

# **ULC Maryland UTDA Testimony Feb 2023.pdf**

Uploaded by: Benjamin Orzeske

Position: FAV



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**Statement of Ben Orzeske, Chief Counsel of the Uniform Law Commission to the Maryland Senate Judicial Proceedings Committee in support of SB 0446 to adopt the Maryland Trust Decanting Act, February 14, 2023**

Chairman Smith and Members of the Committee:

Thank you for considering SB 0446 – the Maryland Trust Decanting Act, which is based on a uniform law produced by the Uniform Law Commission (ULC). The ULC is a nonprofit, nonpartisan organization comprised of volunteer attorneys, appointed by all 50 states to draft model state legislation on topics where uniformity of the law is beneficial. Maryland has a long history of adopting uniform acts including the Uniform Commercial Code, the Uniform Transfers to Minors Act, the Uniform Anatomical Gift Act, and many others.

In the trust context, decanting describes a trustee's distribution of assets from one trust to a different trust – much like wine is decanted from a bottle to another vessel. Ordinarily, a trustee will decant when the terms of an irrevocable trust are no longer operating for the benefit of the beneficiaries because of some unanticipated event.

For example, assume the settlor of a trust made provisions for the trustee to support the education of the settlor's grandchildren, but significant funds remain after all of the grandchildren have completed their education. If the terms of the original trust did not account for this possibility, the trustee could decant to a new trust with terms allowing the surplus funds to benefit future generations, or to create a scholarship fund for students in need.

The strategy of decanting has been used for decades as a common law exercise of a trustee's discretion. However, if unregulated, the authority to decant can also be abused to defeat the intended purpose of the original trust's settlor. Recognizing the potential for harm, New York adopted the first statute regulating trust decanting in 1992, and over the next two decades about twenty other states followed suit. Unfortunately, there was a great deal of variance between decanting statutes, which caused confusion and created the potential for a regulatory race to the bottom.

In 2013, the Uniform Law Commission formed a drafting committee of national trust law experts to review all of the current statutes and draft a uniform law based on the best practices. The Uniform Trust Decanting Act (UTDA) was approved in 2015 and has since been adopted by thirteen states. Three more states, including Maryland, are considering the act this year.

The UTDA includes two sets of rules: one set for trustees with broad discretion to distribute assets among beneficiaries, and a stricter set for trustees with limited discretion. To illustrate, imagine a trust that authorizes the trustee to distribute assets to any or all of the settlor's descendants according to their needs, in the sole discretion of the trustee. That trustee could, in theory,

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.

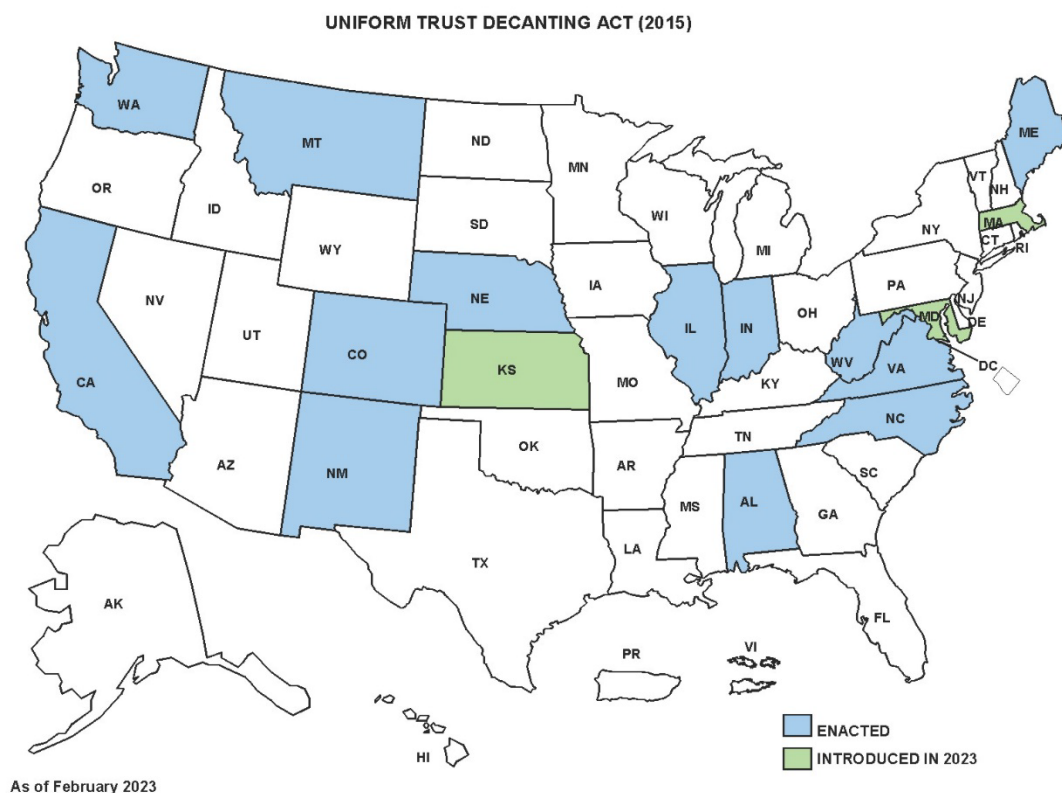
distribute all of the assets to one or more beneficiaries while entirely excluding other beneficiaries. Under the UTDA, that trustee could also decant to a new trust that eliminates one or more beneficial interests.

