THE PRIVATE CLIENT RESERVE

TRUST DECANTING IN NEW YORK

Raymond C. Radigan,
Managing Director of Trust East Region

February 6, 2013

All of us serving you

usbank

FOR INTERNAL USE ONLY

WHAT TO COVER

- Why Decant?
- General Rules of Statute
- Mechanics of Decanting – What are the Options?
- Procedural Requirements
- Tax Consequences of Decanting
- Unresolved Issues

FOR INTERNAL USE ONLY

The Private Client Reserve

MAKING ADMINISTRATIVE CHANGES

- Update Trust Provision
- Expand or Limit Investment Powers
- Provide or Eliminate Spendthrift Provisions
- Change Trust Situs
- Change Trustees
- Correct Drafting Errors

FOR INTERNAL USE ONLY

THE PRIVATE CLIENT RESERVE

CHANGE BENEFICIAL INTEREST

- Extend Trust Term
- Eliminate Some or Most of Current Beneficiaries or Remaindermen
- Give Beneficiary General or Limited Power of Appointment
- Create SNT

FOR INTERNAL USE ONLY

DIVIDE OR COMBINE TRUSTS

- Beneficiaries have Different Investment Objectives
- Facilitate Tax Planning
- Gain Efficiencies – Reduce Costs

FOR INTERNAL USE ONLY

GAIN TAX EFFICIENCIES

- Grantor to Non-Grantor Trust
- Change Situs
- Extend Term
- Divide Trust – GST or Marital Deduction
- Subchapter S Stock

FOR INTERNAL USE ONLY

GENERAL RULES OF STATUTE

- Authorized Trustee must decant – not Grantor or Beneficiary
- Fiduciary Duty when Decanting
- Cannot Decant against Intent of Grantor
- Trust Agreement can Override Statute
- Cannot Exonerate the Trustee from Liability
- Cannot Alter the Power to Remove the Trustee
- Cannot Change Trustee Compensation
- Can Extend Term of Trust but not Violate Rules Against Perpetuities
- Statute is Retroactive

FOR INTERNAL USE ONLY

UNLIMITED DISCRETION TO INVADE

- If can invade to make outright distribution, then able to invade in more limited fashion – i.e. in further trust
- Can extend term of the trust
- Can give beneficiary general or limited power of appointment
- Cannot take away vested rights
- Can eliminate one or more current beneficiaries or remaindermen but cannot add a new beneficiary

FOR INTERNAL USE ONLY

UNLIMITED DISCRETION TO INVADE

Example No. 1

- Trust for the benefit of X
- Trustee – complete discretion to invade for X
- Trust terminates when X turns 40
- X is 20

Decanting Options:

1. Trustee has complete discretion to invade for X for X's lifetime.
2. Trustee has complete discretion to invade for X – terminates at 50.
3. Trustee has complete discretion to invade for X – income to X at 25, terminates at 50.

FOR INTERNAL USE ONLY

UNLIMITED DISCRETION TO INVADE

Other decanting options:

1. Trustee to invade for X's HEMS for X's lifetime, income at 25.
2. Trustee has complete discretion to invade for X for X's lifetime, X has testamentary general power of appointment
3. Trustee has complete discretion to invade for X for X's lifetime, X has testamentary limited power of appointment.

FOR INTERNAL USE ONLY

UNLIMITED DISCRETION TO INVADE

Example No. 2

- Trustee has complete discretion to invade for X
- X has 5 and 5 power
- X gets income at 25
- X gets 1/3 principal at 35
- X is 35
- Trust terminates when X turns 40

Result

1. X must retain vested rights
2. Can decant to new trust – trustee either has unlimited discretion to invade, invade for HEMS, or give X general or limited power of appointment

FOR INTERNAL USE ONLY

UNLIMITED DISCRETION TO INVADE

Example No. 3

- Trustee has complete discretion to invade for X
- X gets 1/3 principal at 35
- X is 25
- Trust terminates when X turns 40

Result

Same as options on Example No. 1

FOR INTERNAL USE ONLY

UNLIMITED DISCRETION TO INVADE

Example No. 4

- Trustee has complete discretion for invade for X
- Trust terminates the sooner of X's death or when X turns 50
- If terminates at X's death, remainder to brother and sister

Result

Same options as example No. 1 except if X dies before trust is terminated, the remaindermen can be brother, sister or both

FOR INTERNAL USE ONLY

UNLIMITED DISCRETION TO INVADE

Example No. 5

- Trustee has complete discretion to invade for X, Y, or Z
- Trust terminates when Z turns 25
- Z is 15

Result

Same options as Example No. 1 except new trust could be for the benefit of one or more of X, Y, and/or Z

FOR INTERNAL USE ONLY

LIMITED DISCRETION TO INVADE

- Can extend the term of the trust
- Invasion standard must remain the same
- Current beneficiaries and remaindermen must be the same
- Must retain same invasion standard but if extended beyond the term of the original trust, thereafter the trust can have unlimited discretion to invade

FOR INTERNAL USE ONLY

LIMITED DISCRETION TO INVADE

Example No. 6

- Trustee must invade for X's HEMS
- Trust terminates when X turns 40
- X is 25

Result

New trust – X must invade for X's HEMS until 40. Once X turns 40, trustee can have the unlimited discretion to invade for X's benefit but must invade for X's HEMS

FOR INTERNAL USE ONLY

LIMITED DISCRETION TO INVADE

Example No. 7

- Trustee must invade for HEMS of X, Y and Z
- Trust terminates when Z turns 30, remainder to X, Y and Z per stirpes
- Z is 15

Result

New trust – Trustee must invade for HEMS of X, Y and Z until Z turns 30. Thereafter, trustee has complete discretion to invade for X, Y or Z but must invade for HEMS of X, Y, and Z

FOR INTERNAL USE ONLY

UNLIMITED AND LIMITED DISCRETION TO INVADE

Example No. 8

- Trustee has complete discretion to invade for X, Y and Z
- Trustee must invade for HEMS of X, Y and Z
- Trust terminates when Z turns 25
- Z is 20

Result

New trust – Trust for the benefit of X, Y and/or Z. Same options as Example No. 1

FOR INTERNAL USE ONLY

NOTICE REQUIREMENTS

Must serve notice of decanting and the old and new trust to:

- All those entitled to service of process in judicial accounting proceedings
- Grantor, if living
- Any person who could remove the trustee

FILING AND OTHER REQUIREMENTS

- Must file old trust with court of jurisdiction
- Must wait 30 days after notice before decanting
- Do not need the consent of court or the beneficiaries
- Decanting instrument must state if receiving some or all of the assets

TAX CONSEQUENCES OF DECANTING

- Little Law on this Issue
- IRS Notice 2011-101- Looking for Public Comment
- Income Tax Consequences
- Gift Tax Consequences
- Estate Tax Consequences
- GST Tax Consequences

UNRESOLVED ISSUES

- Consent of beneficiaries not required
- Service of notice should not impact statute of limitations
- Grantor entitled to notice