

STETSON LAW

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CAN'T YOU DECANT?

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I. Introduction

Can't you decant?? The short answer is Yes! . . . But The name itself seems to imply we can't - De-"cant"-ing – but we can if we cognizant of our state statutes/common law and federal law relating to public benefits eligibility. The concept of decanting a trust is often compared to the decanting of a fine wine, ad nauseam. But I have to admit, it's the best way to conceptualize decanting a trust. So, here's my wine reference - decanting a trust isn't just a legal maneuver, it's a bit like uncorking a complex wine. You need to consider the structure of the trust you are decanting, the appropriate time to decant, and what type of trust you're pouring into. So, let's unbottle the truth about decanting. In this presentation, I will focus primarily on decanting from a self-settled SNT to another self-settled SNT (aka D4A trusts or first-party SNT's). For clarity, I will refer to the trust being decanted as the "first trust" and the new trust as the "second trust". I will make some references to third party trusts but it is not my focus as decanting a third party trust is less risky and draws less scrutiny from SSA.

II. What is Decanting?

Decanting refers to the process by which an existing irrevocable trust may be transferred or "poured into" another trust with more favorable or updated terms, without the need for court approval. In other words, trust decanting is changing an irrevocable trust to better match new circumstances. Generally, irrevocable trusts are inflexible documents that may be amended or modified only under certain circumstances, such as to accommodate a change in the law that may affect the public benefits of a disabled individual. Decanting allows a trustee to address or fix issues or circumstances that were not contemplated when the existing irrevocable trust was created. The decanting concept applies to special needs trusts. Although other legal mechanisms

exist to “fix” an irrevocable trust, many require court intervention or assents by the beneficiaries, both of which can be time-consuming, expensive and fruitless.

III. When Is Decanting Appropriate?

Decanting is initiated by the trustee of the first trust, acting with the guidance of counsel. The trustee of the second trust may be the same individual or entity but this is not a requirement. Decanting a special needs trust is fundamentally a strategy to preserve the beneficiary’s eligibility for public benefits. It becomes especially relevant when circumstances evolve in ways the settlor could not have anticipated at the time of the trust’s creation. For instance, when the trust has been in place for decades and the beneficiary’s needs have shifted significantly.

The following is a detailed list of common decanting scenarios:

1. Correct Drafting Errors or Ambiguities

- Clarify vague distribution standards
- Remove language that inadvertently grants the beneficiary control

2. Update Trustee Provisions

- Appointing successor or co-trustees
- Change trustee provisions
- Adding trust protector roles or administrative agents
- Refine trustee powers to improve flexibility or oversight

3. Respond to Changed Circumstances

- Adjust for the beneficiary’s evolving medical, financial, or residential needs
- Update for shifts in available public benefits
- Adapt to relocation of the beneficiary or trustee to a new state with different trust laws
- Add language to support future modifications, decanting, change of situs

4. Modernize Administrative Terms

- Incorporate clearer standards for discretionary distributions
- Update notice, accounting, or reporting provisions
- Add a spendthrift provision
- Bring older trusts into compliance with updated state and federal statutes
- Update to comply with revised public benefits eligibility/compliance requirements and tax laws

5. Preserve Public Benefits Eligibility

- Remove provisions that risk triggering SSA's resource-counting rules
- Ensure the trust remains irrevocable and retains the Medicaid payback clause (for self-settled SNT's)
- Avoid SSA early termination triggers

6. Consolidate or Segregate Trust Assets

- Merge multiple trusts for administrative efficiency
- Create separate subtrusts for distinct purposes (e.g., housing, therapy, education)

IV. Legal Authority for Decanting Special Needs Trusts

A. Statutory vs. Common Law Authority

The benefit of statutory law over common law is that statutory law provides clear authority (for the most part) to decant with procedural instructions as to the trustee's authority and notice requirements, among other things. In contrast, common law is limited and subject to judicial interpretation which can be vague and case specific. Decanting in statutory law states tends to be less risky and uncertain as opposed to common law states.

Currently 41 states have decanting statutes and 9 do not. Of the 41 states with decanting laws, 26 of them have special needs trust provisions. My state of Massachusetts is one of the 9 don't-have states, but we do have legislation currently under consideration. Eventually I think it will pass. For now, we have some scant case law as guidance. For those states like Massachusetts, without a statute, a trustee should consider whether their state allows decanting pursuant to common law or whether they may change the trust situs to a state with a decanting statute to accomplish their goal. For states with their own decanting statute, be sure to look for any guidance on prerequisites to decanting. Regardless of whether a state allows decanting by statute or common law, the trust instrument itself should first be carefully reviewed to determine what authority the trustee may or may not have to decant. This is also important because generally decanting statutes operate as default rules, not binding requirements. The trust

instrument itself typically governs if it sets forth contrary or more detailed terms than the statute does.

