

**Beverly Hills Bar Association – Trusts & Estate Section**  
**September 2018 Legal Updates**

PLR 201831004

In PLR 201831004, the Taxpayer requested a ruling under IRC Section 408(d). Decedent and the Taxpayer established an revocable trust during their joint lifetimes. Upon Decedent's death, Taxpayer became the sole Trustee of the trust. Decedent owned an IRA at the time of his death and the IRA became an asset of the trust. Pursuant to the terms of the Survivor's Trust created under their living trust, Taxpayer became the sole income and principal beneficiary of that trust. The Taxpayer exercised a power of appointment over the Survivor's Trust to transfer the assets in the IRA to a non-IRA account in the name of the Survivor's Trust. Sixty days later, the assets in the non-IRA account were paid to a Rollover IRA established in the Taxpayer's name.

The IRS held that the Taxpayer shall be treated as the distributee of Decedent's IRA, that Decedent's IRA is not an inherited IRA with respect to Taxpayer, that Taxpayer's rollover of assets from Decedent's IRA into a Rollover IRA was valid and Taxpayer will not be required to include in her gross income for Year 1 or Year 2 the amount distributed from Decedent's IRA and rolled over to the Rollover IRA.

*Paula Trust v. California Franchise Tax Bd.*, No. CGC-16-556126 (Cal. Super. Ct. 3/7/18)

In this case, a client created a trust for the benefit of his daughter, Paula. The primary assets in the trust included California-source income. The trust had two trustees, one who was a resident of California and one who was a resident of Maryland. The trust had \$2.8 million of capital gain in 2007. In 2012, the Trustees filed a claim for a refund and took the position that only 50% of the income was subject to California income tax under the apportionment formula, Revenue and Taxation Code Section 17743. The Trustees apportioned the income based on the number of resident and non-resident fiduciaries. The Franchise Tax Board initially denied their claim for a refund because the trust had California source income. The trustees argued that Revenue and Taxation Code Section 17743 did not qualify California source income as any income "from property or business activity in California."

The Superior Court agreed with the trustees, and provided that all of the trust's income, even California-source income, is subject to the apportionment formula in Revenue and Taxation Code Section 17743. Thus, only half of the income in the trust should be taxed for California income tax purposes based on the non-resident and resident fiduciaries. The FTB appealed this decision.

PLR 201834002

In PLR 201834002, the Taxpayers created an irrevocable trust to benefit their children and issue. In Year 1 and Year 2, Taxpayers transferred assets to the trust. In Year 2, Taxpayers retained CPA firm to prepare Forms 709, which failed to prepare Year 2 Forms 709, and therefore, failed to allocate GST exemption to those transfers. The Taxpayers requested an extension of time under IRC 2642(g)(1) to allocate their GST exemption with respect to Year 2 transfers to the trust so that the allocations would be effective as of the date of the Year 2 transfers; and the amount of GST tax exemption allocated to the trust would be based on the value of the assets transferred in Year 2 for federal gift tax purposes.

Treasury Regulations Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably if he or she relied on the advice of a qualified tax professional, and that professional failed to make the GST election. The IRS concluded that the requirements of Treasury Regulations Section 301.9100-3(b)(1)(v) were met. The Taxpayers were granted a 120-day extension from the date the letter was issued under IRC 2642(g) to allocate their respective GST tax exemption to a trust

SB 909: Uniform Trust Decanting Statute - Section 19501, et seq. of the California Probate Code

The bill permits a fiduciary of an irrevocable trust to distribute property out of a first trust to one or more second trusts (which may be created under any jurisdiction) or modify the terms of the first trust without the consent of the beneficiaries or approval of court, provided that the fiduciary has "limited distributive discretion" over the principal of the first trust for the benefit of one or more qualified beneficiaries. "Limited distributive discretion" is defined as discretionary power of distribution limited to an ascertainable standard or reasonably definite standard. The second trust must grant each beneficiary of the first trust rights which are "substantially similar (i.e. no material change in a beneficiary's beneficial interest)" to their beneficial interests in the first trust. "Substantially similar" is defined as a distribution applied for the benefit of the beneficiary, on the beneficiary's behalf if the beneficiary is under a legal disability, or the distribution is made pursuant to the terms of the first trust instrument.

Other important points to consider from SB 909:

1. If the first trust contains a charitable interest, the second trust may not diminish it or alter the charitable purpose of the second trust.
2. Qualified beneficiaries must be provided notice at least 60 days before the intended exercise to decant the trust. The qualified beneficiaries may request that the court approve such exercise in certain situations.
3. The trust must be irrevocable or revocable by the settlor only with the consent of trustee or a person holding an adverse interest.
4. It does not apply charitable trusts.
5. decanting must be made in writing signed by authorized fiduciary.
6. A trust may prohibit the decanting power.
7. The second trust may not increase the fiduciary's compensation.
8. The second trust instrument does not relieve a fiduciary from liability for breach of trust to extent of first trust instrument.
9. An exercise of the decanting power may not remove the following from the first trust: if it qualified for the marital deduction, charitable deduction, annual exclusion requirements, include shares of S-corporation stock, exempt from generation-skipping transfer tax, qualified retirement benefits, and grantor trust status.

10. The settlor may object to the decanting within the notice period if both the first and second trusts are grantor trusts, or the first trust is a non-grantor trust and the second trust is a grantor trust.