But consider the case of a trustee whose authority to distribute assets is limited to the amount that is necessary for each beneficiary's health, education, maintenance and support, a common standard that the internal revenue service has deemed to create a safe harbor. Under the UTDA, that trustee could decant for administrative purposes, but only if the beneficial interests of the new trust remained substantially the same as under the old trust.

The UTDA expressly states that any decanting must be conducted in accordance with the trustee's fiduciary duties, including the duty to comply with the terms of the first trust. It requires advance notice to the settlor and all qualified beneficiaries with an opportunity to object to a proposed decanting. The UTDA also contains a number of innovative provisions to ensure charitable interests are protected.

In summary, adopting the UTDA will give Maryland trustees a clear set of guidelines for exercising their decanting power in accordance with the law, and Maryland trust beneficiaries will benefit from a widened range of possibilities to preserve or enhance their beneficial interests. There is no cost or additional administrative burden to the state.

Thank you for considering this uniform act for adoption in Maryland. I welcome any questions from the committee.



## **SB446 West FAV.pdf**

Uploaded by: Christopher West

Position: FAV



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February 15<sup>th</sup>, 2023  
Senate Judicial Proceedings Committee  
The Honorable William C. Smith, Jr.  
2 East Miller Senate Building  
Annapolis, Maryland 21401

**Re: Senate Bill – 446 – Estates and Trust – Trusts – Decanting (Maryland Trust Decanting Act)**

Dear Chairman Smith and Members of the Committee,

When a trust is established and circumstances later change, the trust terms sometimes frustrate the purposes of the trust. An example of this is a trust that will soon distribute fund outright to a trust beneficiary when he turns 30, but if the settlor had known that the beneficiary would be (suffering from addiction, bankrupt, undergoing a divorce, qualifying for governmental assistance), the settlor never would have required the outright distribution, which in some cases could do more harm than good.

In Maryland these issues go to court to move the trust to a jurisdiction that allows decanting or argue that Maryland's common law allows distribution of assets in further trust. Decanting allows the trustee to set up a new trust for a beneficiary and Senate Bill 446 provides carefully outlined restrictions on whether and how decanting can be done.

The threshold question for the trustee is whether doing so would further the purposes of the original trust. A trustee cannot add beneficiaries, take away a vested interest, or further things in the trustee's self-interest. There are several provisions clarifying what a trustee can and cannot do regarding decanting. Prior to exercising the decanting power, the trustee must provide 60-days' notice of the trustee's intent to exercise the power to various individuals involved with the trust, including the settlor (if living), the qualified beneficiaries and all other fiduciaries.

Senate Bill 446 is a comprehensive means of ensuring that trusts retain their original intent once used.

I appreciate the Committee's consideration of Senate Bill 446 and will be happy to answer any questions the Committee may have.

# **MACPA Testimony - SB 446 \_ Estates and Trusts - Tr**

Uploaded by: MB Halpern

Position: FAV



Feb. 15, 2023

The Honorable William C. Smith, Jr., Chair  
Judicial Proceedings Committee  
Miller Senate Office Building  
Annapolis, MD 21401

Re: SB 446, "*Estates and Trusts - Trusts - Decanting*" - **FAVORABLE**

Dear Chairman Smith and members of the Committee,

The Maryland Association of Certified Public Accountants (MACPA) is a membership organization with nearly 9,000 CPA members. Our CPA members serve thousands of clients throughout the state and offer many specialized services, including estate planning and trust administration.

Tax laws are complex and continually changing, and in some cases modifications to a trust's terms are needed to avoid unintended adverse consequences. In other situations, additional flexibility is desired to address changes in beneficiaries' circumstances that were unanticipated by the grantor. Practitioners and fiduciaries must often rely on time consuming and costly court action to modify an irrevocable trust absent a decanting statute in the state that governs the trust agreement. This can be a considerable burden, especially if a party to the agreement is elderly or in poor health.

As of June 2022, a uniform decanting statute has been adopted in 13 states and 24 other states have enacted some version of a decanting statute. The premise of these statutes is that a trustee's discretion to make distributions includes the discretion to distribute assets to a new trust. Decanting provides a mechanism to update trust terms without the need for court approval where there is amicable agreement among the parties.