B. The Uniform Trust Decanting Act (UTDA)

The UTDA is the foundation for most of the decanting statutes found today. The Act was created by the Uniform Law Commission (ULC) and approved in 2015.¹ It was created to provide states with a uniform method to decant, permit flexibility, maintain the grantor's intent, and to prevent abuse of the trustee's discretion.² Currently, 19 states have adopted the UTDA while 23 states have their own variation. The UTDA, Section 13(b) authorizes decanting of special needs trusts provided that the trustee of the first trust has discretionary authority of principal, the second trust is a special needs trust that benefits the disabled beneficiary, and the decanted trust will further the purpose of the first trust.

C. Key Fiduciary Considerations:

Decanting a special needs trust demands heightened attention to fiduciary standards. A trustee should consider all of the following in determining whether decanting is the best option:

1. Fiduciary Duty:

- **Duty of Loyalty:** The trustee must act solely in the best interest of the disabled beneficiary. Any decanting must preserve eligibility for public benefits (e.g., SSI, Medicaid) and avoid self-dealing or conflicts of interest.
- **Duty of Prudence:** Trustees must exercise care, skill, and caution. Consider documenting the decision to decant with a memorandum outlining the rationale, risks, and benefits.
- **Duty of Impartiality:** If other beneficiaries exist (e.g., remainder beneficiaries), the trustee must balance their interests, especially if the new trust alters future distributions. State law should be consulted as to whether the interest of remainder beneficiaries can be altered in the decanted trust. Under the UTDA, the interest of a beneficiary, other than the disabled beneficiary, must be "substantially similar" to their interest in the first trust.

¹ The Uniform Law Commission (ULC) is a non-partisan body of legal professionals appointed by U.S. jurisdictions to draft model laws that promote clarity and consistency in state statutory frameworks.

² The Uniform Trust Decanting Act, A Summary, [Uniformlaws.org](https://www.uniformlaws.org)

- **Preservation of Intent:** The trustee must honor the settlor's original intent, particularly if the trust was designed to protect a disabled beneficiary's access to public benefits. Decanting should not introduce provisions that jeopardize this purpose.

Best Practice: Include a fiduciary analysis in the trustee's file, showing that the decanting enhances the beneficiary's protection, aligns with the trust's purpose, and complies with applicable law.

2. Notice requirements

Determine the amount of notice required under state law and to whom it must be given.

Under the UTDA 60 days' notice is required. Generally (and it is good practice), written notice should be provided to the following:

- The settlor(s), if living
- The current beneficiary (or their legal representative)
- Remainder beneficiaries
- Co-trustees and any trust protector or advisor
- State Medicaid agencies, depending on jurisdiction and trust type (especially if the trust is first-party and subject to payback provisions)
- Social Security, if beneficiary(ies) is eligible for or receives SSI

Notice must include:

- The intent to decant
- A copy of the existing trust
- A copy of the proposed new trust
- Specify the proposed effective date (consult state/common law for timing)

3. Court involvement (if any)

Regardless of whether the authority is statutory, common law or stated in the trust instrument, generally a trustee can exercise the decanting power without consent or court approval. However, a trustee or beneficiary could seek court intervention under the following circumstances:

- Determine/clarify who is entitled to notice
- Determine whether notice was proper, if required

- Approve or authorize trustee's authority to decant, if necessary
- Provide instructions to trustee (e.g., clarify ambiguities in law, confirm/clarify authority to decant)
- Settle disputes between trustees and/or beneficiaries
- Provide any potential relief under state or common law
- Decanting testamentary trusts

4. Change of situs

A trustee may consider changing the trust's situs to take advantage of more favorable laws in another state. For example, a more flexible decanting statute (or a state that has a decanting statute for those in a common law state), more flexible trust laws, or stronger asset protection.

To do this, the trustee must consider two key factors:

- Does the trust document allow for changing the situs?
- What does the current state and the new state require to make the change legally valid? (e.g., does the new state require an in-state trustee or some other nexus to the state)

If the trust is silent as to whether the trust situs may be changed, most state statutes and the UTDA permit it unless the trust specifically precludes it. Be mindful of a rule against perpetuity violations in the new state. Not all states enforce this rule but they may have a variation of it (Massachusetts repealed the rule against perpetuities in 2008). The rule against perpetuities limits how long a trust can last, typically requiring that interests vest, if at all, within a certain period of time (e.g., 21 years after the death of a measuring life). Violating this rule can render future interests void, undermining the trust's long-term structure.

V. State-by-State Comparison of Decanting Laws

States differ in how much flexibility their decanting statutes allow. The chart below provides a current (as of August 2025) state-by-state comparison highlighting which states have decanting statutes (which has grown significantly in the last 10 years) and those that don't. It also highlights the notice requirements as well as which states have a specific carve out for special needs trusts, making decanting of SNT's less risky and ambiguous. Note that while most

states mandate notice, none require prior consent (except Ohio with regard to testamentary trusts), and some are silent on the matter altogether. Although Massachusetts is a common law state, we do not require notice or consent of a beneficiary.

