



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,

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.

