

Now, How Do I Decant a Trust?

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Decanting has been Texas law for almost three months and several articles have discussed what can be accomplished by decanting (e.g., Bill Pargaman's [2013 Legislative Update](#)). This article will discuss the documents needed to decant under Texas law without obtaining the approval of the court. (While a court approval can be obtained, your client probably wants to avoid the cost of doing so.)

While the ability of the trustee to decant depends on whether the trustee has full discretion under the Texas Property Code (TPC) [§ 112.072](#) or limited discretion under TPC [§ 112.073](#), the decanting process is the same for both. The requirement that notice be provided to trust beneficiaries mentions an authorized trustee and does not differentiate between full-discretion and limited-discretion trustees. TPC [§ 112.074\(a\)](#).

To decant a trust under the new statute, you'll need to create at least three documents: written notice to the current and presumptive remainder beneficiaries, a trustee resolution approving the decanting, and the new trust agreement.

The Notice

Who Must Be Notified?

The TPC requires that the trustee provide written notice to the trust's current beneficiaries and the presumptive remainder beneficiaries of the trustee's decision to decant the trust (the Notice). [§ 112.074\(a\)](#). The current beneficiaries and presumptive remainder beneficiaries entitled to receive the Notice are determined as of the date the Notice is sent. [§ 112.074\(b\)](#). The Notice must be delivered in person or sent by registered or certified mail, return receipt requested, no later than thirty days before the proposed distribution. [§ 112.074\(f\)\(6\)-\(7\)](#). By requiring that the Notice be sent thirty days before the decanting, current beneficiaries and presumptive remainder beneficiaries will have the time to receive the Notice and react to it if they choose.

Current beneficiaries are persons who are receiving or are eligible to receive an income or principal distribution from a trust on a particular date. [§ 112.071\(3\)](#). Presumptive remainder beneficiaries are those beneficiaries who, absent the exercise of a power of appointment, would be eligible to receive a trust distribution if the trust terminated on that date or the interests of all current beneficiaries ended on that date without causing the trust to terminate. [§ 112.071\(7\)](#).

If a beneficiary has a court-appointed guardian or conservator, then the Notice must be sent to that guardian or conservator. [§ 112.074\(d\)](#). For minor beneficiaries with no appointed guardian or conservator, the Notice must be sent to that minor beneficiary's parents. *Id.*

The trustee must send the Attorney General the Notice if any of the current beneficiaries or presumptive remainder beneficiaries is a charity (even if it no longer exists). [§ 112.074 \(c\)\(1\)-\(2\)](#). The trustee must send the Notice to the Attorney General if the trustee may distribute trust assets to a charity not named in the original trust agreement. [§ 112.074\(c\)\(3\)](#). The trustee must also send the Notice to the Attorney General if the trustee may distribute trust assets for a charitable purpose

described in the original trust agreement, but no charity is named in the original trust agreement. [§ 112.074\(c\)\(4\)](#).

Trustees do not need to send the Notice to a beneficiary who is known and cannot be located, is not known to the trustee, waives receipt of the Notice, or is a descendant of another beneficiary who received Notice from the trustee if the beneficiary and the beneficiary's ancestor's interests in the trust are similar and there is no apparent conflict of interest. [§ 112.074\(e\)](#).

Successor beneficiaries, defined in TPC [§ 112.071\(10\)](#) as beneficiaries other than current beneficiaries or presumptive remainder beneficiaries or the possible objects of a power of appointment, do not need to receive the Notice.

What Must the Notice Contain?

The requirements for the Notice are contained in TPC [§ 112.074\(f\)](#). Rather than trying to modify the statutory language, tracking the requirements ensures that you include all of the requirements. A complete Notice has the following items:

1. a statement that the trustee intends to exercise its power to decant;
2. a statement that the beneficiary has the right to object to this exercise;
3. a statement that the beneficiary may petition the court to approve, modify, or deny the proposed exercise;
4. a description of how the proposed distribution will occur—stating that the trustee will sign the enclosed trustee resolution and new trust agreement should suffice;
5. the date on which the trustee proposes to distribute the first trust to the second trust; and
6. the trustee's name and mailing address.

The trustee must also provide the beneficiaries with copies of the original trust agreement and the proposed modified trust agreement. [§ 112.074\(f\)\(5\)](#). Including a redline of the second trust agreement against the original trust agreement will help the beneficiary identify changes.

Trustee Resolution

In addition to the Notice required under TPC [§ 112.074](#), you will also need to draft a trustee resolution authorizing the distribution. Under TPC [§ 112.075](#), a distribution must be made by a written instrument, signed and acknowledged by the trustee, and filed with the records of the first and second trust. Having a separate trustee resolution approving of the decanting will document the trustee's authority to decant under the statute.

A full-discretion trustee has broad discretion to decant under TPC [§ 112.072](#) so the resolution will need to recite that the trustee has full discretion and therefore can exercise the power to decant. Because the provisions of TPC [§ 112.072\(a\)-\(d\)](#) do not mandate particular terms in the second trust agreement, the trustee resolution does not need to make specific reference to those provisions. But if the second trust will have terms that are outlined in TPC [§ 112.072\(a\)-\(d\)](#), then the resolution should include a recital referencing the trustee's ability to include that term.

Limited-discretion trustees, on the other hand, have several restrictions on the terms that can be included in the second trust. Because a limited-discretion trustee may only distribute to trusts with certain terms, it is useful to include all of the limitations on the trustee as recitals in the resolution.

Namely, the resolution should include the following statements:

1. The current beneficiaries of the second trust are the same as the current beneficiaries of the first trust, and the successor and presumptive remainder beneficiaries of the second trust are the same as the successor and presumptive remainder beneficiaries of the first trust. [§ 112.072\(b\)](#).
2. The second trust agreement includes the same language authorizing the trustee to distribute the income or principal of the second trust that was in the first trust agreement. [§ 112.072\(c\)](#).
3. The beneficiaries of the second trust include all persons who could become members of a class of persons who would be beneficiaries of the first trust after the distribution to the second trust. [§ 112.072\(d\)](#).
4. The second trust agreement grants the same power of appointment to the current beneficiaries as the first trust agreement, and the class of permissible appointees under that power is the same as the class of permissible appointees under the power granted by the first trust. [§ 112.072\(e\)](#).

The New Trust Agreement

Finally, if you're going to decant, you need a new trust agreement to decant into. Because the Notice must include a copy of the second agreement, you must draft a new trust agreement to decant the trust. [§ 112.074\(f\)\(5\)](#). Merely drafting a trustee resolution that lists the changes made to the original trust will not satisfy TPC [§ 112.074\(f\)\(5\)](#).

Conclusion

The TPC now allows trustees to modify trust terms without petitioning a court for approval. Once the current and presumptive remainder beneficiaries have been notified of the proposed changes, a trustee may distribute the property of the original trust to the new trust.