Some jurisdictions permit decanting even when the original trust instrument is silent on the matter, while others require express authorization within the trust document. In all cases, the decanting process must comply with the specific procedural and substantive requirements set forth in the applicable state statute. The variations between states are a consideration when contemplating the trust's transfer to another jurisdiction.

State Statute Comparison Chart³

State	Decanting Legislation	Statute	State Adopted UTDA?	Prior Notice Required?	Prior Consent Statutorily Required?	Is There a Special Needs Trust Section?
Alaska	Yes	Alaska Stat. Ann. §§ 13.36.157 to 13.36.159	No	Yes, Unless Grantor exempts	No	Yes
Alabama	Yes	Ala. Code §§ 19-3D-1 to 19-3D-29	Yes	No	No	Yes
Arkansas	Yes	Ark. Code Ann. § 28-73-818	No	No	No	Yes
Arizona	Yes	A.R.S. § 14-10819	No	Silent	Silent	No
California	Yes	Cal. Prob. Code §§ 19501 to 19530	Yes	Yes	No	Yes

³ [State Decanting Laws Chart](#), [Practical Law Checklist w-022-0638](#) and [ArentFoxSchiff state summary chart](#).

Thank you to Tim Snead for creating the last row showing whether each state has a special needs trust provision.

Colorado	Yes	Colo. Rev. Stat. Ann. §§ 15-16-901 to 15-16-931	Yes	Yes	No	Yes
Connecticut	Yes	Conn. Gen. Stat. Ann. 45a-545a to 45a-545cc	Yes	Yes	No	Yes
D.C.	Yes	D.C. Code §§ 19-1901 to 19-1929	Yes	Yes	No	Yes
Delaware	Yes	12 Del. C. § 3528	No	Silent	Silent	No
Florida	Yes	§ 736.04117, Fla. Stat.	No	Yes	Silent	Yes
Georgia	Yes	O.C.G.A. § 53-12-62	No	Yes	No	No
Hawaii	No	N/A	N/A	N/A	N/A	N/A
Iowa	Yes	Iowa Code Ann. § 633A.4215	No	No	Silent	No
Idaho	No	N/A	N/A	N/A	N/A	N/A
Illinois	Yes	760 ILCS 3/1201 to 3/1227	Yes	Yes	No	Yes
Indiana	Yes	Ind. Code § 30-4-10-1 to 30-4-10-60	Yes	Yes	No	Yes
Kansas	Yes	K.S.A. 58-5101 to 58-5130	Yes	Yes	No	Yes
Kentucky	Yes	KRS 386.175	No	Yes	No	No
Louisiana	No	N/A	N/A	N/A	N/A	N/A
Massachusetts	Proposed	N/A	N/A	N/A	N/A	N/A
Maryland	Yes	Md. Code Ann., Est. & Trusts §§ 14-601 to 14-625	Yes	Yes	No	Yes

Maine	Yes	18-B M.R.S.A. §§ 1201 to 1229	Yes	Yes	No	Yes
Michigan	Yes	MCL 556.115a	No	Yes	Silent	No
Minnesota	Yes	Minn. Stat. Ann. § 502.851	No	Yes	No	Yes
Missouri	Yes	§ 456.4-419, RSMo	No	Yes	Silent	Yes
Mississippi	No	N/A	N/A	N/A	N/A	N/A
Montana	Yes	Mont. Code Ann. §§ 72- 39-101 to 72- 39-303	Yes	Yes	No	Yes
North Carolina	Yes	N.C.G.S. §§ 36C-8B-1 to 36C-8B-30	Yes	Yes	No	Yes
North Dakota	Yes	N.D.C.C. §§ 59-16.1-01 to 59-16.1-17	No	Yes	No	Yes
Nebraska	Yes	Neb. Rev. St. §§ 30-4501 to 30-4529	Yes	Yes	No	Yes
New Hampshire	Yes	N.H. RSA § 564-B:4-418	No	No	No	No
New Jersey	No	N/A	N/A	N/A	N/A	N/A
New Mexico	Yes	NMSA 1978, §§ 46-12-101 to 46-12-129	Yes	Yes	No	Yes
Nevada	Yes	NRS 163.556	No	No	No	Yes
New York	Yes	N.Y. EPTL § 10-6.6	No	Yes	No	Yes
Ohio	Yes	Ohio R.C. 5808.18	No	Yes	No, unless testamentary trust	No
Oklahoma	Yes	Okla. Stat. tit. 60, §§ 175.701 to 175.719	No	Yes	No	Yes
Oregon	No	N/A	N/A	N/A	N/A	N/A

