

Maybe you can put the toothpaste back in the tube?

A Survey of Strategies to Adapt to Changed Circumstances.



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Overview

- Trusts
 - Modification / Decanting / Division / Combination
- Businesses
 - Spin-off / Split-off / Split-up / FLPs
- Contracts
 - Recission / Amendments / Termination
- Private Foundations



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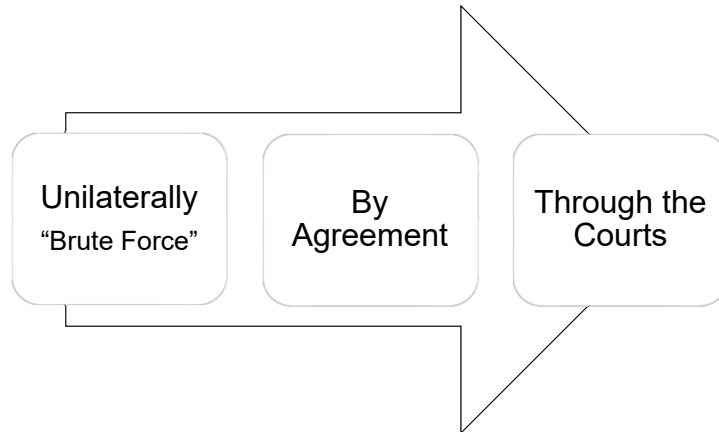
What leads to a change?

- Parties' Circumstances
- Laws
- Creditors
- Relationships
- Disputes
- Expansion
- Growth Opportunities



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Various Methods



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Trusts

- Modification
 - Nonjudicial vs. Judicial
- Decanting
 - North Carolina Uniform Decanting Act
- Combination or Division



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Reasons to Modify/Decant

- Extend the trust term
- Converting a support trust into a discretionary trust
- Fixing drafting errors or resolving ambiguity
- Moving the trust to a state with more favorable laws
- Adjusting powers of appointment
- Changing trustee provisions
- Combining or separating trusts
- Drafting a special needs trust
- Qualifying the trust to hold Sub S stock

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Trusts - Nonjudicial Modification

- Nonjudicial Settlement Agreements NCGS § 36C-1-111
 - Primarily for administrative matters where all “interested persons” are willing to sign (not substantive or dispositive issues)
- Approve trustee reports
- Direct the trustee to perform or refrain from an administrative act
- Resignation, appointment, compensation
- Transfer place of administration
- Address liability for other items in the list

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Trusts - Nonjudicial Modification

- Modification of Irrevocable Trusts NCGS § 36C-4-411(a)
 - Requires consent of the settlor and beneficiaries
- Permitted even if the proposed change is inconsistent with a material purpose of the trust
- Does not require court approval (but may seek)
- All beneficiaries (not just “qualified”)



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Trusts - Nonjudicial Modification

- Modification of Uneconomic Trusts NCGS § 36C-4-414
 - No court required
 - Under \$50K if trustee determines insufficient to justify costs
 - Beneficiary consent not required, but requires notice to qualified beneficiaries



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Trusts - Judicial Modification

- Compelled modification by consent of all beneficiaries (NCGS § 36C-4-411(b))
 - “Material purpose”

- Requested modification by consent of all beneficiaries (NCGS § 36C-4-411(c))
 - “Substantially outweigh trust’s material purpose”



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Trusts - Judicial Modification

- Modification without consent of beneficiaries (NCGS § 36C-4-411(d))
 - Adequate protection for nonconsenting beneficiaries

- Modification due to unanticipated circumstances (NCGS § 36C-4-412)
 - Administrative or dispositive provisions or terminate the trust
 - Will further the trust’s purpose



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Trusts - Judicial Modification

- Modification of Charitable Trusts NCGS § 36C-4-413
 - Cy pres
 - Becomes unlawful, impracticable, impossible to achieve, or wasteful
 - Modify or terminate in a manner consistent with the settlor's charitable purposes



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Trusts- Judicial Modification

