CAN'T YOU DECANT?

STETSON LAW
2025 Nation Conference on
Special Needs Planning and Special Needs Trusts

Presented by:
Michelle M. Mulvena, Esq.
Mulvena Winston, PC
2 Main Street, Suite 350
Stoneham, MA 02180
(781) 288-4100
Michelle@Mulvenawinston.com
www.mulvenawinston.com

Special thank you to Timothy J. Snead, who is a 3L at Stetson Law, for his invaluable assistance in preparing this presentation

1

MULVENA WINSTON PC

INTRODUCTION "CAN'T YOU DECANT?"

- Yes . . . But . . .
- Some Considerations
  - State Statutes and Common Law
  - Public Benefits
  - Tax Implications
  - Trust Instrument
- Focus on decanting from a self-settled trust to another self-settled trust

2

MULVENA WINSTON PC

WHAT IS DECANTING?

- Process by which a trustee may transfer or "pour over" an irrevocable trust another irrevocable trust
- Typically, without the need for court approval (State specific)
- Applicable to special needs trusts

3

When Is Decanting Appropriate?

- Initiated by the trustee to:
  - Preserve beneficiary's benefits
  - Correct drafting errors or ambiguities
  - Update trustee provisions
  - Respond to Changed Circumstances
  - Modernize
  - Consolidate or segregate trust assets

4

Statutory vs. Common Law Authority

- Statutory
  - Clear authority with procedural instructions
  - Less risky as opposed to common law
  - 41 States have decanting statutes
  - 26 of them have special needs trust provisions
- Common Law
  - Relies on judicial interpretation
  - Vague and case specific
- Default rules - trust itself governs in most cases

5

The Uniform Trust Decanting Act (UTDA)

- Created by the Uniform Law Commission in 2015 to provide guidance to states on:
  - Uniform method to decant
  - Permit flexibility in decanting
  - Maintain settlor's intent
  - Prevent abuse of trustee's discretion
- Adopted by 19 states while 23 have their own variation.

6

Key Fiduciary Considerations:

- Fiduciary duty
- Notice requirements
- Court involvement (if any)
- Change of situs

7

Fiduciary Duty

- Duty of loyalty to the beneficiary
- Duty of prudence to exercise care, skill and caution
- Duty of impartiality to balance the interest of all beneficiaries
- Preserve Settlor's intent
- Best practice – include fiduciary analysis in trust file showing decanting in best interest of beneficiary

8

Notice Requirements

- Consult state or common law:
  - Is notice required and
  - To whom
- Generally, written notice to the following:
  - Settlor, if living
  - Current beneficiary (or legal representative)
  - Remainder beneficiaries
  - Co-trustees, trust protector
  - State Medicaid agency (if required)
  - Social Security (if required)

9

Court Involvement

- Generally, not necessary
- Trustee or beneficiary could seek court intervention:
  - Determine/clarify who is entitled to notice & was it proper
  - Approve or authorize Trustee authority to decant
  - Provide instructions to Trustee (clarify ambiguities)
  - Settle disputes among Trustees or beneficiaries
  - Provide relief under statutory or common law
  - Decant a testamentary trust

10

Change of Situs

- Take advantage of more favorable decanting laws in another state
- Review trust for authority to change situs
- Consult state statute for authority
- Watch out for the rule of perpetuity
  - Violation can render future trust interest void, undermining trusts long term structure

11

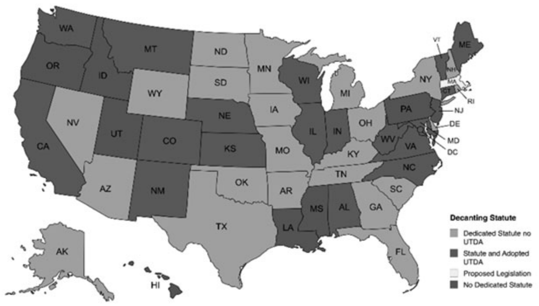
State-by-State Comparison

- Number of states with decanting statutes has grown in the last 10 years
- Detailed chart in materials – key points:
  - 41 states with decanting statutes
  - 26 have carve out for special needs trusts
  - 9 are common law states (no statute)
  - 1 has legislation pending (Massachusetts)
  - Most states mandate notice
  - None require prior consent (except Ohio-testamentary trusts)

12

MULVENA WINSTON PC

State By State Comparison



13

MULVENA WINSTON PC

Social Security Considerations

SSA defines decanting in POMS SI 01120.199D.7:

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.

14

MULVENA WINSTON PC

Social Security Considerations

- SSA treatment of decanting is unpredictable and case specific
- SSA evaluates decanting under its early termination policy under POMS SI01120.199
- Applies only to self-settled and pooled SNT's
- SSA does not require 3rd party SNT compliance with the early termination policy

15

Mulvena Winston PC

Social Security Considerations

- SSA Early Termination Factors Applied to Decanting:
  - Did decanting result in distribution to beneficiary that bypassed the required Medicaid payback provision
    - Depends on whether SSA considers the 2nd trust terminated or modified
  - After Medicaid payback & admin expenses listed in SI 01120.199E.3, remaining funds may only be distributed to/for sole benefit of beneficiary (this provision must be in the second trust)
  - Beneficiary cannot possess the power to terminate the trust. (this provision must be in the 2nd trust)

16

Mulvena Winston PC

Social Security Considerations

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 3rd 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.

17

Mulvena Winston PC

Social Security Considerations

- Limited Exception to Early Termination Policy:
  - POMS SI 01120.199E.2
  - Applies when the 1st SNT's early termination clause only allows transfer to a 2nd self-settled trust for the same beneficiary.
  - The clause must include limiting language that:
    - Prohibits disbursements except to the 2nd SNT or for administrative expenses listed in SI 01120.199E.3.
  - Early termination criteria under SI01120.199E.1 do not apply.
  - Result: A self-settled SNT ***may*** include a decanting provision without a Medicaid payback clause, as long as the limited exception terms are satisfied.

18

MULVENA WINSTON PC

CIRCUMVENT EARLY TERMINATION POLICY

- Decant to modify or amend vs. termination
  - Consult state law – modification/amend permissible
  - Retain name of 1st trust
  - Retain same TIN
  - Preserve Medicaid payback provision
  - Retain irrevocable status
  - Avoid language that implies termination or beneficiary control
  - Document the intent to decant – emphasize continuity of protective provisions

19

MULVENA WINSTON PC

CIRCUMVENT EARLY TERMINATION POLICY

- Support for SSA treatment of decanted trust as a modification or amendment.
  - POMS SI 01120.202A.1.a
    - "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 <u>amended trust</u>***) in all initial claims and post eligibility events." (emphasis added).

20

MULVENA WINSTON PC

DECANTING CLAUSE IN SELF-SETTLED SNT

- Decanting under SSA regs possible but still uncertain
- Including a decanting provision in a self-settled trust can be risky if not carefully drafted.
- Risk of jeopardizing SSI and Medicaid benefits.
- The risks may outweigh the benefits of convenience.
- Consider omitting decanting provisions in self-settled SNTs or draft with extreme care.

21

ALTERNATIVES TO DECANTING

- Trust modification via court petition
- Non-judicial settlement agreements
- Powers of Appointment/limited amendment clauses
- Creating a new supplement trust and merging assets

22

CONCLUSION

- The Bottom Line – Yes! You can decant . . . But proceed with caution.
- Case specific
- Consult your state's law
- Consult POMS

THANK YOU!

23

MULVENA WINSTON, PC

Michelle M. Mulvena, Esq.
michelle@mulvenawinston.com

24