Pennsylvania	No	N/A	N/A	N/A	N/A	N/A
Rhode Island	Yes	R.I. Gen. Laws § 18-4-31	No	Yes	Silent	No
South Carolina	Yes	S.C. Code Ann. § 62-7-816A	No	Yes	No	No
South Dakota	Yes	SDCL 55-2-15 to 55-2-21	No	No	No	No
Tennessee	Yes	T.C.A. § 35-15-818	No	Silent	Silent	No
Texas	Yes	Tex. Prop. Code Ann. §§ 112.071 to 112.087	No	Yes	No	No
Utah	No	N/A	N/A	N/A	N/A	N/A
Virginia	Yes	Va. Code Ann. §§ 64.2-779.1 to 64.2-779.25	Yes	Yes	No	Yes
Vermont	Yes	14A V.S.A. §§ 1401 to 1429	Yes	Yes	No	Yes
Washington	Yes	RCW 11.107.010 to 11.107.080	Yes	Yes	Silent	Yes
Wisconsin	Yes	Wis. Stat. §§ 701.1301 to 701.1327	Yes	Yes	No	Yes
West Virginia	Yes	W. Va. Code §§ 44d-8b-1 to 44d-8b-31	Yes	Yes	No	Yes
Wyoming	Yes	Wyo. Stat. Ann. § 4-10-816(a)(xxviii), (b)	No	Silent	Silent	No

VI. Tax and Benefits Consequences

A. Income Tax Implications

- **Grantor vs. Non-Grantor Status**
Decanting may inadvertently shift the trust's classification. If the first trust is a grantor trust and the second trust lacks the necessary powers (e.g., retained power to substitute assets), it could become a non-grantor trust, triggering different tax treatment and reporting obligations.
- **Carryover Basis and Tax Attributes**
Assets transferred to the new trust generally retain their original basis and holding period. However, if decanting is deemed a taxable event (e.g., due to beneficiary changes), this could trigger gain recognition or loss of favorable tax attributes.
- **Non-taxable if:** The second trust is a continuation of the first one and authorized by law or the trust document.
- **Taxable if:** The trust has liabilities exceeding asset basis or converts from grantor to non-grantor during the grantor's life.
- **State Tax Strategy:** Trustee may move the trust's situs to a state with no income tax to reduce annual tax burdens. Some state statutes allow the situs of the trust to be changed without restrictions.

B. Gift and Estate Tax Risks

- **Gift Tax:** Triggered when a beneficiary consents to a trust modification, decanting, or restructuring that results in a reduction of their beneficial interest, the IRS may treat that consent as a taxable gift to the other beneficiaries.
- **Estate Tax:** Generally self-settled trusts are grantor trusts so assets will be includable in their estate for estate tax purposes.

VII. How Does the Social Security Administration (SSA) Treat Decanted Trusts?

A. Decanting From a Self-Settled SNT to a Second Self-Settled SNT

Although decanting has gained significant traction over the past decade as a flexible estate planning tool, the treatment of a decanted trust by SSA remains unpredictable and case dependent. Even when decanting is permitted under state law, the lack of consistent SSA guidance means the second trust may still face adverse treatment under SSA's resource-counting rules.

The SSA evaluates decanting under its early termination policy found at POMS SI 01120.199. This section applies to self-settled trusts and pooled trusts.⁴ It does not apply to third party SNT's as those are established with assets of a third party, not the disabled individual's assets and do not require compliance with the early termination policy set forth in SI 01120.199. It does, however, apply in circumstances where an irrevocable trust (a non-special needs trust) is decanted to a self-settled trust. In that case, SSA will apply the early termination policy but will focus on the substance of the second trust, not the first trust, and will apply the full review criteria under POMS SI 01120.201.⁵

POMS SI 01120.199D.7 defines decanting as follows:

Trust decanting generally refers to the distribution or transfer of trust property from one trust to one or more other trusts, usually with more favorable terms. Decanting may involve the early termination of the first trust, or the effect of decanting may be materially the same as the effect of an early termination. In such a situation, we generally evaluate the decanting provision under the instructions on early termination in this section. However, decanting can be complex and can vary depending on applicable State law. It may be appropriate for the RO to seek input from OPLaw. (emphasis added).

When evaluating whether a decanted trust constitutes an early termination of the original self-settled special needs trust, SSA focuses its analysis on the following factors⁶:

1. Whether the decanting results in a distribution of assets during the beneficiary's lifetime that bypasses the required Medicaid payback provision.
2. After reimbursement to the state Medicaid agency and any administrative expenses allowed under SI 01120.199E.3⁷, the remaining trust funds may only be distributed to or for the sole benefit of the trust beneficiary.
3. The trust beneficiary cannot possess the power to terminate the trust. This power must be exercised by the Trustee or some other individual or entity.

⁴ POMS SI 01120.199A

⁵ POMS SI 01120.201 outlines the criteria SSA applies to evaluate trusts established on or after January 1, 2000 to determine whether they are countable resources for SSI purposes.

⁶ See POMS SI 01120.199E.1

⁷ The only administrative expenses allowed under POMS SI 01120.199E.3 are state and federal taxes payable due to the trust termination and reasonable fees and administrative expenses related to the termination of the trust.