- | | |
|---|---|
| <ul style="list-style-type: none">▪ Modification to Correct Drafting Errors NCGS § 36C-4-415<ul style="list-style-type: none">▫ Clear and convincing extrinsic evidence▫ Mistake of fact or law▫ Expression or inducement | <ul style="list-style-type: none">▪ Modification to Achieve Tax Objectives NCGS § 36C-4-416<ul style="list-style-type: none">▫ Not contrary to the settlor's probable intention▫ May have retroactive effect |
|---|---|

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Trust - Decanting

- Uniform Trust Decanting Act
NCGS § 36C-8B-1 *et. seq.*
 - Definitions: “first trust”, “second trust”, “current beneficiary”
 - Trustee exercises power to distribute assets from first trust to second trust (which may be created by trustee)
 - Doesn't require consent or court approval
 - Notice and waiver



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Trust - Decanting

- Modification v. Decanting
- Limitations:
 - Cannot add beneficiaries
 - Cannot accelerate a beneficiary's interest
 - Dispositive terms of the new trust must adhere to specific requirements



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Trust - Decanting

- Limitations on Dispositive Terms
 - Ascertainable standard (HEMS) must be maintained
 - Cannot reduce a fixed income, annuity or unitrust interest (that has come into effect)
 - Marital or charitable deduction savings
 - 2503(b) and (c) gifts
 - Grantor Trust, GST, S-Corp and RMD savings provisions
 - Withdrawal rights preserved



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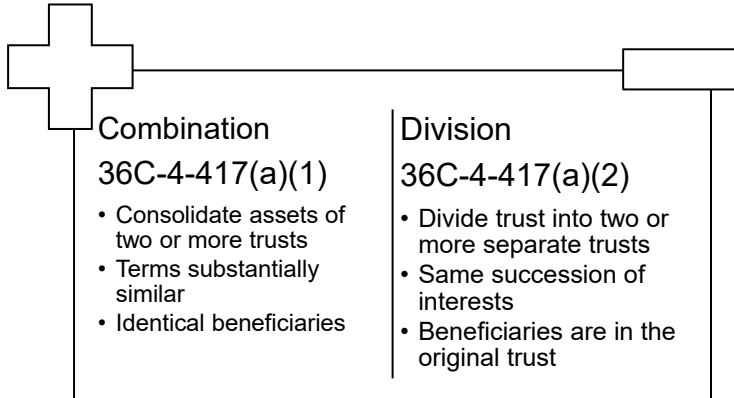
Trust - Decanting

- Second Trust May
 - Grant new power of appointment
 - Note: permissible appointees may include persons not beneficiaries of the original trust
 - Retain, Modify or Omit a power of appointment

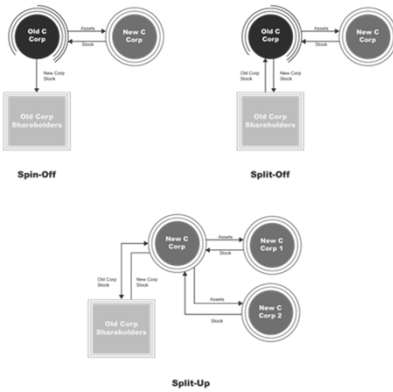


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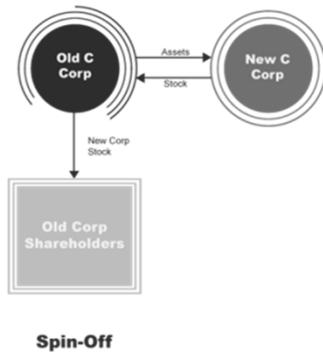
Trust – Combination or Division



Businesses Spin-off / Split-off / Split-up / FLPs



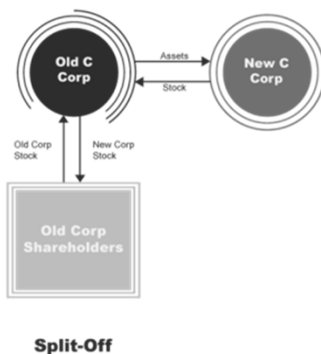
Businesses Spin-off



- A spin-off is the pro rata distribution of the stock of a corporation that is controlled by the distributing corporation.
- Shareholders of the distributing corporation do not surrender any of their stock.

