

Memorandum

TO: Senator Hollis French, Chairman of the Senate Judiciary Committee,
Alaska State Legislature

FROM: Beth Chapman and Dave Shaftel

DATE: February 6, 2012

RE: Section Analysis: Amendments to AS 13.36.157, Trustee's Power to Appoint
to Another Trust

Section _____. Existing Alaska Statute 13.36.157 provides a trustee with a method to modify an existing trust, commonly referred to as “decanting”. Alaska enacted its “decanting” statute in 1998. Alaska copied New York’s statute. At the present time, the following states have enacted decanting statutes: Alaska, Arizona, Delaware, Florida, Indiana, Missouri, Nevada, New Hampshire, New York, North Carolina, Ohio, South Dakota, and Tennessee. In addition, decanting statutes are pending before Illinois, Michigan, and Virginia.

New York recently did a thorough revision of its decanting statute and enacted this new revised statute in 2011. The proposed amendment to Alaska’s decanting statute closely tracks the changes made by New York with modifications necessary to accommodate Alaska’s procedural provisions.

The purposes of a decanting statute are to allow a trustee to modify a trust in order to correct errors and to adjust to changed circumstances and laws. The revised draft distinguishes between trustees who have unlimited discretion and those without unlimited discretion. A trustee without unlimited discretion must maintain the same beneficiaries in the new trust and apply the same standard for distributions. The trustee cannot be a settlor or beneficiary of the trust, and has a fiduciary duty to exercise the power of appointment in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under prevailing circumstances. A trustee must exercise the power in writing and must give written notice to the settlor, any person having the right to remove or replace the trustee, and any qualified beneficiary. A beneficiary may object to the exercise if it is an abuse of discretion, or fails to comply with the trustee’s duties stated above. Restrictions exist to protect mandatory distribution rights, tax benefits, and to prohibit the trustee from exercising the power to either increase the trustee’s compensation or decrease the trustee’s liability.

Implementation of irrevocable trusts is best accomplished if the law provides reasonable flexibility to adjust to changed circumstances and to correct errors. The reason why so many states have enacted decanting statutes is because of the need for this flexibility. Amendment to Alaska’s decanting statute to include these revised provisions will benefit the residents of the state of Alaska, many of whom use lifetime or testamentary trusts to implement their estate planning purposes.