SSA's determination hinges on whether the second trust materially alters the first trust's protective structure. Even if the decanting is valid under state law, any provision that enables premature access, circumvents Medicaid recovery, or grants the beneficiary the power to terminate, may be treated as an early termination event, jeopardizing SSI eligibility. In addition to the above considerations, presumably the trust beneficiary would have to be under age 65 to decant to a self-settled trust pursuant federal law.⁸

There is a limited exception to the early termination policy. Under SI 01120.199E.2, if the early termination clause in the first self-settled SNT "allows solely for a transfer of the beneficiary's assets to a secondary section 1917(d)(4)(A) . . . trust of which the same individual is the beneficiary", then the elements of early termination do not need to be met, provided that the early termination clause contains specific limiting language that "precludes the early termination from resulting in disbursements other than to the [second self-settled SNT] or to pay administrative expenses listed in SI 01120.199E.3"⁹ The effect of the limited exception means that a self-settled SNT may contain a decanting provision without a Medicaid reimbursement clause or the other elements of the early termination policy so long as the specific terms of the limited exception are present in the decanting provision.

Below I've provided a synopsis of the primary factors SSA considers when reviewing decanted self-settled SNT's.

⁸ See 42 U.S.C 1396p(d)(4)(A)

⁹ See footnote 7, *supra*.

SSA Primary Factors for Determining Early Termination via Decanting of Self-Settled Trusts

Factor	SSA Focus	Implication
Who receives the remaining assets	examines whether the decanted trust allows assets to be distributed to anyone other than the state Medicaid agency upon termination.	If assets can go to the beneficiary or third parties before death, bypassing reimbursement to Medicaid, SSA may treat the trust as a countable resource.
Timing of termination	looks at whether the trust can be terminated during the beneficiary's lifetime.	Early termination during life without preserving Medicaid recovery rights raises red flags.
Control over termination	assesses who has authority to terminate the trust (e.g., beneficiary, trustee, court).	If the beneficiary has direct or indirect control, the trust may be deemed accessible and countable.
Preservation of Medicaid payback provision	checks whether the decanted trust retains the original payback clause.	Omission or dilution of this clause may result in disqualification.
Continuity of irrevocability	verifies that the new trust remains irrevocable.	If the decanted trust is revocable, it may be treated as a resource.
Substantive changes to trust terms	reviews whether the decanting altered distribution standards, remainder beneficiaries, or administrative powers.	Omission or dilution of this clause may result in disqualification.

B. Avoiding the Early Termination Policy When Decanting from a Self-Settled SNT

The SSA's decanting policy is vague and ambiguous. It does not definitively state whether its application of the early termination policy to decanting is mandatory. Rather, it appears to be subjective, indicating that decanting "may involve the early termination of the first trust,"¹⁰ or it may have the material effect of early termination. This makes decanting a self-settled SNT risky and fraught with uncertainty. The end result of which could be the loss of SSI benefits for the beneficiary or depletion of the SNT if the Medicaid payback provision is invoked.

¹⁰ See POMS SI 01120.199D.7

So, what can trustees and counsel do to steer clear of having the early termination policy applied to the decanting of a self-settled SNT? Consider structuring the decanting to resemble a modification, amendment to, or restatement, instead of a termination of the first trust, thereby preserving continuity and minimizing disruption of public benefits. Support for the proposition that the SSA may treat a decanted trust as a modification or amendment to the first trust can be found in POMS SI 01120.202A.1.a.¹¹ The relevant language states:

“Evaluate all trusts where an applicant, recipient, or spouse alleges an interest in a trust that needs a resource determination (***such as a new or amended trust***) in all initial claims and post eligibility events.” (emphasis added).¹²

The section proceeds to outline:

“For PE events [post eligibility], do not reevaluate the trust resource determination (of a trust that has previously been reviewed) unless there is ***new and material evidence, such as an amendment to the trust*** or a clarification or change in policy that may affect the trust resource determination.”¹³

To effectuate a modification of the first trust, apply the following:

3. Consult state law to determine if modification or amendment is permissible.
4. Retain the name of the first trust. This also avoids having to retitle the assets which can appear as a distribution and thus a termination.
5. Retain the taxpayer identification number of the first trust.
6. Retain the same beneficiaries and remainder beneficiaries.
7. Preserve the Medicaid payback provision.
8. The trust must be irrevocable.
9. Avoid language that implies termination, revocation or beneficiary control.
10. Document the intent and rationale for the decanting or modification, emphasizing continuity of protective provisions.

The key is to ensure that any modification preserves the first trust’s protective framework without introducing substantive changes. Given SSA’s deference to state trust law and the fact that SI 01120.202A.1.a appears to give effect to properly executed trust amendments, trustees in states that authorize decanting by modification (whether by statute or common law) may reduce the risk of triggering the early termination policy. I venture to say that even if a state statute or common law is silent as to modification, it is worth considering.

¹¹ POMS SI 01120.202A.1.a which governs the development and documentation of trusts established on or after January 1, 2000.

¹² Id.

¹³ Id.

C. Decanting Clauses in Self-Settled Trusts

While decanting does seem possible under the SSA regulations if their early termination policy is met, it is not well-settled yet. The idea of having a decanting provision in a self-settled trust sounds appealing but may do more harm than good if not properly drafted to comply with SSA's requirements. The risk of losing SSI and Medicaid benefits for the beneficiary may outweigh the convenience of having a decanting provision in the trust. Consider leaving out a decanting provision in self-settled SNT's or craft the language very carefully.

