tax chart:

- [The Annual Domestic Asset Protection Trust State Rankings Chart](#)
- [The Annual Dynasty Trust State Rankings Chart](#)
- [The Annual Trust Decanting State Rankings Chart](#)
- [The Annual Non-Grantor Trust State Income Tax Chart](#)

Before we get to Steve's commentary, members should note that **Bruce Steiner** and **Michelle Ward** will be delivering a webinar for the **American Bar Association** on January 19<sup>th</sup> at 1 p.m. EST titled "Trusts as Beneficiaries of IRAs." Topics discussed will include: Why leave assets in trust, the requirements for a trust to qualify as a designated beneficiary, the deadline for determining a designated beneficiary, conduit trusts versus accumulation trusts and income tax issues surrounding having an IRA payable to a trust. For more information and to register, click this link: [Trusts as Beneficiaries of IRAs](#)

Now, here is Steve Oshins' commentary:

## **EXECUTIVE SUMMARY:**

Trust decanting is the act of distributing assets from one trust to a new trust with different terms for one or more beneficiaries of the first trust. Just as you can decant wine by pouring it from its original bottle into a new bottle, leaving the unwanted sediment in the original bottle, you can pour the assets from one trust into a new trust, leaving the unwanted terms in the original trust.

For many years, practitioners have struggled to find ways to change the terms of an irrevocable trust. However, through common law and through the decanting statutes that have been enacted in many jurisdictions, it is now possible to "modify" an irrevocable trust by having the trustee distribute the trust assets into a new or different irrevocable trust for one or more of the same beneficiaries of the first trust.

The rationale for allowing such a modification is that a trustee who has the power to distribute the trust property to or for the benefit of one or more beneficiaries should be able to make the distribution to them in trust and dictate the terms of that trust. Decanting is essentially a "do-over."

Trust decanting has become one of the most important techniques used by

estate planners. With the increased estate tax exemption having reduced much of the high-end estate planning business, decanting has replaced much of that lost business as estate planners look for alternate ways to help their clients and prospective clients.

There must be tens of thousands of existing irrevocable trusts that should be decanted, but since decanting is still not as mainstream as it could be, those trusts likely are not getting the attention they could be getting which means that there is more potential work out there for estate planners than many realize.

## **COMMENT:**

### **The Chart**

The [3rd Annual Trust Decanting State Rankings Chart](#) was enhanced this year to provide links to each state's decanting statute. There are currently 23 states with a decanting statute now that Minnesota has joined the group as of 1/1/2016.

The states are ranked based on the ease of use and amount of flexibility provided by their statutes. Many lower-ranked state statutes have flexibilities that higher-ranked state statutes lack and therefore are often better in certain situations. So the reader should not necessarily conclude that a higher-ranked state is always better.

The chart provides a simple guide for an estate planner who can use it to quickly analyze which states might be used to accomplish the decanting goals for a particular client situation. Regardless, as decanting has become so important in the estate planner's playbook, it is important to understand the differences among the states.

### **But What if the Trust is Sitused in a Non-Decanting Jurisdiction?**

What do you do if the trust is sitused in a jurisdiction other than the 23 that have decanting statutes? Do you give up?

If this is the case, first look at the trust agreement to see if it has decanting language. It likely does not, but if it does, then decant it via the authority

granted in the trust agreement.

However, since very few trust agreements have decanting language, assuming there is no such language, the next step is to check the trust to see if it gives the trustee or trust protector the power to change the situs. Many trusts do and many trusts do not. If it does, then first move it to the new situs that does allow decanting, and then decant it using the decanting statutes in the new situs.

If the trust agreement doesn't give anybody the power to change the situs, then look at the current situs's statutes to see if there is a Nonjudicial Settlement Agreement statute. If so, then you may be able to change the situs using that statute to then decant it under the new situs's statute. In many situations, the clients may be comfortable making the changes using the Nonjudicial Settlement Agreement statutes in the current situs; however, since those statutes likely require all "interested persons" or "indispensable parties" to agree to it, this is not always going to be the best solution given the required involvement of the trust beneficiaries.

Regardless, do not give up. The foregoing is meant to describe certain alternative solutions that can potentially get the trust to the intended result by simply using different creative solutions. If nothing else works, then petition the local court for a trust reformation.

## **Summary**

Decanting has become very popular as a means of modifying an irrevocable trust. There are so many irrevocable trusts where the settlor and/or the beneficiaries would like a "do-over." Decanting allows this to be done. The new Chart provides a guide for the estate planner to easily access the state-by-state decanting rules, especially now that the Chart includes interactive statutory links.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

# Steve Oshins

## **CITE AS:**

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## **CITES:**

The author highly recommends Susan Bart's [State Decanting Summaries](#) and Patty Culler's list of [State Decanting Statutes Passed or Proposed](#), both of which maintain helpful current information about the states with decanting legislation.