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**To:** Maryland House – Judiciary Committee

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

**Date:** March 27, 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.

### **Description of Amendment**

SB 446, as passed by the Senate, includes an amendment from the initial language, which the Estate and Trust Law Section supports. This amendment does not change the substance of the bill but clarifies its reading in three ways:

1. Confirms, at the request of the Judiciary, that the bill would not require a court to provide legal advice.
2. Reverts to the Uniform Act in a couple of places where style changes were initially made but may have changed the meaning.
3. As required by the Elder Law Section for their unqualified support, confirms, without any room for misinterpretation, that a second trust may be either a pooled trust or a payback trust *or neither*.

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.**

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