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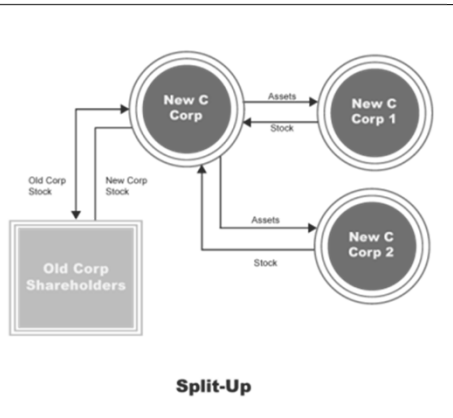
Businesses Split-off



- A split-off is the distribution of the stock of a controlled corporation to typically some but not all of the shareholders of the distributing corporation.
- Shareholders of the distributing corporation surrender stock of that corporation in exchange for stock in the controlled corporation.

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Businesses Split-up

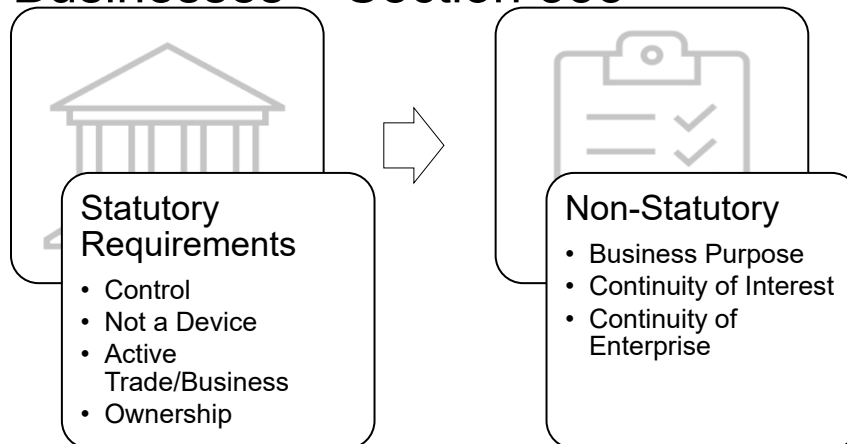


- A split-up is the distribution of the stock of two or more controlled corporations in complete liquidation of the distributing corporation.
- Shareholders of the distributing corporation receive stock in the controlled corporations in the liquidation of the distributing corporation.



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Businesses – Section 355



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Businesses

FLPs

Why undo the Family Partnership?

- Reduced creditor threats
- Estate Planning
- Business Succession
- Asset Management
- Administrative Hassle

Exit Strategies

- Unwind the FLP
- Sell or Distribute Assets In-Kind
- Transfer FLP interests to an Irrevocable Trust



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Contracts

Rescission / Amendments / Termination

Mistake of Fact

- Mutual Mistake – Both Parties are Mistaken
- Unilateral Mistake – Only One Party is Mistaken

Mistake of Law

- Mutual Mistake
- Unilateral Mistake

Rescission

- Contract Cancelled
- Parties Position Restored to Pre-Contract

Reformation

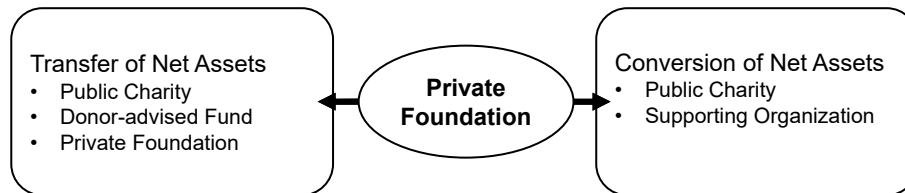
- Contract Revised to Reflect Parties' Original Intent

- Novation/Amendment
- Statute of Frauds



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Private Foundations



The termination tax is easily avoided if a private foundation either transfers its net assets to an allowable organization or converts its net assets to an allowable organization.



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QUESTIONS?

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