D. Additional Materials on Decanting

The SSA does give us some guidance in the form of Regional Chief Counsel (RCC) opinions.¹⁴ These opinions are state-specific and limited in circumstances, some of them relate to pooled trusts, but at least offer some insight into the mind of the SSA relative to decanting. The following is a very brief overview of some of these opinions and are provided for your reading pleasure (or as a sleep aid).

1. PS 18-106 Does an early termination clause in a Special Needs Trust meet SSA policy requirements for continued eligibility for SSI? (at POMS PS 01825.026G, (Minnesota)). In this case, the RCC distinguished early termination from decanting under the Minnesota decanting statute because the assets of the first trust were transferred to the second trust after early termination.
2. PS 20-068 Analysis of the Sixth Alaska Amendment to the Secured Futures Pooled Special Needs Trust Agreement, dated October 23, 2019 (at PS 01825.002B, (Alaska)), the RCC equates an early termination "rollover" with decanting without discussion of when the asset transfer takes place. (See following paragraph, noting the requirement for the POMS limiting language as required in SI 01120.199E.2.)

"An early-termination provision need not satisfy these three criteria if it solely allows for the "**decanting**" of a beneficiary's assets from one pooled trust under 42 U.S.C. § 1396p(d)(4)(C) to another 42 U.S.C. § 1396p(d)(4)(C) trust. POMS SI 01120.199.F.2. However, the trust must specify that, in such a trust-to-trust transfer, the only permissible disbursements are the transfer of sub-account funds to the secondary trust and the payment of allowable administrative expenses. POMS SI 01120.199.F.2"

¹⁴ The term RO refers to a Regional Officer and the term OPLAW refers to Office of Program Law. A Regional Officer oversees field operations across a geographic area, ensuring compliance with federal policies and coordinating service delivery. The Office of Program Law provides legal guidance on SSA's benefit programs, drafts regulations, and ensures that agency policies align with federal law.

3. PS 20-064 Analysis of the [Amended] National Foundation for Special Needs Integrity Pooled Trust for the State of Idaho (at PS 01825.015 (Idaho)) applies certain early termination requirements to decanting. The RCC applied the early termination "rollover" requirements to decanting as follows:

"The amended NFSNI Trust clarifies a problematic termination clause in the earlier version. Specifically, language in that Trust agreement allowed for decanting, but did not specify such decanting must be to another 42 U.S.C. § 1396p(d)(4)(C) trust, as is required. After amendment, the termination clause now specifies decanting to "a not-for-profit pooled special needs trust in compliance with 42 U.S.C. § 1396p(d)(4)(C)." Master Trust, art. 16.1 (as amended). This clarification means that the Trust now satisfies the sole benefit requirement."

4. PS 21-006 Analysis of Life Enrichment Trust's Oregon Pooled Trust (at PS 01825.041A. (Oregon)) applies early termination "rollover" requirements to decanting (See following paragraph).

"The 2017 Trust contains an early termination provision that does not violate the sole benefit criteria. The early termination provision has two parts. Master Trust Agreement, "Amendment or Termination of the Trust." First, if it becomes impossible or impractical to carry out the purpose of the trust, then the trustee may, in its discretion, choose to terminate the trust. Id. The trustee will first try to transfer the funds to another qualifying 42 U.S.C. § 1396p(d)(4)(C) trust. Id. This **decanting** provision satisfies the requirements of POMS [SI 01120.199.E.2](#), which states that a decanting clause must contain specific language that precludes disbursement of funds to anything other than a qualifying 42 U.S.C. § 1396p(d)(4)(C) trust or to pay allowable expenses. Here, the decanting provision provides that the funds of the trust, without qualification or limitation, will be transferred to a qualifying trust."

VII. Alternatives to Decanting

- Trust modification via court petition
- Non-judicial settlement agreements
- Powers of appointment or amendment clauses
- Creating a new supplemental trust and merging assets

VIII. Conclusion

The bottom line is, yes! You can decant. But it depends on your specific circumstances and be aware of your state's decanting statute, case law (even if you live in a state with a statute as sometimes statutes and case law conflict), the social security POMS, and how they all converge.

Effective Dates: 05/24/2024 - Present

TN 100 (08-24)

SI 01120.199 Early Termination Provisions and Trusts

A. When to apply the policies in this section

This section applies to:

- **special needs trusts** intending to meet the requirements for exception to resource counting under section **1917(d)(4)(A)** of the Social Security Act (Act) (see [SI 01120.203](#)); and
- **pooled trusts** intending to meet the requirements for exception to resource counting under section **1917(d)(4)(C)** of the Act (see [SI 01120.203](#)).

This includes trusts that:

- are newly formed; or
- have not been previously excepted from resource counting under section 1917(d)(4)(A) or 1917(d)(4)(C) of the Act; or
- were previously excepted from resource counting under section 1917(d)(4)(A) or section 1917(d)(4)(C) of the Act, but that need to be amended for continued exception.