SB 446 would reduce burdens on courts, practitioners, and fiduciaries by allowing for a statutory mechanism by which a fiduciary can exercise discretionary power to modify the terms of an irrevocable trust. These modifications may be necessary for a variety of reasons, but are typically made to ensure the terms of the trust remain aligned with the grantor's original intentions when circumstances have changed. We believe SB 446 would add clarity for planning purposes and allow for a simpler path to resolve issues confronting the fiduciary of a Maryland trust.

MACPA supports efforts to add clarity and simplicity to existing state laws for taxpayers in order to reduce unnecessary burdens and complexity. We believe SB 446 accomplishes this goal through the use of decanting to address changes in circumstances and tax laws not anticipated by the drafters of the original trust agreements.

MACPA's State Tax Committee appreciates the opportunity to provide these comments. For the reasons noted, we respectfully request a **favorable** report for SB 446.

Should you have questions, please contact Mary Beth Halpern at the MACPA office at [marybeth@macpa.org](mailto:marybeth@macpa.org) or (443) 632-2330.

Sincerely,

MACPA State Tax Committee

cc: Nick Manis, Manis Canning & Associates



## **Estate and Trust Section Council Testimony in favo**

Uploaded by: Sarah Kahl

Position: FAV



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**To:** Maryland Senate – Judicial Proceedings Committee

**From:** MSBA Estate & Trust Law Section

**Date:** February 14, 2023

**Subject:** **SB 446** – Estates and Trusts – Trusts – Decanting (Maryland Trust Decanting Act)

**Position:** Support

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The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports Senate Bill 446 – Estates and Trusts – Trusts – Decanting (Maryland Trust Decanting Act).**

### **Description of Current Law**

When circumstances change so that a trust no longer fulfills its purposes, the Maryland Trust Act allows certain modifications to be made by a court if the modification would further the purposes of the trust. In addition, interested persons may enter into a binding nonjudicial settlement agreement with respect to certain matters involving a trust.

Another common method of modifying a trust is through trust decanting, when a trustee distributes assets from one trust to a second trust. There is no express statutory law permitting decanting in Maryland, although there are decanting statutes in over 30 other states. The theoretical basis for decanting stems from the common law idea that a holder of a power of appointment may exercise it in a way narrower in scope than the full power would allow. In other words, if you have discretion to distribute property to someone, you should also be able to distribute property to that person in further trust. This theoretical basis for decanting finds support in Maryland common law. Lamkin v. Safe Deposit & Trust Co. of Baltimore, 64 A.2d 704 (Md. 1949).

### **Problem Addressed by this Legislation:**

Because of unanticipated circumstances, the terms of an irrevocable trust may frustrate the original purposes of a settlor. For example, a trust may provide for an upcoming outright distribution to a

beneficiary who has a substance abuse problem, bankruptcy, or impending divorce. A trustee may wish to modify the trust to take into account the birth of a special needs beneficiary or a change in tax law.

In some cases, the existing framework for modifying an irrevocable trust falls short of a trustee's needs, either because of the need for prompt action, or because for tax or creditor reasons, it would be inappropriate for a beneficiary to consent to a change in terms.

For these reasons, many trustees seek to exercise a decanting power as a means of modifying an existing trust. In some cases, trustees have decanted Maryland trusts using the common law as questionable authority. More commonly, trustees will change the situs of a trust to another state that permits decanting.

### **How this Legislation Solves the Problem:**

A new Maryland Trust Decanting Act would provide clear authority for when a trust may be decanted in Maryland. The Act would provide certainty and flexibility for trustees to further the settlor's objectives and would allow more trusts to continue to be administered in Maryland. The Act would also bring Maryland more in line with other states that have adopted decanting statutes.

The proposed legislation is based on the Uniform Trust Decanting Act and provides that a trustee may decant one trust into another trust under certain circumstances. The extent of the power of the trustee to decant depends in part on how much discretion a trustee was given in the original trust document. A trustee who has "expanded distributive discretion" over a trust, such as the discretion to make distributions to any one or more of the beneficiaries for any reason, may decant the trust into a second trust for the benefit of one or more of the beneficiaries of the first trust. If any beneficiary of the first trust has a vested interest, such as the right to receive mandatory income distributions, that vested interest cannot be eliminated or reduced in the second trust.

If a trustee who has limited distributive discretion over a trust, such as the discretion to make distributions solely for the health, education, maintenance and support of any one or more of the beneficiaries, the decanting power is more limited. The interests of the beneficiaries in the second trust must be substantially similar to the interests in the first trust. The terms of the second trust



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may delay distributions to the beneficiary, but those delayed distributions must be segregated for only that beneficiary and must vest in the beneficiary's estate.

The proposed legislation also provides a trustee with the power to decant a portion of a trust to a special needs trust for the benefit of a beneficiary with a disability.

To allow trustees the same tools that they have in other states to address changed circumstances, the Estate and Trust Law Section of the MSBA **supports SB 446 and urges a favorable committee report.**

**For further information, please contact:**

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