Trusts cannot be excepted under section 1917(d)(4)(A) or 1917(d)(4)(C) of the Act unless their early termination provisions meet the requirements in this section.

Trusts that were previously determined to meet the requirements for exception continue to be excepted, provided they are amended to conform with the requirements of this section within 90 days. For more information on the 90-day amendment period, see [SI 01120.201K.2](#). For more information on the manual notice to send if the trust still does not conform with the policy requirements within 90 days, see [SI 01120.204D](#).

B. Case processing alert for early termination provisions and trusts

Trusts are often complex legal arrangements involving State law and legal principles that require legal counsel. Therefore, the following instructions may be sufficient only to recognize that an issue is present that you should refer to the regional office (RO) for possible referral to the Office of Program Law (OPLaw). When in doubt, discuss the issue with the RO staff or submit the inquiry via vHelp.

C. What is an early termination provision?

An early termination provision allows a trust to terminate before the death of the beneficiary. Commonly, such provisions provide for termination of the trust when, for example, the beneficiary is no longer disabled or otherwise becomes ineligible for Supplemental Security Income (SSI) and Medicaid, or when the trust no longer contains enough assets to justify its continued administration.

D. Defining terms for trusts

1. Trust

A trust is a property interest whereby property is held by an individual or entity (e.g., a bank) called the trustee, subject to a fiduciary duty to use the property for the benefit of another (i.e., the beneficiary).

2. Trust established with the assets of an individual

We consider a trust to be established with the assets of an individual if any assets of the individual or spouse were transferred to the trust other than by a will. To determine what we consider an "asset," see [SI 01120.201B.1](#).

3. Grantor

A grantor, also referred to as a settlor or trustor, is the individual who provides the trust principal or corpus. The grantor must be the owner of, or have a legal right to, the property or otherwise be qualified to transfer it. For more information on grantors, see [SI 01120.200B.3](#).

4. Trustee

A trustee is a person or entity that holds legal title to property for the use or benefit of another. In most instances, the trustee has no legal right to revoke the trust or use the property for their or its own benefit.

5. Trust beneficiary

A trust beneficiary is a person for whose benefit a trust exists. A beneficiary does not hold legal title to trust property but has an equitable ownership interest in it. As equitable owner, the beneficiary has certain rights that will be enforced by a court because the trust exists for their benefit. The beneficiary receives the benefits of the trust, while the trustee holds the title and duties. A beneficiary has certain rights relative to the trust, such as to enforce mandatory provisions of the trust, to demand an accounting, and to sue to remove the trustee. The trustee owes certain duties, such as loyalty and attention, to the beneficiary.

6. Trust principal

The trust principal is the property that is placed in trust by the grantor and held by the trustee, subject to the rights of the beneficiary. It includes any earnings on the trust. It is also called "the corpus of the trust."

7. Decanting

Trust decanting generally refers to the distribution or transfer of trust property from one trust to one or more other trusts, usually with more favorable terms. Decanting may involve the early termination of the first trust, or the effect of decanting may be materially the same as the effect of an early termination. In such a situation, we generally evaluate the decanting provision under the instructions on early termination in this section. However, decanting can be complex and can vary depending on applicable State law. It may be appropriate for the RO to seek input from OPLaw.

8. Other definitions

For other definitions applicable to this section, see [SI 01120.200B](#).

E. Policy for early termination provisions

Apply the following policies to early termination provisions in trusts intending to comply with section 1917(d)(4)(A) or 1917(d)(4)(C) of the Act.

1. Criteria for determining whether an early termination provision is acceptable

A trust that contains an early termination provision may not be excepted from the SSI resource counting rules at section 1613(e) of the Act unless it satisfies the requirements in either section 1917(d)(4)(A) or section 1917(d)(4)(C). Additionally, the trust must satisfy the resource counting rules in [SI 01120.200D](#) and [SI 01110.100B](#) in order not to be a countable resource. To meet those requirements, all of the following criteria must be met:

- Upon early termination (i.e., termination prior to the death of the trust beneficiary), the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and
- Other than payment for the administrative expenses listed in [SI 01120.199E.3](#) in this section and in [SI 01120.201F.4](#), no individual or entity other than the trust beneficiary may benefit from the early termination (i.e., after reimbursement to the State(s), **all** remaining funds are disbursed so as solely to benefit the trust beneficiary); and
- The early termination provision gives the power to terminate to an individual or entity other than the trust beneficiary.

NOTE: For trusts that are excepted from resource counting under section 1917(d)(4)(C) as a pooled trust and do not contain an early termination provision, it is permissible for the trust to retain amounts remaining in the individual's account upon the death of the individual. For more information, see [SI 01120.203D.8](#).

2. Exception for transfers to a secondary trust upon early termination

An early termination provision in a section 1917(d)(4)(A) special needs trust or section 1917(d)(4)(C) pooled trust does not need to meet the above criteria if the provision allows solely for a transfer of the beneficiary's assets to a secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust of which the same individual is the beneficiary.

The early termination provision must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary section 1917(d)(4)(A) or section 1917(d)(4)(C) trust or to pay for the administrative expenses listed in [SI 01120.199E.3](#) in this section and in [SI 01120.201F.4](#).

3. Allowable administrative expenses paid from the trust

The following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State(s):

- Taxes due from the trust to the State(s) or Federal government due to the termination of the trust; and
- Reasonable fees and administrative expenses associated with the termination of the trust.

For more information about allowable and prohibited expenses, see [SI 01120.203E](#).

F. Procedure for the development and documentation of trusts

For instructions on how to develop and document the trusts to which this section applies, see [SI 01120.202](#).

G. Examples of trust evaluations and determinations

The following examples are illustrative of situations you may encounter.

- Do not rely solely on the analysis provided in the examples in making determinations in a specific case, as laws vary from State to State and the language of individual trust documents may warrant different treatment from that given in an example.

- Refer to applicable regional instructions and consult your RO as necessary. Also, be aware of the implications that the trust may have for Medicaid eligibility - see [SI 01730.048](#).

1. Unacceptable early termination provisions

EXAMPLE 1: A special needs trust contains an early termination provision stating that, upon early termination, all assets remaining in the trust will be distributed to the trust beneficiary. The provision gives the trustee or the trust beneficiary the power to terminate.

Treatment: This early termination provision is unacceptable for two reasons. First, upon early termination, the trust does not provide first for reimbursement to the State(s) for the amount of medical assistance paid on behalf of the trust beneficiary. Second, the early termination provision gives the trust beneficiary the power to terminate the trust.

EXAMPLE 2: A pooled trust established in State X contains an early termination provision stating that, upon early termination, State X will receive all amounts remaining in the trust up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State X Medicaid plan. After reimbursement to State X, any remaining funds will be distributed evenly among the other sub-accounts in the pooled trust. The provision gives the trustee the power to terminate.

Treatment: This early termination provision is unacceptable for two reasons. It restricts Medicaid payback to State X rather than requiring payback to any State(s) that paid medical assistance on behalf of the trust beneficiary. It also allows for individuals or entities other than the trust beneficiary (i.e., the other pooled trust sub-accounts) to benefit from the early termination.

2. Acceptable early termination provisions

EXAMPLE 1: A special needs trust contains an early termination provision stating that, upon early termination, the State(s) will first be reimbursed for the amount of medical assistance paid on behalf of the trust beneficiary, and any remaining assets will be distributed to the beneficiary. The provision gives the trustee the power to terminate.

Treatment: This early termination provision is acceptable because it meets all three criteria in [SI 01120.199E.1](#) in this section.

EXAMPLE 2: A pooled trust contains an early termination provision stating that, upon early termination, trust assets may solely be transferred to a secondary section 1917(d)(4)(A) trust, or a secondary section 1917(d)(4)(C) trust, where the beneficiary of the original trust also is the beneficiary of the secondary trust.

Treatment: This early termination provision does not meet the regular criteria for an acceptable early termination provision outlined in [SI 01120.199E.1](#) in this section. However, it meets the exception to the regular criteria, set out in [SI 01120.199E.2](#) in this section, by allowing solely for a transfer of the beneficiary's assets to a secondary section 1917(d)(4)(A)

trust, or a secondary section 1917(d)(4)(C) trust, of which the same individual is the beneficiary.

H. References

- [SI 01120.200](#) Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
- [SI 01120.201](#) Trusts Established with the Assets of an Individual on or after 1/1/00
- [SI 01120.202](#) Development and Documentation of Trusts Established on or after 1/1/00
- [SI 01120.203](#) Exceptions to Counting Trusts Established on or after 1/1/00
- [SI 01150.100](#) What is a Resource Transfer
- [SI 01150.121](#) Exceptions – Transfers to a Trust
- [SI 01730.048](#) Medicaid Trusts

Program Operations Manual System (POMS)

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SI 01120.202 Development and Documentation of Trusts Established on or After 01/01/00

A. Procedure for trust development

1. General development for written trusts

a. When to evaluate trust documents

Evaluate all trusts where an applicant, recipient, or spouse alleges an interest in a trust that needs a resource determination (such as a new or amended trust) in all initial claims (IC) and posteligibility (PE) events.

For PE events, do not reevaluate the trust resource determination (of a trust that has previously been reviewed) unless there is new and material evidence, such as an amendment to the trust or a clarification or change in policy that may affect the trust resource determination. However, evaluate all potential income implications, such as those of trust distributions and payments. For resource status changes in PE events, see SI 01120.201K.

b. Review the trust document(s)

Obtain a copy of the trust document (the original trust document is not required) and any related document(s) and review the document(s) to determine whether the:

- individual is the grantor, trustee, or trust beneficiary;
- trust was established before, on, or after 01/01/00;
- assets were transferred into the trust before, on, or after 01/01/00;
- trust was funded with assets of the individual or third parties or both;